

NATIONAL FAMILY VIOLENCE PREVENTION LEGAL SERVICES

WORKING TO ACHIEVE IMPROVED JUSTICE OUTCOMES FOR ABORIGINAL AND TORRES STRAIT ISLANDER
VICTIMS/SURVIVORS OF FAMILY VIOLENCE AND SEXUAL ASSAULT

The National Family Violence Prevention Legal Services Forum
submission to the Australian Law Reform Commission

REVIEW OF THE FAMILY LAW SYSTEM DISCUSSION PAPER

November 2018

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Executive Summary

“We need to remember how inaccessible the family law system is to Aboriginal and Torres Strait Islander people. Aboriginal and Torres Strait Islander women are unlikely to disclose family violence or access support through a mainstream setting.”

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018

The National Aboriginal Family Violence Prevention Legal Services Forum (**‘National FVPLS Forum’**) welcomes the opportunity to respond to the Discussion Paper of the Australian Law Reform Commission’s review of the family law system (**‘the Discussion Paper’**). The National FVPLS Forum is comprised of 14 (Aboriginal) Family Violence Prevention Legal Service (**‘FVPLS’**) organisations across the country that work exclusively with Aboriginal and Torres Strait Islander victim survivors of family violence – predominantly women and their children.

We commend the ALRC for acknowledging the prevalence of family violence throughout the family law system and recognising that the safety and best interests of children relies upon the safety of their carers who are victim survivors of family violence. The National FVPLS Forum urges the ALRC to maintain its commitment to break down barriers to justice and safety for victim survivors of family violence, most especially Aboriginal and Torres Strait Islander women and their children.

This submission focuses on the anticipated impacts of the ALRC Discussion Paper’s proposals (**‘the proposals’**) on Aboriginal and Torres Strait Islander people who have experienced family violence, predominantly women and children, as one of the groups at greatest risk and disadvantage in the family law system. Around Australia, Aboriginal and Torres Strait Islander women are 32 times more likely to be hospitalised as a result of family violence¹ and 10 times more likely to be killed as a result of violent assault.²

The voices and unique experiences of Aboriginal and Torres Strait Islander women are all too often silenced, ignored and overlooked - including in reports aimed at improving outcomes for Aboriginal and Torres Strait Islander people in contact with the justice system. The ALRC Final Report provides an important opportunity to ensure that Aboriginal and Torres Strait Islander women and their children are not left to fall through the gaps and cracks in the family law system any longer.

“We get to see the corridors our clients move through, from one Country and one community to another. We are best placed to understand and address the gaps in services and the issues that Aboriginal people experience as they move through the family law system.”

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018

¹ Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia 2018*, p 93, available at <https://www.aihw.gov.au/getmedia/d1a8d479-a39a-48c1-bbe2-4b27c7a321e0/aihw-fdv-02.pdf.aspx?inline=true>

² Australian Institute of Health and Welfare, *Family Violence among Aboriginal and Torres Strait Islander people*, 2006, p 66, available at <https://www.aihw.gov.au/getmedia/26f5e907-d1cb-4eac-b26f-a46a88665f3b/fvaatsip-c01.pdf.aspx>

In summary, in this submission the National FVPLS Forum:

- Supports the proposals concerning the elevation of safety in Part VII of the *Family Law Act*; the specific legislative provision to consider the cultural rights in determining the best interests of Aboriginal and Torres Strait Islander children; the specialist ‘Indigenous List’ (noting we recommend it be renamed either as the Aboriginal and Torres Strait Islander list or as locally adapted in each region); improved court safety; and the workforce capability plan, including the requirement for judicial officers to have experience in family law and family violence;
- Expresses partial support for and makes recommendations to strengthen the proposals concerning revising and simplifying the Family Law Act; culturally appropriate family dispute resolution and expanded legally assisted dispute resolution; separate legal representatives; the specialist family violence list; the definition of family violence; the definition of family member; cultural reports for Aboriginal and Torres Strait Islander children; and the cultural safety framework; and
- Expresses reservations and/or opposes the proposals for the Families Hubs; the information sharing regimes, the expansion of the Family Advocacy and Support Service; Parent Management Hearings; the new children’s advocate role; and the Family Law Commission.

“We don’t want these reforms to be an opportunity to further mainstream service delivery for Aboriginal people. We need to ensure specialist ACCOs continue to be prioritised and invested in.”

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018

Key issues emphasised in this submission include:

- The critical importance of Aboriginal victim survivors of family violence having early and ongoing access to independent, specialist and culturally safe legal advice, representation and support at every stage of their engagement with the family law system, including dispute resolution processes.

Aboriginal Family Violence Prevention and Legal Services (‘FVPLSs’) already provide specialist, culturally safe and wrap-around legal and non-legal support for Aboriginal and Torres Strait Islander victim survivors and their children and should be funded and supported to continue and expand their existing, highly successful service delivery models. Increased resourcing for FVPLSs to meet unmet need, including expanding to have true national coverage, is essential to the success of the proposed reforms.

- Rather than draining significant resources in establishing new entities for service delivery and system oversight (for example, the proposed Families Hubs and Family Law Commission) which will create additional layers of bureaucracy and associated barriers for Aboriginal and Torres Strait Islander people, it is more safe, equitable and effective to invest in existing, specialist and culturally safe services like FVPLSs to enable them to expand, build capacity and address unmet need and identified gaps in the family law system.

Mainstream ‘one-stop-shop’ service delivery models are unlikely to be able to address the many risks and barriers faced by Aboriginal and Torres Strait Islander people in the family law system – particularly Aboriginal and Torres Strait Islander people experiencing family violence. Indeed, initiatives that aren’t centred around the experiences of Aboriginal and Torres Strait Islander women and children may present as yet another system failure.

- Aboriginal and Torres Strait Islander community controlled legal services such as FVPLSs and Aboriginal and Torres Strait Islander Legal Services (**‘ATSILSs’**) are best placed to design, develop, deliver, monitor and evaluate all family law reforms directly impacting Aboriginal and Torres Strait Islander people. Every stage of the ALRC reform process must be co-designed in meaningful partnership and consultation with Aboriginal and Torres Strait Islander communities, organisations and peak bodies, particularly those with specialist expertise such as FVPLSs and the National FVPLS Forum. This cannot be a top down process – if the family law reforms are going to succeed in improving safety and justice outcomes for Aboriginal and Torres Strait Islander people, community control must be at the heart of the process, every step of the way.
- The need for the final ALRC report to contain a recommended timeframe and sequencing of recommendations in recognition that many of the recommendations are interdependent and cannot succeed without the prior or concurrent implementation of other recommendations.

For example, unless there is significant and sustained investment in improving the cultural awareness of the family law system through a range of mechanisms, reforms will not yield better outcomes for Aboriginal and Torres Strait Islander victim survivors.

Summary of Recommendations

The National FVPLS Forum respectfully recommends that:

1. The ALRC final report recognise that all Aboriginal and Torres Strait Islander people who have experienced or are at risk of family violence have the right to ongoing, specialist and culturally safe legal representation, from adequately funded Aboriginal and Torres Strait Islander legal service providers with family violence expertise, such as FVPLSs, throughout their engagement with the family law system.
2. The ALRC final report set out a recommended timeframe for the staged implementation of its final recommendations so that the government remains accountable to implementing the reforms in a timely manner and there is appropriate sequencing of those proposals which are preconditions to the effectiveness of others.
3. All family law reforms directly impacting Aboriginal and Torres Strait Islander people must be co-designed, developed and delivered in meaningful partnership and consultation with Aboriginal and Torres Strait Islander communities, legal services (FVPLSs and ATSILSs) and peak bodies (National FVPLS Forum and NATSILS) from the outset.
4. The ALRC final report recognise that all proposed reforms to the family law system must be accompanied by increased, long-term and secure resourcing for the legal assistance sector, including FVPLSs and ATSILSs. The report should explicitly recommend implementation of the Law Council of Australia *Justice Report* recommendation that a minimum \$390 million per annum in additional funding be invested into the legal assistance sector and note the Productivity Commission's 2014 recommendations of at least \$200 million additional funding per year, which are yet to be implemented.
5. FVPLSs and the National FVPLS Forum must be resourced to:
 - contribute to the national education and awareness campaign and family law information package;
 - develop and expand specialist, culturally safe and targeted community legal education programs for Aboriginal and Torres Strait Islander people experiencing family violence;
 - build and maintain formalised referral pathways and relationships;
 - lead and/or partner in the development of culturally appropriate and safe models of legally assisted family dispute resolution for parenting and financial matters;
 - design and deliver cultural competency training under the workforce development plan with a specific focus on the experiences of Aboriginal and Torres Strait Islander people who have experienced or are at risk of family violence;
 - support Aboriginal and Torres Strait Islander children in family law proceedings, including through providing separate legal representation and culturally safe support; and
 - build capacity to engage in data collection, monitoring and evaluation.

6. The national education and awareness campaign and the national family law information package must include information about FVPLSs and ATSILSs and be available in all relevant local Aboriginal and Torres Strait Islander languages.
7. The *Family Law Act 1975* (Cth) should be revised and simplified provided that:
 - It is understood the proposed changes do not negate the importance of culturally safe legal assistance and representation by Aboriginal legal assistance providers (FVPLSs and ATSILSs), particularly in circumstances of family violence;
 - Simplified court forms include a free form comment box to enable family court users to explain their situation in their own words if they wish;
 - The term ‘safety’ is clearly understood to encompass safety from family violence in all its forms for children and adult victim survivors, as well as cultural safety;
 - The specific provision recognising the cultural rights of Aboriginal and Torres Strait Islander children is adopted;
 - The reforms are accompanied by guidance material and ongoing judicial education to assist with interpretation;
 - The terminology in Part VII is changed from ‘parental responsibility’ to ‘decision making responsibility’;
 - The presumption of equal shared parental responsibility is removed from Part VII;
 - The decision-making pathway around ‘time spent’ is simplified and there should be no requirement to consider equal or shared and significant time; and
 - The *Rice v Asplund* principle is enshrined in legislation.
8. Families Hubs should not be established. Instead, the significant resources this proposal would entail should be invested in existing specialist services, such as FVPLSs, to meet increasing demand, expand their current case management capacity and support better service integration across the family law system.
9. The ALRC final report recommend the development of practices and procedures that ensure that all Aboriginal and Torres Strait Islander victim survivors of family violence have access to legal assistance provided from an FVPLS or other culturally safe and specialised service with family violence expertise before, during and after engagement in dispute resolution processes.
10. To further improve the accessibility of legally assisted dispute resolution, the ALRC final report should:
 - Ensure that the development of any culturally tailored models of dispute resolution for Aboriginal and Torres Strait Islander families are led by, and/or developed in genuine partnership, with appropriately skilled and resourced Aboriginal and Torres Strait Islander legal organisations (FVPLSs and ATSILS);

- Remove the requirement to demonstrate urgency in order to access the exemption to attempt FDR on the grounds of family violence or abuse;
 - Not implement a means-tested fee for dispute resolution models involving legal assistance; and
 - Revise and extend the timeframes within which proceedings in property and financial matters must be instigated.
11. The 'Indigenous List' (or specialist Aboriginal and Torres Strait Islander list as we suggest) should be further rolled out, noting there must be further consultation regarding:
- Renaming the list in accordance with the wishes of the relevant, local Aboriginal and Torres Strait Islander communities;
 - Eligibility to access the list; and
 - How it will interact with the proposed specialist family violence list to avoid the risk of siloing specialist knowledge and expertise.
12. The circuiting of Federal Circuit Courts across rural, regional and remote areas is reinstated and/or increased as a key means of improving accessibility of family courts for Aboriginal and Torres Strait Islander people.
13. Specific measures should be taken to ensure that any expansion of the Family and Advocacy Support Service does not unnecessarily duplicate existing service delivery. Instead the ALRC must recognise that it is more appropriate, effective and culturally safe to increase resourcing for existing culturally safe and specialist services such as FVPLSs which already provide ongoing, wraparound and culturally safe support for Aboriginal and Torres Strait Islander victim survivors engaged with the family law system, including resourcing to build and strengthen referral pathways between the Family and Advocacy Support Service and FVPLSs.
14. Parent Management Hearings should not be expanded as they are inappropriate for victim survivors of family violence, particularly Aboriginal and Torres Strait Islander women.
15. The ALRC final report explicitly recognise the right of all Aboriginal and Torres Strait Islander children to receive culturally safe advocacy, legal representation and support from a suitably specialist Aboriginal and Torres Strait Islander-specific organisation (FVPLS or ATSILS) who should be resourced to provide separate legal representation and culturally safe advocacy and support for Aboriginal and Torres Strait Islander children engaged in family law proceedings.
16. Careful consideration must be given to whether there is sufficient basis to justify the creation of new professional roles to work with children engaged in family law proceedings, including the distinction between the proposed children's advocate, family consultant and separate legal representative.
17. Practice directions are developed and implemented stipulating a strong preference for family law professionals (including separate legal representative, children's advocate and/or family consultant) working directly with Aboriginal and Torres Strait Islander children to be

Aboriginal and Torres Strait Islander professionals. Where unavailable, non-Aboriginal or Torres Strait Islander professionals working directly with Aboriginal or Torres Strait Islander children must have a very high level of cultural competency and demonstrated experience working with Aboriginal and Torres Strait Islander young people and a set of minimum standards should be developed in this regard.

18. Further research undertaken to examine the strengths and limitations of the definition of family violence in relation to experiences of Aboriginal and Torres Strait Islander people must explicitly recognise the disproportionate impact of family violence on Aboriginal and Torres Strait Islander women and the specialist expertise of Aboriginal and Torres Strait Islander organisations with expertise in family violence.
19. The definition of 'family member' in the *Family Law Act 1975* (Cth) should be changed subject to further comprehensive consultation with Aboriginal and Torres Strait Islander communities and organisations.
20. There must be significant and sustained investment in the Aboriginal and Torres Strait Islander workforce across the family law system and the prioritisation of strategies to recruit, train, accredit and build the capacity of more Aboriginal and Torres Strait Islander staff, including:
 - Aboriginal and Torres Strait Islander Family Consultants;
 - Aboriginal and Torres Strait Islander interpreters;
 - Aboriginal and Torres Strait Islander Liaison Officers;
 - Aboriginal and/or Torres Strait Islander Dispute Resolution Facilitators/Mediators;
 - Aboriginal and Torres Strait Islander Registrars; and
 - Aboriginal and Torres Strait Islander Judicial Officers
21. Under the proposed workforce development plan for the family law system, the core competencies should be expanded to include:
 - the intersections of different competencies, such as a specific focus on the experiences of Aboriginal or Torres Strait Islander victim survivors under both the cultural competency and family violence competency;
 - the ongoing impacts of intergenerational trauma for Aboriginal or Torres Strait Islander people, within the competency on understanding trauma; and
 - an additional, separate competency on sexual violence
22. All Family Dispute Resolution practitioners should receive training in the same core competencies as other family law professionals, as outlined in the proposed workforce development plan.

23. The ALRC final report should consider recommending corresponding training for other key services with a duty to assist family law clients with complex and interlocking needs and to support the judiciary in enforcing court orders, such as child protection agencies, Australian Federal Police and police forces at state and territory levels.
24. Reference to the National Domestic and Family Violence Bench Book should be mandatory in all Family Law judgements involving family and domestic violence.
25. Cultural reports should be mandatory in all parenting proceedings involving an Aboriginal or Torres Strait Islander child, with the reform accompanied by appropriate resourcing, training and mechanisms to monitor timeliness, quality and effectiveness of such reports.
26. If any of the information sharing proposals are adopted, safeguards must be put in place *prior* to the rollout of any such scheme to mitigate unintended risks for Aboriginal and Torres Strait Islander people, particularly victim survivors of family violence. Such measures must be developed in close consultation with Aboriginal and Torres Strait Islander legal assistance providers (FVPLSs and ATSILSs).
27. The Family Law Commission should not be established. Instead, less resource intensive options for supporting cross-disciplinary training and monitoring and evaluation should be explored, including resourcing and building the capacity of existing organisations and peak bodies with specialist expertise.
28. The cultural safety framework must be specific to the needs, experiences and barriers faced by Aboriginal and Torres Strait Islander people accessing the family law system, including the unique experiences of Aboriginal and Torres Strait Islander victim survivors of family violence.

About the National FVPLS Forum

The National FVPLS Forum is comprised of 14 Family Violence Prevention Legal Service ('FVPLS') member organisations across Australia that provide culturally safe and specialist legal and non-legal assistance and support to Aboriginal and Torres Strait Islander victim survivors of family violence – predominantly women and children. FVPLSs also design and deliver essential community legal education and early intervention and prevention activities.

FVPLSs have been working with Aboriginal and Torres Strait Islander victim survivors of family violence around the country for almost twenty years. All 14 organisations came together in May 2012 to establish the National FVPLS Forum with an elected national convenor. The National FVPLS Forum works in collaboration across its member FVPLSs to increase access to justice for Aboriginal and Torres Strait Islander people experiencing or at risk of family violence, especially women and children.

The National FVPLS Forum members are:

- Aboriginal Family Law Service Western Australia (Perth HO, Broome, Carnarvon, Kununnurra, Geraldton, Kalgoorlie, Port Hedland)
- Aboriginal Family Legal Service Southern Queensland (Roma)
- Binaal Billa Family Violence Prevention Legal Service (Forbes)
- Central Australian Aboriginal Family Legal Unit Aboriginal Corporation (Alice Springs HO, Tennant Creek)
- Djirra – formerly the Aboriginal Family Violence Prevention and Legal Service Victoria (Melbourne HO – currently host of the National FVPLS Secretariat, Mildura, Gippsland, Barwon South West, Bendigo and shortly also Echuca-Shepparton, La Trobe Valley and Ballarat)
- Family Violence Legal Service Aboriginal Corporation (Port Augusta HO, Ceduna, Pt Lincoln)
- Many Rivers Family Violence Prevention Legal Service (Kempsey)
- Marninwarnitkura Family Violence Prevention Unit WA (Fitzroy Crossing)
- Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service (Alice Springs, NPY Tri-state Region)
- Queensland Indigenous Family Violence Legal Service (Cairns HO, Townsville, Rockhampton, Mount Isa, Brisbane)
- Southern Aboriginal Corporation Family Violence Prevention Legal Service (Albany, WA)
- Thiyama-li Family Violence Service Inc. NSW (Moree HO, Bourke, Walgett)
- Warra-Warra Family Violence Prevention Legal Service (Broken Hill)
- North Australian Aboriginal Family Legal Service (Darwin HO, Katherine)

In this submission, the National FVPLS Forum focuses on the proposals and questions most directly impacting Aboriginal and Torres Strait Islander victim survivors of family violence.

About Family Violence Prevention Legal Services

Why FVPLSs exist

FVPLSs provide culturally safe and holistic frontline legal and non-legal support, early intervention/prevention and community legal education to Aboriginal and Torres Strait Islander victim survivors of family violence. FVPLSs were established in recognition of:

- the gap in access to legal services for Aboriginal and Torres Strait Islander victim survivors of family violence and sexual assault;
- the high number of legal conflicts within Aboriginal and Torres Strait Islander Legal Services ('ATSILS'); and
- high rates of family violence in Aboriginal and Torres Strait Islander communities.

FVPLSs are one of the four primary legal assistance service providers in Australia, along with ATSILSs, Community Legal Centres and Legal Aid Commissions.



"We are the most culturally appropriate service. We are highly skilled specialists. We understand that there are multiple layers of trauma for each individual client that must be addressed. Our lawyer and support worker have already built up a relationship of trust. Her journey will be easier through family law if she is engaged with and supported by us."

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018

Who FVPLSs service

FVPLSs support Aboriginal and Torres Strait Islander people who have experienced or who are experiencing family violence or sexual assault. Over 90% of our clients are Aboriginal and Torres Strait Islander women and their children.

Aboriginal and Torres Strait Islander people experience family violence at disproportionately higher rates than other Australians – with women and children representing the overwhelming majority of Aboriginal and Torres Strait Islander victim survivors. In comparison with other Australian women, Aboriginal and Torres Strait Islander women are 32 times more likely to be hospitalised as a result of family violence³ and 10 times more likely to be killed as a result of violent assault.⁴ Nationally, approximately ninety per cent of FVPLS clients are Aboriginal and Torres Strait Islander women and their children.

FVPLSs service some of the most vulnerable and in need clients in the country. Aboriginal and Torres Strait Islander women have been found to be the most legally disadvantaged group in Australia.⁵ Our clients live with intergenerational trauma, removal of children, family violence-driven homelessness, discrimination, poverty, mental health issues, disability, lower levels of literacy and numeracy, as well as a range of other cultural, legal and socio-economic issues.

³ Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia 2018*, p 93, available at <https://www.aihw.gov.au/getmedia/d1a8d479-a39a-48c1-bbe2-4b27c7a321e0/aihw-fdv-02.pdf.aspx?inline=true>

⁴ Australian Institute of Health and Welfare, *Family Violence among Aboriginal and Torres Strait Islander people*, 2006, p 66, available at <https://www.aihw.gov.au/getmedia/26f5e907-d1cb-4eac-b26f-a46a88665f3b/fvaatsip-c01.pdf.aspx>

⁵ Aboriginal and Torres Strait Islander Commission, *Submission to the Senate Legal and Constitutional References Committee: Inquiry into Legal Aid and Access to Justice*, November 2003, p 4.

Aboriginal and Torres Strait Islander victim survivors of family violence, predominantly women, experience a range of complex and compounding barriers to accessing support, safety and justice. Barriers include:

- lack of understanding of legal rights and options and how to access advice and support;
- mistrust of mainstream legal, medical, community and other support services and their ability to understand and respect the needs and wishes of Aboriginal and Torres Strait Islander women;
- a lack of cultural competency and experiences of direct or indirect discrimination across the support sector, including by police and other agencies such as child protection;
- a lack of access to interpreters or support for people with low levels of literacy;
- fear of child removal if disclosing experiences of violence and/or risk of criminalisation;
- particular cultural or community pressures not to go to the police, such as perceived threats to cultural connection (especially for children) or to avoid increased criminalisation of Aboriginal and Torres Strait Islander men; and
- poverty and social isolation.

Notwithstanding these many barriers, Aboriginal and Torres Strait Islander women, children and people have great strength and resilience and, with appropriately resourced and culturally safe supports, all our children can flourish in families strong in culture, identity, love and safety.

Culturally safe and specialist legal services

FVPLSs frontline services include **legal assistance, casework, counselling and wrap-around support** to Aboriginal and Torres Strait Islander adults and children who are victim survivors of family violence. FVPLSs also design and deliver innovative, **community engagement, community legal intervention and early intervention/prevention programs and strategies**.

FVPLSs deliver these services in holistic and culturally safe ways tailored to **addressing the complex socio-economic issues underlying our clients' legal issues and experiences of family violence**. FVPLSs service diverse communities and each FVPLS tailors their services and programs to the unique issues facing their local community.

FVPLS lawyers provide legal assistance in the four core areas of:

- family violence law;
- child protection;
- family law; and
- victims of crime assistance.

Family law is a core area of FVPLS's service delivery model, with some members reporting up to 40% of their legal work is in family law.

Where resources permit, some FVPLSs also provide additional assistance in other civil law issues arising from family violence such as Centrelink, Child Support, fines and infringements, tenancy and police complaints.

A unique holistic service model

The holistic, specialist and culturally safe services offered by FVPLSs provide Aboriginal and Torres Strait Islander victim survivors of family violence, predominantly women and their children, with wraparound support as they navigate the family law system. A key feature of the holistic FVPLS model is the employment of **support workers who work alongside a lawyer** to assist clients in addressing their range of legal and non-legal needs. Having Aboriginal and Torres Strait Islander people employed in all key roles including as lawyers, support workers and community engagement workers is essential to building and maintaining trust and ensuring cultural safety. This wraparound model of support means that Aboriginal and Torres Strait Islander women are more likely to disclose experiences of violence and benefit from opportunities for safety planning, case management and referrals.

FVPLS support workers provide vital **emotional support**, for example by accompanying clients to court hearings or appointments and supporting them to remain engaged in family law matters which would otherwise be retraumatising and/or culturally alienating and intimidating. FVPLS support workers also link women and their children in with a range of **practical supports to address the complex socio-economic issues** interwoven with the client's legal problem.⁶ Through the assistance of FVPLS Support Workers, clients are equipped with a network of culturally safe supports needed to live safely, build resilience and heal from the trauma of family violence. This may include referrals to housing and refuge services, culturally appropriate counselling, drug and alcohol support workers, medical services, respite and parenting services.

FVPLSs are best placed to ensure that Aboriginal and Torres Strait Islander victim survivors are **empowered** to access support services relevant to their needs and **supported in their journey** through the family law system in a **culturally safe and trusted** way. It must be recognised that this unique, holistic and intensive model of specialist support requires greater levels of resourcing – which, as discussed below are currently deficient.

Funding and coverage of FVPLSs

In 2014, the Productivity Commission recommended that the legal assistance sector – comprised of FVPLSs, Community Legal Centres, ATSILSs and Legal Aid Commissions – receive an annual \$200 million increase in funding for civil law, including family law⁷. This recommendation has not been implemented. In August 2018, the Law Council of Australia recommended in its *Justice Project Final Report* that a minimum, additional \$390 million per annum be invested by Commonwealth, State and Territory governments in FVPLSs, ATSILSs, Legal Aid Commissions and Community Legal Centres to address critical civil and criminal legal assistance service gaps.⁸

“Our legal services would not work without our early intervention and prevention engagement programs. Our early intervention and prevention programs wouldn't work without our legal services. It's a holistic service.”

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018

⁶ Djirra (formerly FVPLS Victoria), *Submission to the Victorian Royal Commission into Family Violence*, June 2015, available at <https://djirra.org.au/wp-content/uploads/2018/02/FVPLS-Victoria-submission-to-Royal-Commission-FINAL-15Jul15.pdf>

⁷ Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report - Overview*, 2014, p 63, Recommendation 21.4, available at <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>

⁸ Law Council of Australia, *The Justice Project Final Report: Recommendations and Group Priorities*, August 2018, p 4. Available at <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/03%20-%202018%2009%20-%20Recommendations%20and%20Group%20Priorities.pdf>

Despite this strong evidence of critical under-resourcing of the legal assistance sector dating back to 2014, FVPLS's Federal funding has remained largely static and organisations are unable to meet increasing demand for assistance with family law (and other legal needs).

As stated in our submission to the Issues Paper in this inquiry:

*Thirteen of the 14 FVPLSs operating across Australia have received **no increase in core funding** since 2013-14. Further, over the last five years, not one FVPLS's funding has been increased to match Consumer Price Indexation ('CPI'). The **lack of CPI** alone represents a **cumulative loss of \$9.7 million**. Our members advise that the lack of increase in core funding and CPI has placed significant pressure on services in terms of recruitment and retention.*

Due to limited funding, there are a number of areas throughout both regional, remote and urban Australia where Aboriginal and Torres Strait Islander victim survivors have no access to a culturally safe family violence prevention legal services despite high rates of family violence. In 2016, some National FVPLS Forum members reported being forced to **turn away approximately 30-40%** of people seeking assistance due to under-resourcing.

Since this time, funding levels have not increased and it is anticipated the situation may well be worse. Currently, FVPLSs collectively are only funded to service approximately **half the Aboriginal and Torres Strait Islander population nationally**. Much of this coverage in remote areas is extremely limited and often consists of only one or two days per month.⁹

There also remain pressing **gaps in access to services in urban areas**. Federal funding for FVPLSs is limited to certain rural and remote locations only. This fails to recognise that social isolation and cultural barriers seriously impact on Aboriginal and Torres Strait Islander peoples living in urban and metropolitan areas – particularly Aboriginal and Torres Strait Islander women experiencing or at risk of family violence.¹⁰ Increased funding must **enable true national coverage** for FVPLSs, as all Aboriginal and Torres Strait victim survivors of family violence have the right to access specialised, holistic and culturally safe legal and non-legal support, regardless of their geographic location.

The National FVPLS Forum recommends increased, long-term and secure resourcing of FVPLSs to enable FVPLSs to meet increasing demand and effectively address the multitude of barriers faced by Aboriginal and Torres Strait Islander women and children experiencing or at risk of family violence in accessing and engaging with the family law system. We refer to the important recognition by the Productivity Commission that funding legal assistance services, including FVPLSs, is likely to provide greater financial benefit in the long run:

"Advocating for increases in funding (however modest) in a time of fiscal tightening is challenging. However, not providing legal assistance in these instances can be a false economy as the costs of unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection."¹¹

Role in the family law system

Aboriginal and Torres Strait Islander people (particularly women and children) experiencing family violence face a wide array of **complex and compounding barriers** to reporting family violence,

⁹ Nous Group, *Family Violence Prevention Legal Services – Research and Needs Analysis Report*, 2013, p 5.

¹⁰ Djirra (formerly FVPLS Victoria), *Submission to the Victorian Royal Commission into Family Violence*, June 2015, p 43, available at: <https://djirra.org.au/wp-content/uploads/2018/02/FVPLS-Victoria-submission-to-Royal-Commission-FINAL-15Jul15.pdf>

¹¹ Ibid, p. 30.

accessing the family law system and accessing culturally safe support. As detailed in our previous submission, these barriers include the ongoing fear of child removal as a result of family law proceedings, entrenched discrimination and lack of cultural competency of family law professionals, and the risk of re-traumatisation.¹²

Aboriginal and Torres Strait Islander legal service providers with specialist family violence expertise, such as FVPLSs, are best placed to respond to these unique and complex barriers. FVPLSs provide vital, **culturally safe legal representation** and associated support to Aboriginal and Torres Strait Islander victim survivors of family violence **throughout the life of their family law matter**. As such, FVPLSs play an important role within the family law system, as well as interconnected legal systems such as the family violence and child protection systems at the State and Territory level.

¹² National FVPLS Forum, *Submission to the ALRC Review of the Family Law System Issues Paper*, May 2018, pp 13-14, available at http://www.nationalfvpls.org/images/files/NFVPLS_Submission_to_ALRC_Family_Law_Review_May_2018_FINAL.pdf

Education, awareness and information about the family law system

National education and awareness campaign (Proposal 2-1 and 2-2)

The National FVPLS Forum supports increased efforts to raise awareness and understanding of the family law system around the country. However, there can be no single, universal or ‘one size fits all’ approach to family law education campaigns. There is a clear need for targeted education and awareness campaigns and programs for different cohorts who experience specific barriers to understanding and accessing the family law system, such as Aboriginal and Torres Strait Islander women experiencing family violence. It is critical to develop the right content in the right languages in the right way.

Although it is important for the proposed national education and awareness campaign to be developed in consultation with Aboriginal and Torres Strait Islander communities and organisations, this alone is insufficient. Family law community legal education programs must engage with local needs. Without community trust, such campaigns will fail. To be successful in raising awareness of family law over the long term, programs must be designed *for* Aboriginal and Torres Strait Islander women *by* Aboriginal and Torres Strait Islander women. We caution against attempting to retrofit a mainstream national education campaign to Aboriginal and Torres Strait Islander communities.

Accordingly, we propose that any national campaign should involve the provision of resourcing to FVPLSs to develop and expand on our existing specialist and culturally safe community legal education programs to include more specific content on family law, in alignment with the national campaign proposed. This should include resourcing to expand coverage/reach of the delivery of community legal education programs. As recommended in our previous submission:

‘With appropriate resourcing, FVPLSs could provide vital community legal education nation-wide and significantly increase access to and understanding of the family law system for Aboriginal and Torres Strait Islander people experiencing family violence’¹³.

The National FVPLS Forum understands that the national education campaign will prioritise the best interests and safety of children, as this is the prerogative of the family law system as a whole. We stress that necessarily includes the safety of children’s carers as well. As stressed in our IP submission:

Protecting women who have experienced or are experiencing family violence is foundational to protecting children from harm. The family law system must recognise its responsibility to prioritise the safety of adult victim survivors as well as the safety of children.’¹⁴

Increased community awareness of family violence and family law means increased demand for specialist family violence services, including FVPLSs. Additional funding should be made available for FVPLSs and others to respond to increased demand which will be incurred by the delivery of a national education campaign.

Improved referral relationships (Proposal 2-4)

The Discussion Paper recognises the importance of building referral relationships with services outside the family law system, for example between health services and legal assistance services. We

¹³ National FVPLS Forum, *Submission to the ALRC Review of the Family Law System Issues Paper*, May 2018, p17, available at http://www.nationalfvpls.org/images/files/NFVPLS_Submission_to_ALRC_Family_Law_Review_May_2018_FINAL.pdf

¹⁴ Ibid, p 11.

stress that specialist culturally safe services like FVPLs are best placed to undertake legal health checks for Aboriginal and Torres Strait Islander women, enabling identification of not only family law needs but also other inter-related legal and non-legal issues women may be experiencing. It is therefore essential to ensure that staff in relevant universal services understand the work of FVPLs, the importance of culturally safe and community controlled services, and how and when to make referrals for Aboriginal and Torres Strait Islander women and their children that recognise and promote their cultural rights. FVPLs are well placed to design and deliver education programs for staff in universal services to raise their understanding of the needs of Aboriginal and Torres Strait Islander women engaged in the family law system to ensure a strong understanding of the importance and process of referrals.

In addition to health services, FVPLs build referral relationships with many other organisations (including community legal centres, housing, mental health, parenting, counselling, drug and alcohol and other services) to ensure the women we work with have access to all the supports they need. Yet FVPLs are often so under-resourced that staff are principally tied up in frontline service delivery, with little capacity to develop and sustain referral relationships and partnerships. Increased funding is essential to develop and maintain more formalised referral pathways and relationships. If the ALRC is committed to ensuring that vulnerable victim survivors engaged with the family courts have access to a range of supports, FVPLs must be resourced to build vital referral relationships (including formal referral protocols as required) for the benefit of Aboriginal and Torres Strait Islander women and their children experiencing family violence.

The Discussion Paper also states:

*The risk of family violence is heightened immediately before and after separation, and police are often the first point of contact within the family violence system for people experiencing family violence. As such, police may be well positioned to refer people experiencing separation in the context of family violence to family law services at an early stage.*¹⁵

We note that the capacity of police to refer victim survivors to family law and other specialist services at an early stage relies on their ability to accurately identify and respond to family violence. At present, Aboriginal and Torres Strait Islander women and children experiencing or at risk of family violence all too frequently receive poor responses from police that ignore, minimise or misunderstand their experiences of violence. The story of Ms Dhu in Western Australia is just one example of the horrific, and in this case fatal consequences, of Aboriginal and Torres Strait Islander victim survivors of family violence being poorly treated by police and broader systems.¹⁶

There are also disturbingly high rates of police misidentifying who is the ‘victim’ and who is the ‘perpetrator’ in cases of family violence, which disproportionately impact Aboriginal and Torres Strait Islander women due to the intersection of systemic racism, unconscious bias and victim blaming attitudes. While misidentification may be a mistake that is corrected at point of contact with services or the courts, by this time the damage can already be done. In order to ensure Aboriginal and Torres Strait Islander women have access to the necessary supports at the earliest possible stage, it is essential that police significantly improve their capacity to correctly identify and respond to family violence. We stress the importance of training – not only for family law professionals, as outlined in the proposed workforce capability plan, but also for services in close contact with the family law system such as the police and child protection systems.

¹⁵ Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper 86*, p 2, paragraph 2.20.

¹⁶ See, for example, <https://www.sbs.com.au/yourlanguage/aboriginal/en/audiotrack/ms-dhus-death-custody-another-indigenous-woman-failed-system> or <https://www.abc.net.au/news/2016-12-16/who-was-ms-dhu/8128440>.

Family law system information package (Proposal 2-5 to 2-8)

The National FVPLS Forum supports in principle the proposal to develop a family law system information package in consultation with Aboriginal and Torres Strait Islander organisations (Proposal 2-8). As explained in our previous submission:

A lack of accessible and culturally relevant information about how to access and navigate the family law system is a foundational barrier to many Aboriginal and Torres Strait Islander people. Without a strong understanding of the reasons for using the family law system, the difference between the family law and child protection systems, and how to access culturally safe and specialist supports, Aboriginal and Torres Strait Islander people experiencing family violence will not readily walk through the door of a family law court or family law related service.¹⁷

We recommend the information package:

- be **co-designed** with Aboriginal and Torres Strait Islander communities, organisations and peak bodies with relevant specialist expertise;
- be accompanied by **appropriate resourcing** for Aboriginal and Torres Strait Islander organisations to engage in the co-design process, including resourcing for peak bodies such as the National FVPLS Forum and NATSILS to participate in the proposed standing working group (Proposal 2-5);
- include **information about specialist family violence ACCOs such as FVPLSs** (and other key services such as ATSILS) including local service provision and referral pathways;
- be available in all relevant local **Aboriginal and Torres Strait Islander languages**; and
- be available in **a range of formats**, such as visual and video materials in addition to written resources.

The national information package must be accompanied by locally devised and targeted face to face community legal education to successfully reach and be accessible to Aboriginal and Torres Strait Islander communities. An investment into FVPLSs to lead and supplement the national information package with tailored and targeted community legal education, information and resources for Aboriginal and Torres Strait Islander victim survivors of family violence, as discussed above, is essential to ensure the relevance, effectiveness and cultural safety of the proposal for Aboriginal and Torres Strait Islander women, children and families.

¹⁷ National FVPLS Forum, *Submission to the ALRC Review of the Family Law System Issues Paper*, May 2018, p17.

The proposals in relation to revision of Part VII of the Family Law Act

The National FVPLS Forum broadly supports the proposed changes to simplify and redraft the *Family Law Act 1975*. In particular, we commend the ALRC on picking up two key recommendations we made in our previous submission, namely:

***‘Recommendation 20:** Consider amending the ‘best interests of the child’ checklist in s60cc of the Family Law Act 1975 to more clearly prioritise the protection of children from family violence, including stronger recognition that family violence towards a parent causes harm to the child.’*

***‘Recommendation 24:** Restructure the list of s60cc factors in the Family Law Act 1975 to elevate connection to culture as a ‘primary consideration’ for Aboriginal and Torres Strait Islander children as a key mechanism to ensure that a child’s Aboriginal and Torres Strait Islander status, cultural rights and other cultural issues are brought to the attention of judicial officers determining the child’s best interests at an early stage.’¹⁸*

While legislative changes such as these are welcome and highly significant, they must be supported by adequate and sustained funding for the implementation of other key reforms which are preconditions for these legislative reforms achieving their desired effect – namely, increased safety for children and their carers, and increased access to cultural rights and cultural safety for Aboriginal and Torres Strait Islander children.

Accordingly, as outlined elsewhere in this submission, the National FVPLS Forum strongly recommends the final ALRC report set out a recommended timeframe for staged implementation of its recommendations in recognition that certain recommendations are preconditions to the effectiveness of others. For example, the workforce development plan must be implemented alongside the proposed amendments to Part VII, to ensure judges and other family law professionals understand how to interpret and implement the changes in a culturally competent, family violence aware and trauma informed way.

We also stress that Aboriginal and Torres Strait Islander people must be empowered to understand the proposed legislative changes and their impacts. This highlights the importance of community legal education, designed and delivered by Aboriginal and Torres Strait Islander people and organisations with relevant specialist expertise, as discussed in the previous section.

Simplify the Family Law Act 1975 (Proposal 3–1)

The National FVPLS Forum supports the effort to simplify the Act although we stress that redrafting the Act and removing legal Latin, archaisms, and terms that are unlikely to be understood by general readers of the legislation (for example, ‘subpoena’ and ‘affidavit’) will not in itself make the Act or the family law system less alienating. Access to adequately resourced, specialised and culturally safe legal assistance is essential to ensure that Aboriginal and Torres Strait Islander victim survivors of family violence understand their rights and obligations under the Act.

We support increased recognition of parentage in non-nuclear family forms, including the recognition of parents under Aboriginal or Torres Strait Islander traditions and customs. We refer to our comments at pages 47-48 below regarding Aboriginal and Torres Strait Islander concepts of family and kinship.

¹⁸ National FVPLS Forum, *Submission to the ALRC Review of the Family Law System Issues Paper*, May 2018, p 5-6.

Review of family law court forms (Proposal 3–2)

The National FVPLS Forum supports the simplification of family court forms, which are currently highly complex, through proposals to draft all forms in ordinary English, provide a paper form for use by individuals without access to technology and provide a single set of forms for all courts exercising family law jurisdiction.

However, the simplification of family court forms must not be seen to legitimise measures to increase self-representation in family law matters across the board. The National FVPLS Forum maintains the strong position that self-representation is not appropriate for vulnerable clients such as Aboriginal and Torres Strait Islander victim survivors of family violence, as discussed in our previous submission:

Given the pervasive and significant barriers that Aboriginal and Torres Strait Islander women and their children face in accessing safety and justice through the family law system, culturally safe legal representation at all stages of family law proceedings is vital. [...] Without ongoing access to culturally safe legal advice and representation, Aboriginal and Torres Strait Islander victim survivors are at increased risk of being pressured or intimidated by the perpetrator into agreeing to unsafe, unfair or unworkable arrangements, potentially leaving them and their children at risk of continuing or escalating violence.¹⁹

Furthermore, there must be sufficient funding for duty lawyers and barristers to ensure that no party is self-represented in any family law matter where family violence is alleged. We note that the important moves currently underway to prohibit cross-examination of victim survivors by their abusers²⁰. Going one step further, we recommend that relevant legislation and regulation should ensure that where there is an allegation of family violence, the alleged perpetrator will not be permitted to be self-represented.

The National FVPLS Forum similarly cautions against an over-reliance on technology (such as ‘smart’ forms or live chat functions) which can compound barriers to accessing the family law system. As stated in our previous submission:

Many FVPLS clients, experience barriers to literacy, regardless of whether they live in urban, rural or remote areas. Financial and geographic constraints create further challenges to accessing the internet for many clients. In general, the National FVPLS Forum raises concern about the increased reliance on online tools and resources as a means of increasing access to information about family law and related services. While online resources are useful, they are not a panacea for access barriers.²¹

Furthermore, we emphasise the importance of balancing simplification against the vital need for key information (including information about risk). To this end, we query whether proposals to simplify how information is gathered may lead to important information about a victim survivors story being overlooked or missed. In particular, we caution against the overuse of check boxes on court forms. Family violence is complex and the issues our clients face are complex. Distressed and vulnerable victim survivors may struggle to comprehensively express the complexity of their experiences through check boxes, and may be inclined to not to tick a box if in doubt. We suggest that a free form comment box should always be included alongside any ‘tick a box’ option to enable victim survivors and other family court users to explain her situation in her own words and include any information not covered by the form which might be relevant to the judge.

¹⁹ National FVPLS Forum, *Submission to the ALRC Review of the Family Law System Issues Paper*, May 2018, p 24.

²⁰ Parliament of Australia, *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018*

²¹ National FVPLS Forum, *Submission to the ALRC Review of the Family Law System Issues Paper*, May 2018, p 16.

Redraft the *Family Law Act 1975* (Cth)

Focus on safety for parenting matters (Proposal 3–3)

The National FVPLS Forum strongly commends the prioritisation of safety along with the best interests of children as a paramount consideration in parenting matters, currently set out in s 60CA of the *Family Law Act 1975* (Cth). The elevation of safety to be an integral aspect of the paramountcy principle is an important step towards embedding family violence awareness in the Act and the family law system more broadly.

We add our voices to specialist services and peak bodies across the family violence sector in stressing the term ‘safety’ must encompass safety from family violence in all its forms, including safety from psychological, emotional and other non-physical harms. Crucially, safety must also encompass cultural safety for Aboriginal and Torres Strait Islander children and for Aboriginal and Torres Strait Islander court users more broadly.

Clear principles to assist with interpretation (Proposal 3–4)

We support the amended objects and principles section set out in s60B, to assist the interpretation of the provisions governing parenting arrangements as follows:

- *arrangements for children should be designed to advance the child’s safety and best interests;*
- *arrangements for children should not expose children or their carers to abuse or family violence or otherwise impair their safety;*
- *children should be supported to maintain relationships with parents and other people who are significant in their lives where maintaining a relationship does not expose them to abuse, family violence or harmful levels of ongoing conflict;*
- *decisions about children should support their human rights as set out in the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities; and*
- *decisions about the care of an Aboriginal or Torres Strait Islander child should support the child’s right to maintain and develop the child’s cultural identity, including the right to:*
 - a) maintain a connection with family, community, culture and country; and*
 - b) have the support, opportunity and encouragement necessary to participate in that culture, consistent with the child’s age and developmental level and the child’s views, and to develop a positive appreciation of that culture.*

This new principles list contains many positive developments. We strongly commend the inclusion of the cultural rights of Aboriginal and Torres Strait Islander children as one of the six key principles governing decisions about parenting arrangements. We also support the inclusion of safety considerations for the child’s carers as well as for children inclusion of safety; the recognition of significant relationships in a child’s life beyond parents; and the acknowledgement that maintaining such relationships should never come at the expense of exposing children to abuse or family violence.

Simplify the best interests factors (Proposal 3–5)

We support the proposal to simplify the unwieldy list of best interests factors (currently set out in s60CC) to a less complex and prescriptive list of six considerations, namely:

- *any relevant views expressed by the child;*
- *whether particular arrangements are safe for the child and the child’s carers, including safety from family violence or abuse;*

- *the developmental, psychological and emotional needs of the child;*
- *the capacity of each proposed carer of the child to provide for the developmental, psychological and emotional needs of the child;*
- *the benefit to a child of being able to maintain relationships that are significant to them, including relationships with their parents, where it is safe to do so; and*
- *anything else that is relevant to the particular circumstances of the child.*

We strongly support elevating safety for both the child and the child’s carers, as this sends a strong message that children’s safety is depended on the safety of adult victim survivors, overwhelmingly mothers. This must be accompanied by training to support judicial officers and other family law professionals to develop a mature and nuanced understanding of the dynamics of family violence.

We are of the view that the need to consider ‘*the capacity of each proposed carer of the child to provide for the developmental, psychological and emotional needs of the child*’ is an improvement on the former deficit-based wording, which emphasised the ‘*extent to which parent has fulfilled or failed to fulfil*’ parental obligations or opportunities to spend time with child. However, despite the improved phrasing, we stress that it remains vital to recognise the impact of family violence on a woman’s parenting capacity and her presentation in family law proceedings. Too often, Aboriginal and Torres Strait Islander mothers are judged and implicitly blamed by child protection, judges, the police, or mainstream services for being a victim of violence. It is essential that training in relation to the legislative changes address the impact of family violence on the parenting capacity of adult victim survivors, including each Aboriginal and Torres Strait Islander woman’s right to wraparound, holistic and culturally safe support to recover from family violence and care for her child in safety.

Specific provision for Aboriginal or Torres Strait Islander children (Proposal 3–6)

We congratulate the ALRC for recognising that connection to culture is a foundational right for Aboriginal and Torres Strait Islander children, not simply one among thirteen ‘additional considerations’. This is a recommendation that the National FVPLS Forum made in our previous submission, so we are very pleased to see it adopted as a proposal in the Discussion Paper.

A specific provision in the Act is a key mechanism to ensure that a child’s Aboriginal and Torres Strait Islander status, cultural rights and other cultural issues are brought to the attention of judicial officers determining the child’s best interests at an early stage. However, we respectfully suggest some amendments to the wording proposed in the Discussion Paper, as below:

The Family Law Act 1975 (Cth) should provide that, in determining what arrangements best promote the safety and best interests of an Aboriginal or Torres Strait Islander child, the maintenance of their connection to their family, community, culture and country must be considered.

The word ‘maintenance’ is problematic as it assumes all children will have an existing, intact connection to culture. It fails to take into account Aboriginal and Torres Strait Islander children who have been previously prevented from knowledge of or engagement with their culture due to, for example, due to the behaviour of a perpetrator of family violence or a non-Aboriginal carer or where a child has been removed from their family by child protection authorities. We prefer the stronger, existing language in s60CC(3)(h) of the Act which refers to a child’s ‘right to enjoy’ his or her culture. Accordingly, we suggest the following wording:

*The Family Law Act 1975 (Cth) should provide that, in determining what arrangements best promote the safety and best interests of an Aboriginal or Torres Strait Islander child, the **child's right to access and enjoy** their connection to their family, community, culture and country must be considered.*

Clearly, it is essential that this provision applies equally to all Aboriginal and Torres Strait Islander children. At the same time, there must be recognition that the implementation of this provision will mean different things for each and every Aboriginal and Torres Strait Islander child. It is essential that this reform is accompanied by increased cultural awareness training for judicial officers, and all professionals involved in the family law system, to better understand how to interpret and implement this provision in accordance with the cultural needs and rights of Aboriginal and Torres Strait Islander children. There should be further consultation with Aboriginal and Torres Strait Islander led organisations in relation to the implementation of this proposal and the development of any guidance material to assist with its interpretation.

Clarify parental responsibility (Proposal 3-7)

Changing terminology

In principle, the National FVPLS Forum sees merit in changing the terminology from 'parental responsibility' to 'decision making responsibility'. However, the National FVPLS Forum is of the view that this change does not go far enough:

- The proposed term 'decision making responsibility' can still be easily misinterpreted by judicial officials and family members: i.e. the degree to which decision making responsibility is equal and what types of long-term decisions each party has responsibility for.
- The proposed change in terminology will not unseat the widespread community perception that decision making responsibility must be shared. This ambiguity of the law may cause victims of family violence to agree to inappropriate and unsafe arrangements.

We reiterate the importance of specialist, culturally safe legal assistance from an Aboriginal and Torres Strait Islander community controlled legal assistance service with family violence expertise to ensure the capacity of Aboriginal and Torres Strait Islander victim survivors to access fair and safe arrangements.

Removing the presumption for equal shared parental responsibility

The National FVPLS Forum explicitly supports removing the presumption of equal shared parental responsibility ('ESPR'). The National FVPLS Forum has previously advocated for the removal of ESPR on the basis that:

- In cases of family violence, shared parental responsibility is often not only inappropriate but dangerous for children and their non-violent carers, overwhelmingly mothers; and
- Even though ESPR is not currently meant to apply in cases of family violence, victim survivors experience many barriers to disclosing and/or proving family violence to the satisfaction of family courts.

In essence, the removal of this presumption will leave judicial discretion unfettered, meaning the question of 'parental responsibility' (or 'decision making responsibility') for each child will be

determined on the basis of the evidence and individual circumstances of that child. Critically, this will better enable the courts to consider the option of sole parenting responsibility in matters involving family violence. As detailed in our submission to the Issues Paper in this inquiry, sector-wide education, including ongoing judicial education, is essential to ensure judges are equipped and supported to exercise their discretion in ways that do not put women and children at risk of ongoing coercion and control by perpetrators of family violence.

Simplifying the decision making pathway

We strongly support simplifying the decision-making pathway around ‘time spent’. The existing provisions which require consideration of ‘equal time’, or ‘substantial and significant time’, are convoluted and difficult to explain to clients with complex needs, such as complex trauma and acquired brain injuries. The current provisions can also lead to women agreeing to unfair or unsafe arrangements. As discussed in our previous submission, it is crucial to challenge the assumption that working towards the ultimate goal of unsupervised time/contact is always possible and desirable. There should be no requirement to consider equal or shared and significant time.

Include *Rice v Asplund* principle (Proposal 3-8)

We support proposal 3-8 regarding the requirement for parties to seek leave to apply for a new parenting order where a final parenting order is already in place, namely that there needs to have been a significant change of circumstances and consideration of whether it is safe and in the best interests of the child for the order to be reconsidered. This move will enshrine the *Rice v Asplund* principle in legislation which is already common practice in family law proceedings and will reassure clients, particularly in cases where the other party is litigious and may otherwise attempt to repeatedly vary orders (which can be a form of systems abuse).

Responses to specific questions

In response to **Question 3–2** of the Discussion Paper regarding confusion about matters requiring consultation between parents, the National FVPLS Forum considers that the current definition of ‘major long term issues’ in s4 of the *Family Law Act 1975* (Cth) should be maintained. It could help if further examples were provided in the Act itself (in much the same way as examples of family violence are provided in the Act to assist in people’s understanding of what may meet the definition). We also reiterate the importance of specialist, culturally safe and targeted community legal education for Aboriginal and Torres Strait Islander women who have experienced family violence to ensure they are not put at increased risk as a result of confusion around parenting arrangements. With appropriate resourcing, FVPLSs would be well-placed to develop these community legal education materials.

In response to **Question 3–2**, the National FVPLS Forum does not support the early release of superannuation for parties experiencing hardship, such as family violence, except in circumstances of last resort. We support WLSA’s comments in their submission that *‘the responsibility for supporting family violence victim-survivors lies with federal, state and territory governments through adequate funding of services to meet health, housing, justice, legal and other needs, and should not come from the victim-survivor’s superannuation.’*²² We call for increased funding for specialist culturally safe legal assistance services like FVPLSs to ensure Aboriginal victim survivors, predominantly women and their children, have the support they need to recover from family violence and rebuild their lives in safety.

²² Women’s Legal Services Australia, *ALRC Review of the Family Law System Response to Discussion Paper*, November 2018, p 31.

The proposals for Families Hubs

“Aboriginal organisations like ours do a lot of work in community to build trust and confidence. Often the women who most need our services won’t walk straight through our door. We have to go out to our communities. It is not possible for there to be a single door, a one-stop-shop, that everyone will access.”

– FVPLS member, National FVPLS Forum-ALRC consultation, 21 November 2018

In this section, the National FVPLS Forum raises concerns with the proposed Families Hubs from the perspective of Aboriginal and Torres Strait Islander people experiencing or at risk of family violence (predominantly women and children). On the basis of FVPLSs frontline experience, we anticipate many barriers to Aboriginal and Torres Strait Islander women accessing the Families Hubs, including fear of child protection, lack of community trust and cultural safety, as well as potentially poor identification of legal needs (both in relation to family law and other civil or criminal matters) should the Hubs be staffed by non-lawyers and/or workers from mainstream (non-Aboriginal) services.

The National FVPLS Forum is concerned that the proposed Families Hubs are unlikely to meet the full range of complex and interlocking needs of Aboriginal and Torres Strait Islander mothers and children experiencing family violence who are engaged with the family law system. Indeed, they may have inadvertent or unintentional negative impacts on Aboriginal and Torres Strait Islander victim survivors, as outlined below. As such, we do not support the proposed Families Hubs (Proposal 4–1 to 4–4) and instead advocate for increased investment into and capacity building of existing specialist services, including culturally safe wrap-around legal and non-legal support from specialist Aboriginal and Torres Strait Islander legal service providers such as FVPLSs. However, if the proposal were to go ahead despite these concerns, we make a number of recommendations to mitigate inadvertent negative impacts on Aboriginal and Torres Strait Islander people experiencing family violence – particularly women and children.

General comments

It is unclear what problem the proposed Families Hubs are trying to solve and, as such, there is a significant risk they will make the family law system more, not less, complicated – increasing the barriers and hurdles vulnerable families are required to navigate. We note that the proposals in the Discussion Paper could potentially lead to the expansion of Family and Relationship Centres (**‘FRCs’**), expansion of the Family and Advocacy Support Service (**‘FASS’**) and the development of Families Hubs – all with services on site and some case-management capacity. This is in addition to existing multi-disciplinary Hubs in various jurisdictions (such as the recently established support and safety hubs in Victoria known as the Orange Door which are discussed below), as well as existing specialist services such as FVPLSs which provide culturally safe and holistic wrap-around support and, with investment, could deliver more comprehensive case management as anticipated in the Families Hubs proposal.

Accordingly, we query whether these overlapping proposals will in fact make the family law system more, rather than less, complex and burdensome for families. The Discussion Paper recognises that family violence is present in the majority of family law matters. Victim survivors of family violence, particularly those with complex needs and high levels of risk, will frequently already have many

workers and services involved in their lives. It is vital that the Discussion Paper proposals do not simply create more hoops for vulnerable individuals and families to jump through.

As an alternative to the proposed Families Hubs, the National FVPLS Forum respectfully recommends the ALRC look to less resource intensive, and more effective, options which build on existing service infrastructure rather than attempting to develop an entire new model of service delivery. For example, if the Hubs are trying to address case management, it would be more effective (and safe) to invest in existing services such as FVPLSs to meet increasing demand and expand their case management capacity. If the principal issue the Hubs are trying to address is co-ordination of services, we agree that it is vitally important for services to be more joined up, but there are ways of addressing service fragmentation that would be more cost effective. For example, increased funding for existing specialist services like FVPLSs to enable them to have capacity to better build referral relationships and pathways and support clients to better navigate the family law and associated service system.

The proposed Families Hubs will only be as strong as the service system sitting behind them. As noted above, the proposal for Families Hubs is incredibly resource intensive. We query whether these resources could be more effectively spent elsewhere and stress the importance of investing in, consolidating and expanding existing services. We also note that a large and expertly skilled workforce to service the Families Hubs does not currently exist. Accordingly, the creation of Families Hubs would likely create additional competition for the recruitment of a limited number of skilled workers, draining expertise and capacity from existing services. This would undermine the very purpose of the Families Hubs as there would be an inadequate service infrastructure sitting behind the Hubs to deliver on its promise to families and children in need.

Many of The National FVPLS Forum's concerns with the Families Hubs are similar to concerns that our Victorian member has had with the Orange Door Support and Safety Hubs. We include the following section detailing some of Djirra's experiences with the roll out of the Orange Door in Victoria.



Djirra's perspectives on the Orange Door

Support and Safety Hubs

- The Orange Door Support and Safety Hubs evolved from a recommendation from the Victorian Royal Commission into Family Violence that aimed at ensuring women and children experiencing family violence get the support they need and don't fall through the gaps in service delivery.
- While the intent of the Hubs is positive, along with many of their design elements such as having embedded Aboriginal workers, the Hubs have been implemented with a dual focus on child protection and family violence (including both specialist services for victims and perpetrator services), which presents an inherent tension.
- Fear of child removals is one of the key reasons many Aboriginal and Torres Strait Islander women do not disclose family violence or choose not to approach a (mainstream) service for support. The presence of child protection services in the Hubs alongside family violence services poses significant concerns for the Aboriginal and Torres Strait Islander women we work with, especially with Victoria's new legislative framework enabling greater information sharing between Hub services.
- The likelihood of increased child protection scrutiny and possible intervention for Aboriginal and Torres Strait Islander women, children and families who do access the Hubs significantly decreases community trust. It deters Aboriginal and Torres Strait Islander women from seeking help due to fear of child removal and thus unintentionally sends family violence further underground.
- The presence of perpetrator service within the hubs, meaning men who use violence and women in fear for their lives will be walking the same halls, creates a further significant barrier to access for Aboriginal and Torres Strait Islander women.
- Clearly there is a need for joined up, integrated and collaborative services. However, it is vital to recognise and prioritise the agency, consent, control of information and privacy of victim survivors of family violence - particularly Aboriginal and Torres Strait Islander women - and the role specialist Aboriginal family violence services have, before linking up family violence services with child protection.


Key concerns

In addition to the above concerns, the National FVPLS Forum raises the following points, including comments from members in relation to the proposed Families Hubs:

- The ALRC must **not enforce a ‘one door’ mainstream model** of accessing advice and wraparound support for family law matters and related issues. There must be multiple access points, choice and culturally safe and specialist support for all Aboriginal and Torres Strait Islander women in contact with the family law system. FVPLSs must be recognised as a **vital alternative pathway** for Aboriginal and Torres Strait Islander women who have experienced family violence and resourced accordingly.
- It is not clear from the Discussion Paper what training the Families Hub workers would have to identify when a Hub user has a legal need and to make the appropriate referrals. With increased resourcing, **FVPLSs are best placed to undertake legal health checks** for Aboriginal and Torres Strait Islander women to determine their legal and non-legal needs that are likely intertwined with their family law matter.
- In Victoria, Families Hubs risk **duplicating the services already provided by Orange Door Support and Safety Hubs**. Given family violence is present in the majority of family law matters, it may be confusing for victim survivors to have different Hubs for different purposes.
- The Families Hubs propose to address the ‘psychosocial issues’ that cluster around family law issues by undertaking initial needs and risk assessment, safety planning, referrals and case management²³. The specialist, culturally safe and wraparound **service delivery model of FVPLSs already covers all these areas** for Aboriginal and Torres Strait Islander women and their children experiencing family violence.
- The presence of many different mainstream services within the Families Hubs and the mandated information-sharing processes creates **barriers to gaining and maintaining community trust**. We refer you to our key concerns with the information sharing proposals at pages 57-58 of this submission.
- The proposed central role of **emerging digital technologies** to assess client needs in the Families Hubs²⁴ is **unlikely to be responsive to the unique cultural, legal, practical and emotional support needs** of Aboriginal and Torres Strait Islander victim survivors. The success of FVPLSs’ service model relies on engaging with Aboriginal and Torres Strait Islander women through face to face conversation at intake/assessment and beyond, hearing her story, validating her strength and providing tailored support for her specific needs.

²³ Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper 86*, p 81.

²⁴ Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper 86*, p 86, paragraph 4.25.




“We are an Aboriginal and Torres Strait Islander specific service – trust is everything. If we go into a Hub, and there is one person who comes in who has worked with the child protection department to remove a child, nobody in that community will go into that building again... One inadvertent action like that can jeopardise the whole service.”

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018

“The workers in the Hubs are not trained lawyers. Yet they need to be able to identify if it is a legal issue, is it a social issue, is this person suffering trauma? We are the specialists. Our lawyers, clients support officers and court support officers are best placed to unpack the issues and refer appropriately without incurring a further load of trauma.”

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018



“The women we work with are extremely private and frequently do not want other community members to know that they are seeking support for family violence. They wouldn’t go to a Hub where there were a whole range of other family services, because of that historical fear. That’s why they come to us.”

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018

“We have to be mindful of our clients and the frustration they feel. If they come to us with a legal concern, and we have to refer them to a Hub, they have to retell their story and bring up that trauma all over again.”

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018

If the proposal to establish the Families Hubs proceeds despite our concerns, member organisations make the following suggestions:

- Increased **funding for FVPLSs is essential to meet increasing demand** for specialist, culturally safe and holistic legal and non-legal support that will arise as a result of the Families Hubs and to effectively address the multitude of barriers that Aboriginal and Torres Strait Islander victim survivors experience in accessing support for family law and inter-related issues.
- To mitigate the aforementioned risks and barriers to accessing support, a **streamlined referral process** should be established through which all Aboriginal and Torres Strait Islander women and victim survivors accessing Families Hubs are offered referral to an FVPLS **at the earliest possible stage**.
- Families Hubs must be **co-designed** with Aboriginal and Torres Strait Islander communities, organisations and peak bodies, including FVPLSs and the National FVPLS Forum from the start. This includes meaningful engagement with specialist Aboriginal and Torres Strait Islander community controlled organisations at **local and state-wide level** at every stage of design and implementation, across **rural, remote and urban areas**.
- Families Hubs could be **linked in to local health centres**, which some members suggest could be more acceptable and accessible to victim survivors than, for example, being located in the courts.
- Access to immediate **physical safety for victim survivors of family violence must be prioritised** when it comes to funding.
- Funding for Hubs must go hand in hand with **increased funding for safe houses**. Ideally, there should be a safe house in each suburb, each rural council and each remote community. Safe houses should be linked in to the nearest FVPLS who would be available on an as-needs basis. **Increased funding for FVPLSs** would be essential to ensure wraparound and culturally safe advice and support for Aboriginal and Torres Strait Islander victim survivors.

“All FVPLSs are staffed and shaped differently. Mostly we are small services. When looking at Hubs, if FVPLS are best placed to meet those needs, what capacity do we have? How can we be supported to build capacity?”

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018

“The difficulty is not only can we provide the service? The difficulty is also can we maintain that trust and relationship [in a newly imposed setting like a Families Hub]? Otherwise we have to start from scratch.”

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018

Family dispute resolution

Many FVPLSs retain significant concerns about the inappropriateness of non-legally assisted family dispute resolution (FDR) conducted through Family Relationship Centres for Aboriginal and Torres Strait Islander women experiencing or at risk of family violence. As stated in our previous submission:

*FDR presumes an equal playing field in which both parties have the capacity to put their views forward freely and effectively, without fear or censorship. This is simply not the reality in situations of family violence which inevitably involve power imbalance, coercion and fear. ... The National FVPLS Forum posits that this may be even more so for Aboriginal and Torres Strait Islander women who have experienced family violence given the presence of additional, complex and compounding barriers to participating equally and being understood in FDR processes.*²⁵

However, FVPLS lawyers report that legally assisted dispute resolution processes can have positive outcomes for Aboriginal and Torres Strait Islander women experiencing family violence, provided that clients have access to culturally safe and specialised legal assistance throughout the process. We strongly reiterate our recommendations from our previous submission that:

- Aboriginal and Torres Strait Islander victim survivors of family violence must have access to specialist and culturally safe legal assistance and support from an FVPLS *before, during and after* their engagement in dispute resolution processes;
- All Aboriginal and Torres Strait Islander clients should be offered a referral to a suitably specialised Aboriginal and Torres Strait Islander Community Controlled legal service provider prior to family dispute resolution screening and/or on accessing a Family Relationship Centre, whichever is earliest; and
- Any entry by Aboriginal and Torres Strait Islander victim survivors of family violence into family dispute resolution should be facilitated through an Aboriginal legal service provider with expertise in family law and supporting victim survivors of family violence, such as an FVPLS.

Expanding FDR for property/financial matters (Proposal 5-3)

At present parties must attempt FDR prior to lodging a court application for property and financial matters, unless there is an applicable exception including urgency, an imbalance of power (including as a result of family violence), non-disclosure or an attempt to delay or frustrate the resolution of the matter by one of the parties. We reiterate our comments, above, in relation to the critical importance of any FDR processes involving Aboriginal and Torres Strait Islander people who have experienced or are at risk of family violence being culturally safe and legally assisted.

In response to **Question 5–1**, the National FVPLS Forum is of the view that the current timeframes within which proceedings in property and financial matters must be initiated (twelve months of divorce or two years of separation from a de facto relationship) should be revised and extended. Section 44 of the *Family Law Act 1975* (Cth) currently provides that a party may apply to the court out of time to lodge property proceedings where that party can establish ‘hardship’. The National FVPLS Forum recommends that, the current test of “hardship” should be broadened. We recommend

²⁵ National FVPLS Forum, *Submission to the ALRC Review of the Family Law System Issues Paper*, May 2018, p 42.

section 44 of the Family Law Act be amended to clearly state that a factor to be taken into account to extend time is whether the applicant suffered family violence (or mental health issues) which affected their ability to file within time.

FVPLSs observe from our extensive frontline experience that it can take victim survivors significant time to recover from the impact of family violence to the extent that they feel ready to pursue a claim, or even become aware they are entitled to a settlement, particularly in the context of other complex and pressing concerns regarding safety, relocation, housing, mental health or substance misuse issues. It can take some women, particularly Aboriginal and Torres Strait Islander women, a significant amount of time to disclose family violence. Family violence should therefore be an exemption from the requirement to apply for property settlement within current legislative timeframes.

In response to **Question 5–2**, we note that repeated non-disclosure is an abuse of court process and in many cases constitutes continued family violence. The National FVPLS Forum supports consequences for non-disclosure, however as discussed by WLSV, a punitive approach to non-disclosure has not been effective for financially disadvantaged parties²⁶. We further note NATSILS' concerns that civil or criminal penalties to non-disclosure may have a disproportionate negative impact on Aboriginal and Torres Strait Islander people and further entrench contact with the justice system²⁷.

Culturally safe models for FDR for parenting and financial matters (Proposal 5-9)

The National FVPLS Forum recognises the need for further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters. However, specialist Aboriginal and Torres Strait Islander organisations and peak bodies with expertise in family violence must be the ones leading this work.

The Discussion Paper notes that the proposal to develop culturally appropriate FDR *'should include amendments to existing funding agreements and practice agreements to support this work.'*²⁸ We strongly support this and recommend adoption of principles to ensure appropriately skilled and specialised Aboriginal and Torres Strait Islander organisations are the ones leading this work – for example through adoption of ACOSS' Principles for a Partnership-Centred Approach for NGOs Working with Aboriginal and Torres Strait Islander Organisations and Communities, or similar.²⁹

We observe that in the past, funding for developing 'culturally appropriate' FDR models has gone to mainstream FRCs.³⁰ The development of Aboriginal and Torres Strait Islander models of FDR requires Aboriginal and Torres Strait Islander people and organisations to be at the helm from the very beginning. Simply parachuting Aboriginal workers into a mainstream framework will not make it culturally safe, accessible or effective.

Indeed, in many FVPLSs experience, where mainstream (or non-Aboriginal) organisations attract funding to deliver services to Aboriginal and Torres Strait Islander people, these services often realise after the fact that they are ill-equipped to deliver services in a culturally appropriate and accessible

²⁶ See Women's Legal Service Victoria, *Small claims, Large battles*, 2016, p 24, available at <https://womenslegal.org.au/files/file/WLSV%20Small%20Claims%2C%20Large%20Battles%20Research%20Report%202018.pdf>

²⁷ National Aboriginal and Torres Strait Islander Legal Services (NATSILS), *Submission to the Australian Law Reform Commission Review of the Family Law System Discussion Paper 86*, November 2018, p 12.

²⁸ Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper 86*, p 116.

²⁹ Australian Council of Social Service, *Principles for a Partnership-Centred Approach*, available at <https://www.acoss.org.au/principles-for-a-partnership-centred-approach/>

³⁰ <https://www.communitygrants.gov.au/grants/legally-assisted-and-culturally-appropriate-family-dispute-resol>

way. These organisations then approach Aboriginal and Torres Strait Islander Community Controlled Organisations seeking (unresourced) advice, work, introductions or de facto cultural brokerage to develop and implement their programs. The process would be considerably more culturally appropriate, efficient and equitable if Aboriginal and Torres Strait Islander Organisations were instead invested in to design and deliver programs and build capacity from the outset. Accordingly, we respectfully ask that the ALRC explicitly recommend that any culturally tailored FDR be co-designed and delivered by or in genuine partnership with FVPLSs and ATSILS who must be resourced appropriately to undertake this work.

We note that this proposal suggests examining the feasibility of means-tested fee for service and models involving legal assistance ‘where necessary’. FVPLSs 16 years of on-the ground experience demonstrates that legal assistance is *always* necessary for vulnerable victim survivors, including Aboriginal and Torres Strait Islander women and their children. We stress the importance of culturally safe and specialist legal support from FVPLSs and ATSILSs (not just from VLA, CLC, private practitioner or Legal Advice Line as noted in ALRC recommendation 5-9) for all Aboriginal and Torres Strait Islander women engaged in dispute resolution processes. With respect to fee-for-service models, we emphasise the importance of clear eligibility criteria as we are concerned by the possibility of excluding victim survivors because of cost. We also caution against discouraging the other party from participating in FDR because there is a fee, as this could be a way of leaving victim survivors who don’t want to go to court with no other option to assert their rights.

In addition to the inclusion of a provision that funding to develop culturally appropriate FDR goes to specialist ACCOs, the National FVPLS Forum recommends the following considerations:

- Strategies to **recruit Aboriginal and/or Torres Strait Islander facilitator/mediators**. Wherever possible, matters involving Aboriginal parties should be convened by an Aboriginal facilitator/mediator with family violence knowledge and expertise. Where it is not possible for FDR to be conducted by an Aboriginal and/or Torres Strait Islander facilitator, arrangements could be made for co-facilitation with an Aboriginal cultural advisor.
- **Legally assisted dispute resolution models should be preferred** (as discussed below).
- At the point of initial intake, and during FDR if desired, Aboriginal and Torres Strait Islander people who have experienced family violence must have the option of having an **Aboriginal or Torres Strait Islander support worker**, for example from an FVPLS, sit with them. Aboriginal and Torres Strait Islander women who have experienced family violence are unlikely to feel safe and supported to disclose the full extent of family violence without culturally safe support, including not only legal support but also **practical, emotional and cultural support**.
- Regional members report having difficulty accessing FDR face to face, and instead it is often done over the phone. For example, our member in Roma, Southern Queensland, reports that clients who want to engage in mediation now have to travel to Toowoomba, over 350 kilometres away. Most clients are incapable of obtaining transportation to access such services, and are left with no option except for engaging in FDR via telephone. **Increased availability of FDR in regional and remote areas** is crucial.
- There also must **always be the option of shuttle mediation** so that victim survivors are not forced to be in same room as their abuser. FVPLS clients who engage with dispute resolution processes nearly always opt for shuttle mediation, where it is available, due to family violence.

Legally assisted dispute resolution (LADR) (Proposal 5-10)

We reiterate our comments made above that all Aboriginal and Torres Strait Islander victim survivors of family violence must have access to legal assistance provided from an FVPLS or other culturally safe and specialised service with family violence expertise *before, during and after* LADR. There should also be increased funding to FVPLSs, ATSILSs and other ACCOs to train, recruit and employ Aboriginal and Torres Strait Islander mediators for FDR.

The National FVPLS Forum recognises that sometimes family violence is so extreme that dispute resolution, even when legally assisted, is not appropriate. We propose certain automatic exemptions to LADR including, but not limited to, where there is:

- violence towards a child;
- threats to kill; or
- high risk safety concerns (such as a history of repeated stalking or serious physical injury).

We note that while family violence or abuse is currently an exemption to the requirement to attempt FDR, the process still create barriers. For example, in many (if not all) jurisdictions victim survivors are unable to access a grant of legal aid to bypass FDR unless they can demonstrate urgency. This can present an issue for the women that we work with, who may have experienced significant and extensive violence but with no recent contact between the parties. We are of the view that urgency should not be a requirement.

While not within the power of the ALRC, we note that increased funding to Legal Aid Commissions would be required to enable Aboriginal and Torres Strait Islander victim survivors to secure a grant of aid to initiate proceedings without the requirement to demonstrate urgency. While FVPLSs and ATSILSs provide free services and do not require clients to have a grant of aid for advice and assistance, when a matter proceeds to court and a barrister is required legal aid grants do become necessary. On this note, we again refer to the recommendations of the Productivity Commission and Law Council of Australia concerning the need for drastically increased resourcing across the legal assistance sector, as discussed at page 15 of this submission.

The proposals for specialist court pathways

Simplified small property claims process (proposal 6-4 to 6-6)

We welcome the proposal for a simplified small property claims process to promote the early resolution of small property disputes, as recommended in Women's Legal Service Victoria's *Small Claims, Large Battles* report. In our previous submission, the National FVPLS Forum expressed support for all fifteen recommendations the *Small Claims, Large Battles* report.

Specialist family violence list (proposal 6-7)

The National FVPLS Forum does not support the establishment of a specialist family violence list. Our reasons include:

- The proposed workforce development plan acknowledges that an in-depth understanding of family violence should be a core competency of *all* judicial officers and court staff in the family law jurisdiction. The resourcing that would be associated with implementing this proposal would be better directed towards developing and deepening the family violence awareness of all family law courts staff.
- As recommended in our previous submission, we want to see early determinations of fact in relation to family violence across all family law matters, not only within a limited specialist list.
- Given the prevalence of family violence in family law matters, the volume of matters that could (or should) be heard by a specialist family violence list would be huge. We have concerns about the eligibility criteria and the appropriateness of the family violence list for our clients.

However, if the family violence list is established, we stress that careful consideration is required regarding:

- The interaction between the proposed family violence list and the Indigenous list;
- The interaction between the proposed family violence list and the Magellan List reserved for cases involving allegations of serious physical or sexual child abuse.
- Mechanisms to mitigate the risk of siloing specialist knowledge between different specialist lists: family violence awareness on the one hand, cultural awareness on the other.

FVPLSs work with Aboriginal and Torres Strait Islander people who have experienced family violence, predominantly women and their children. Many (if not most) of our clients also experience high levels of risk, inter-related legal matters in other jurisdictions and simultaneous child protection involvement – all of which fall under the proposed eligibility criteria for the family violence list. This presumably means that many of the women and children that we work with would technically be eligible for both the specialist family violence list as well as the Indigenous list.

The National FVPLS Forum is of the view that the Indigenous List is more appropriate for our clients, provided that the judicial officers and all other court staff engaged in the Indigenous list also have significant family violence experience and expertise.

Specialist Indigenous List

Beyond noting strong support for the Federal Circuit Court's Indigenous List, the Discussion Paper contains very little detail about this proposal. The National FVPLS Forum concurs that ongoing developments to establish Aboriginal and Torres Strait Islander Family law lists in Sydney, Melbourne and Adelaide are positive. We welcome their further roll out and raise the following considerations:

- 'Indigenous' is not the appropriate or preferred term for many Aboriginal and Torres Strait Islander communities. We express strong preference for the specialist Indigenous list to be **renamed in accordance with the wishes of the relevant, local Aboriginal and Torres Strait Islander communities**.
- While we would ideally prefer Aboriginal and Torres Strait Islander family law lists to be available in all regional, rural, remote and urban family courts, we acknowledge this will take some time. In the interim, we reiterate our previous recommendation to **reinstate and/or increase the circuiting of Federal Circuit Courts across rural, regional and remote areas** as a key means of improving accessibility of family courts for Aboriginal and Torres Strait Islander people.
- There must be **further consultation regarding eligibility** to access the Aboriginal and Torres Strait Islander list as well as how it will **interact with the proposed specialist family violence list**. For example, if a party is Aboriginal and also experiencing high risk family violence (as many of our clients are) do they go to the Indigenous list or the family violence list? How will the list work with families where one party is Aboriginal or Torres Strait Islander and the other is not? Our preference is for all matters involving Aboriginal and Torres Strait Islander children to go to the Aboriginal and Torres Strait Islander list as a matter of priority.
- There must be appropriate resourcing for **Aboriginal and Torres Strait Islander Liaison Officers ('ALOs')** to work in the courts, to support both Aboriginal and Torres Strait Islander litigants and their families navigating the family court and court staff in providing better and more culturally competent service to Aboriginal and Torres Strait Islander people. In order to implement culturally appropriate best practice, funding *must* encompass at least two ALO positions so they can be gender appropriate. On days that the Aboriginal and Torres Strait Islander list is not sitting, ALOs could also form part of the FASS program. ALOs must be trained in trauma and family violence.
- There must be appropriate resourcing for **Aboriginal and Torres Strait Islander Family Consultants** to build trust and rapport with Aboriginal and Torres Strait Islander parties and ensure that Aboriginal and Torres Strait Islander children and families have the opportunity for meaningful and culturally safe participation in family law proceedings.
- The judges who sit on the Aboriginal and Torres Strait Islander list must have a very strong understanding of cultural safety, family violence, sexual assault, complex trauma, risk and safety planning. Many if not most Aboriginal and Torres Strait Islander women engaged in family law proceedings have experienced family violence or sexual assault. **Specialist knowledge should not become siloed**. To this end, it could be beneficial for judges who sit in the Indigenous list to regularly sit in the specialist family violence list as well to gain and maintain expertise in both areas. If this is not possible, judges in the Indigenous list must undergo specialist family violence training.

- The creation of specific Aboriginal and Torres Strait Islander lists will likely increase demand for culturally safe legal assistance services such as FVPLSs. There must be **sufficient additional funding for Aboriginal services** such FVPLSs to accommodate the resulting increased demand for specialist and culturally safe legal and non-legal assistance.
- An essential component of a successful Aboriginal and Torres Strait Islander list is having at least two family report writers in each registry with appropriate skills, expertise and commitment to work with Aboriginal and Torres Strait Islander families engaged with the specialist list. Strong preference must be given to recruiting, training and accrediting **Aboriginal and Torres Strait Islander family report writers**. All family report writers participating in the specialist list must have high levels of cultural competence *and* family violence awareness.

A targeted approach to training

While we strongly support the roll out of mandated system-wide training under the proposed workforce capability plan, and the establishment of specialist Aboriginal and Torres Strait Islander lists, we recognise that these proposals will take significant time and resources to fully implement. To improve outcomes for Aboriginal and Torres Strait Islander people engaged in the family law system in the interim, we suggest consideration of the recommendations made by Aboriginal psychologist Stephen Ralph for targeted and in-depth cultural competency training for a limited number of family law professionals in each registry – including select judicial officers, family report writers and registrars – who would then regularly manage and determine Aboriginal and Torres Strait Islander cases. As previously recommended by Ralph, this would entail:

‘[T]he identification and nomination of staff in each registry who have the interest and commitment to working with Indigenous families and communities. These staff would form registry-based teams that would be responsible for liaison with Indigenous litigants and the management of their cases as they proceeded through court from the time of filing of documents to the determination of these cases. This would allow for specifically targeted training to be provided to members of these teams and for members to be given the opportunity to undertake community liaison and engagement with their local Indigenous community. Ideally, this would improve the level of expertise available within the courts in responding to the needs of Indigenous families and forge closer links between the courts and local Indigenous communities. This would in turn promote a degree of confidence amongst Indigenous people that the courts were able to effectively address their issues and provide culturally appropriate services.’³¹

This is consistent with the approach and objectives of the ‘Indigenous List’. In the interim until the ‘Indigenous List’ is established, this sort of targeted, intensive training could build on the existing docket-system and enable more culturally appropriate pathways for Aboriginal and Torres Strait Islander court users in the short-term. This should not be seen as a substitute for training for all professionals, nor a replacement for establishing Aboriginal and Torres Strait Islander Lists in all registries, but rather a complement and pathway towards both proposed reforms.

³¹ Stephen Ralph, *Indigenous Australians & Family Law Litigation: Indigenous Perspectives on Access to Justice*, 2011, pp 55-56, available at http://www.familycourt.gov.au/wps/wcm/connect/03eec3e6-63e4-4060-a874-3cfb3dc125f7/IndigenousAustraliansFamilyLaw.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-03eec3e6-63e4-4060-a874-3cfb3dc125f7-lh-m9FQ

Other proposed models of support and decision making



“Do victim/survivors have access to the services they need without those services increasing the load on her and her children?”

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018

Expansion of FASS (Proposal 4–5 to 4-8)

While the Discussion Paper indicates there has been significant positive feedback for the recently established Family Advocacy and Support Services (**‘FASS’**) delivered by Legal Aid Commissions, there has not been high levels of engagement or collaboration between FASS and specialist and culturally safe services like FVPLSs. Members in the relevant jurisdictions report receiving very few referrals from FASS workers since the establishment of the FASS pilot.

It is positive that the Discussion Paper recognises that FASS is not the most appropriate model of support or the provider of choice for Aboriginal victim survivors of family violence:

‘while FASS was a promising model, as a mainstream service it may not be effective when providing services to Aboriginal and Torres Strait Islander people. It was suggested that these clients should have access to specialist services and Aboriginal Community Controlled Organisations.’³²

The proposed expansion of FASS to include legal and non-legal support and ongoing case management overlaps with the existing services provided by FVPLSs. We do not want to see funding go solely to Legal Aid Commissions for the expansion of FASS when we already provide wraparound and ongoing support for Aboriginal victim survivors engaged with the family law system in a culturally safe way.

Under the Third Action Plan to Reduce Violence Against Women and their Children, six of the 14 FVPLSs were successful in applying for case management grant funding through internal tender process. However, this is lapsing funding, due to expire in June 2019.

Too often, FVPLSs are overlooked for funding despite providing the same services in a culturally safe way. For example, under the Women’s Safety Package, FVPLSs did not receive any additional funding under the legal assistance package for the pilot and expansion of the specialist domestic violence units, despite funds being provided to services within the same service region of a number of FVPLSs,

³² Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper 86*, p 98, paragraph 4.76.

with high populations of Aboriginal and Torres Strait Islander people. This unnecessarily duplicates service delivery when it would have been more effective to resource existing FVPLSs.

For Aboriginal and Torres Strait Islander women who are victims/survivors of family violence, seeking support will often only occur when a culturally safe and trusted service is available. FVPLSs regularly work with Aboriginal and Torres Strait Islander women who have experienced years of serious violence but never before disclosed what they are going through, or indeed received effective support. Culturally safe and specialist services, such as those provided by FVPLSs, enable Aboriginal and Torres Strait Islander women experiencing high levels of vulnerability to remain engaged in support and legal processes through developing relationships based on deep trust and cultural safety and understanding.

One size does not fit all and a single model is not appropriate for all families and individuals moving through the family law system. Instead of, or alongside, expansion of the FASS program, the government must invest in FVPLSs to continue and expand service delivery. It is also important to build and strengthen referral pathways between FASS and culturally safe specialist services, such as FVPLSs. We suggest that the recruitment of Aboriginal Liaison Officers to FASS could also assist in making the family law system more accessible. ALOS could assist in bringing increased awareness and cultural education to FASS and court staff and, crucially, act as a key referral point from the mainstream FASS model to culturally safe and specialist services such as FVPLSs. This must happen alongside increased resourcing to Aboriginal Community Controlled Organisations such as FVPLSs.

Parenting Management Hearings

We have grave concerns with Parent Management Hearings as there is a strong possibility that Aboriginal and Torres Strait Islander victim survivors will go unrepresented to the detriment of their safety and capacity to access justice. Parent Management Hearings are not evidence based or informed by family violence victim survivors or specialists. We remain strongly of the view that Parent Management Hearings are not appropriate for our clients given their intersecting experiences of family violence, complex trauma and cultural needs. We refer you to our previous submission to the Senate Legal and Constitutional Affairs Committee in response to the Family Law Amendment (Parenting Management Hearings) Bill 2017 for more detail.³³

Post-order parenting support service (Proposals 6-9 to 6-11)

The aim of post-order parenting support services is to assist parties implement their parenting orders and manage their *co-parenting* relationship through education regarding conflict management and decision making support. However, in cases of family violence, a co-parenting relationship may not be possible, desirable or safe. It is important to challenge the in-built assumption that this is always the end goal. Instead, we seek strengthened referral pathways for Aboriginal and Torres Strait Islander women to FVPLSs, which can provide ongoing wraparound support, build women's cultural strength and safety, and support women to grow their children free from violence and thriving, strong in culture and identity. In addition, the current s65L provision could be built upon to enable Family Consultants and ALOs involved in the matter to provide post-order oversight and assistance in complex cases, as required.

³³ National FVPLS Forum, *Submission to the Legal and Constitutional Affairs Legislation Committee – Family Law Amendment (Parenting Management Hearings) Bill 2017*, January 2018, available at: http://www.nationalfvpls.org/images/files/FVPLS_Submission_-_FLA_Bill_Parent_Management_Hearings_2018_FINAL.pdf

Court safety (Proposal 6-12)

The broad proposals to improve court safety are very positive, and represent important recognition of the right of victim survivors to be safe while at family court. However, there is very little detail in the Discussion Paper around implementation, prioritisation/sequencing or resourcing

We acknowledge that the proposed changes to court infrastructure, design and processes will take a significant length of time to implement. In the meantime, there are several key things that could be done to improve court safety in the shorter term. Improving physical safety at court, including through safe rooms, is a top priority for our clients. For example:

- Many regional and remote courts do not have safe rooms, nor even sufficient space to enable private and safe conversations between practitioners and clients. This forces lawyers to meet with the clients in open, public spaces where the victim is highly visible and vulnerable to intimidation, harassment and risk from the other party.
- In Victoria at present, it is generally necessary to contact the Federal Circuit Court 48 hours before attending court in order to access a safe room. What if the violent incident occurs the night before, or outside the court the morning of the hearing? It is vital to increase availability and flexibility of access to safe rooms (as well as ensuring safe rooms at all family courts).
- Security personnel should be required to undergo cultural awareness training as well as family violence training and be able to take an active role in supporting and monitoring victim survivors' safety at court.

The proposals in relation to strengthening child participation

Inclusion of children's views (Proposals 7-1 to 7-7)

A number of FVPLSs provide, or have previously provided, Independent Children's Lawyer services. We broadly support the increased participation of children in family law proceedings, provided they are safe and wish to do so, and – crucially – provided that Aboriginal and Torres Strait Islander children receive culturally safe representation and support.

We suggest that circumstances in which it would not be appropriate for children to participate directly include:

- under 10 years of age
- where there is an allegation of sexual abuse against the child
- where there is an allegation of serious physical injury against the child
- where the child does not wish to participate

We highlight the central importance of increased training for all family law professionals working with children as well as initial and ongoing assessment of risk of children's participation in family law proceedings.

New children's advocate role (Proposals 7-8 to 7-11)

The National FVPLS Forum supports the need for strategies to increase children's capacity to be involved in family law matters, where they wish to and it is safe for them to do so. We do, however, query whether the proposed children's advocate is the most appropriate strategy. As we understand it, this new non-legal role would aim to facilitate children's engagement in family law processes by:

- supporting the child to meet with the decision maker;
- supporting the child to appear directly; or
- assessing and advocating for the child's best interests, including through preparing a report.

The National FVPLS Forum appreciates that a non-legal advocate could make valuable contributions to facilitating children's involvement in family law matters where the child wishes to and is safe to do so. However, increasing the number of professionals involved in a child's life is not necessarily the answer to increasing children's participation. Under the provisions proposed in the Discussion Paper, it is feasible that a child could be simultaneously engaged with a Family Consultant, a children's advocate and a separate legal advocate, in addition to any other counsellors or support services. This may further complicate and stress families, and be overwhelming and potentially re-traumatising for the child.

We also note that FVPLSs provide a holistic model in which each client is supported by both a lawyer and a support worker, generally an Aboriginal and/or Torres Strait Islander worker. Were FVPLSs sufficiently resourced to provide Independent Children's Lawyer services, our support workers could fulfil a similar function to the proposed children's advocate.

With regard to the proposed children's advocate role, we seek clarification on several points:

- Will there be eligibility criteria for children to receive support from a children's advocate? The National FVPLS Forum is firmly of the view that Aboriginal and Torres Strait Islander children have a right to culturally safe support and must have access to receive services from a suitably specialist Aboriginal and Torres Strait Islander-specific organisation.
- In the instance that the children's advocate prepares a report, how will this report interact with the family consultant's report and, in the case of Aboriginal and Torres Strait Islander children, the proposed new cultural report? Could the Family Consultant's report address the relevant issues and Family Consultants be upskilled as required to fulfil this function?
- How will the role of the children's advocate and the separate legal representative interact with one another? What strategies will be in place to ensure clear distinction of roles and responsibility, managing opposing views and exercises of professional judgment between the two roles and ensuring the roles work together as a team to best support the child's participation, safety and best interests?

Overall, the National FVPLS Forum is of the view that it would be preferable for ICLs to be better trained and monitored rather than create a new role such as a children's advocate. There is significant overlap and risk of re-traumatising children by requiring engagement with multiple professionals. There are other ways of ensuring that ICLs are better equipped to perform their role. For example, funding could be made available to enable ICLs to liaise with identified specialist consultants, such as experts in child development or cultural advisors and make appropriate recommendations as needed.

Aboriginal and Torres Strait Islander children have the right to culturally safe advocacy

The Discussion Paper states:

*'Professionals working with children should be culturally competent, to enable children to participate appropriately. In some cases, children's participation may be best supported by a children's advocate who shares the child's cultural background.'*³⁴

Clearly, Aboriginal and Torres Strait Islander children will be best supported by Aboriginal and Torres Strait Islander advocates – if such a role is ultimately created. An understanding of the child's identity, culture, family, community and kinship connections is essential to providing culturally safe and meaningful support for Aboriginal and Torres Strait Islander children.

The National FVPLS Forum recommends developing and implementing a practice direction which specifies that in cases involving Aboriginal or Torres Strait Islander parties there is a strong preference for the children's advocate to be an Aboriginal or Torres Strait Islander professional.

We note that the Discussion Paper proposes that children's advocates should have a social science background and expertise in child development. While this is certainly a useful background, the requirement for certain educational or professional qualifications may present a barrier to Aboriginal and Torres Strait Islander people. Cultural expertise and community connections must be taken into account, and Aboriginal and Torres Strait Islander children's advocates should receive ongoing professional development in the relevant areas.

³⁴ Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper 86*, p 173, paragraph 7.80.

If an Aboriginal or Torres Strait Islander advocate is unavailable, children's advocates working with Aboriginal and Torres Strait Islander children must have a very high level of cultural competency. There should be specific qualifications or criteria for advocates working with Aboriginal and Torres Strait Islander children. Namely, experience working with Aboriginal and Torres Strait Islander young people should be a prerequisite.

Separate legal representative for children (Proposal 7–10)

Several reports have found that Aboriginal and Torres Strait Islander children are less likely to be appointed a lawyer in comparison to non-Indigenous children.³⁵ Yet separate legal representation has been identified as crucial to upholding Aboriginal and Torres Strait Islander children's cultural and human rights, as described by SNAICC:

*'Separate legal representation for Aboriginal and Torres Strait Islander children involved in the family law system is a crucial component of upholding the rights to participation and culture guaranteed to Aboriginal and Torres Strait Islander children under the Convention.'*³⁶

The National FVPLS Forum therefore insists that all Aboriginal and Torres Strait Islander children must have access to separate legal representation from a practitioner who is culturally competent and family violence aware. Given wide-spread systemic failures in safeguarding the rights, cultural identity and connection for Aboriginal and Torres Strait Islander children, there must be minimum standards required of these important roles including capacity to demonstrate relevant expertise and experience working with Aboriginal and Torres Strait Islander young people.

FVPLSs and ATSILSs are well-positioned to do this work given members' existing expertise, relationships and trust within community. Dedicated roles within specialist Aboriginal and Torres Strait Islander legal service providers, such as FVPLSs, should be a first port of call, with appropriate resourcing to build capacity and establish information barriers to avoid conflicts of interest as necessary.

While we support the proposal for the appointment of a separate legal representative, in addition to the children's advocate, we make the following points:

- Separate legal representatives who work with Aboriginal and Torres Strait Islander children should undertake additional, mandatory and ongoing training in cultural safety, family violence awareness and complex trauma.
- Renaming the role will not in and of itself reduce the existing confusion that the Independent Children's Lawyer is a direct representative of the child. We reiterate the importance of culturally safe community legal education to support community to understand the proposed changes and their impacts.
- At present, there are barriers to becoming an Independent Children's Lawyer given the requirements to be on a Legal Aid Commission panel. In a number of jurisdictions, FVPLSs are small services with less than 10 staff across the organisation. In those circumstances achieving panel status and complying with panel requirements can be a high burden. We

³⁵ Stephen Ralph, *Indigenous Australians & Family Law Litigation: Indigenous Perspectives on Access to Justice*, 2011, p 21, available at <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/reports/2011/indigenous-australians-and-family-law-litigation>

³⁶ SNAICC – National Voice for Our Children, *Submission to the Australian Human Rights Commission Report to the Committee on the Rights of the Child*, May 2018, p 6.

propose consideration of new strategies to ensure that culturally safe, specialist services aren't unduly excluded from acting as separate legal representatives for Aboriginal and Torres Strait Islander children and the appropriate balance is struck between commanding a high standard of service for Aboriginal and Torres Strait Islander children while also supporting capacity building of Aboriginal and Torres Strait Islander legal service providers.

In response to **Question 7–1**, a separate legal representative should be appointed in all matters involving an Aboriginal or Torres Strait Islander child, in addition to a children's advocate if such a role is created.

In response to **Question 7–2**, we note that there is a high degree of inconsistency across Independent Children's Lawyers at present. We would not want to see this inconsistency translated to children's advocates and separate legal representatives. This raises the necessity of ongoing monitoring, management and coordination of children's advocates and separate legal representatives by Legal Aid Commissions. This should include increased oversight mechanisms to more readily enable the removal of separate legal representatives/ICLs where there have been complaints.

The definitions of family violence and family member

Definition of family violence

The National FVPLS Forum supports the proposals put forward to improve the definition of family violence in the Act, in particular the explicit inclusion of emotional and psychological abuse, technology facilitated abuse and systems abuse.

We reiterate our support, as set out in our earlier submission to the Issues Paper for this inquiry, for the definition in the *Family Violence Protection Act* in Victoria. Our Victorian member reports that this relatively broad definition works well for clients and enables focus on the behaviour of the perpetrator, without requiring a specific causation/effect such as the victim feeling coerced, controlled or fearful.

We welcome the proposal to commission research projects to examine the strengths and limitations of this family violence definition in relation to experiences of Aboriginal and Torres Strait Islander people. However, we stress that this research must:

- be **co-designed** from the outset with specialist Aboriginal and Torres Strait Islander organisations with expertise in supporting Aboriginal and Torres Strait Islander people experiencing family violence and family law;
- recognise the disproportionate impact of family violence on **Aboriginal and Torres Strait Islander women**;
- recognise the **specialist expertise** of family violence Aboriginal and Torres Strait Islander Community Controlled Organisations and peak bodies like FVPLSs and the National FVPLS Forum;
- take into account experiences of Aboriginal victim survivors across urban, **rural, regional and remote areas**; and
- understand that the western colonial legal system, including the family law system, has historically and can still present as another form of violence for Aboriginal and Torres Strait Islander women.

Treatment of sensitive records (Proposals 8-6 to 8-7)

We reiterate our support for WLSV's recommendations regarding the subpoenaing of sensitive records, as discussed in our previous submission³⁷.

³⁷ National FVPLS Forum, *Submission to the Australian Law Reform Commission Review of the Family Law System*, May 2018, p 44.

Definition of family member (Proposal 9-8)

While section 65C already contains a broad category of persons who may apply for a parenting order, namely ‘any other person concerned with the care, welfare or development of the child’, amending the definition of family member within the Act would provide greater clarity and access for Aboriginal and Torres Strait Islander families. Aboriginal and Torres Strait Islander kinship structures function differently to western kinship structures. We refer to the overview of Aboriginal and Torres Strait Islander definitions of kin from SNAICC:

“There is no one definition for Aboriginal and Torres Strait Islander kinship. According to QATSICPP, “consideration of who is kin to a child is the decision and responsibility of family and those with cultural authority for the child.” Some community-controlled organisations define Aboriginal kinship as the “biological bloodlines that have been passed on from generation to generation.” Alternatively, other community-controlled organisations espouse more expansive definitions that view kinship as not limited to biological relationships, but as also including culturally defined relationships that reflect specific cultural bonds and obligations.”³⁸

The National FVPLS Forum supports the definition of family being changed to better reflect the breadth of important relationships across Aboriginal and Torres Strait Islander cultures. In response to **Question 9-2**, it is essential that the wording of this definition be developed by Aboriginal and Torres Strait Islander communities, organisations and peak bodies with relevant expertise to reflect the diversity of Aboriginal and Torres Strait Islander families, cultures and contemporary experiences across Australia.

³⁸ SNAICC – National Voice for Our Children, *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation*, p 47.

A culturally competent, family violence aware and trauma informed workforce

Workforce capability plan (Proposals 10-1 to 10-6)

The National FVPLS Forum supports the proposed core competencies in the workforce capability plan of the family law system, namely:

- *an understanding of family violence*
- *an understanding of child abuse, including child sexual abuse and neglect;*
- *an understanding of trauma-informed practice, including an understanding of the impacts of trauma on adults and children;*
- *an ability to identify and respond to risk, including the risk of suicide;*
- *an understanding of the impact on children of exposure to ongoing conflict;*
- *cultural competency, in relation to Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities and LGBTIQ people;*
- *disability awareness; and*
- *an understanding of the family violence and child protection systems and their intersections with the family law system.*³⁹

In response to **Question 10-1**, we propose that the additional core competencies should be considered for inclusion in the workforce capability plan:

- The cultural competency core competency must include specific components in relation of the experiences of Aboriginal and Torres Strait Islander women, men and children, as well as a specific component on understanding barriers to accessing the family law system;
- Training on trauma-informed practice should include the impact of intergenerational trauma on Aboriginal and Torres Strait Islander people, as compounded by ongoing experiences of systemic racism and discrimination which persist today;
- More detail is also required for the core competency of ‘an understanding of family violence’ for example:
 - early and ongoing risk assessment and screening;
 - the forms, dynamics and nuances of family violence, including identification of primary aggressors;
 - the impacts of family violence on victim survivors over the short, medium and long term;
 - the specific experiences and needs of Aboriginal and Torres Strait Islander victim survivors;
- We recommend a separate, additional competency for ‘understanding of sexual violence’. Sexual violence is often inadequately identified, understood and responded to, and does not always come under family violence. We note that FVPLSs were established to support Aboriginal and Torres Strait Islander people who have experienced family violence and sexual assault and as trusted services with deep community trust and access, it is critical that FVPLSs and the National FVPLS Forum be involved in developing this and other competencies.

³⁹ Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper 86*, p 238-239.

In response to **Question 10-2**, we are of the strong view that all family dispute resolution practitioners should receive the same training as other family law professionals, as outlined in the proposed workforce development plan. Where parties have separated following a history of family violence, property matters are often seized upon by those who use violence as one of the last remaining opportunities to exert control over their victims. Accordingly, negotiating property and financial matters can be a key site for the continuation of family violence, intimidation and control over victims survivors with great potential for re-traumatisation.

While it is important for training to be nationally consistent and mandatory across every level of the system, we stress that training should also come from grassroots and community, particularly with respect to cultural competency and local experiences. This cannot be a top down approach. Aboriginal and Torres Strait Islander Community Controlled Organisations are best placed to lead the design and delivery of cultural competency training, which must contain a specific focus on the experiences of Aboriginal and Torres Strait Islander victim survivors, predominantly women and their children. We strongly reiterate our position in our previous submission, as noted in the Discussion Paper, that *‘cultural competency and family violence competency should not be addressed in isolation, but rather as ‘intersecting issues’, noting the unique experiences and needs of Aboriginal and Torres Strait Islander women who experience family violence.’*⁴⁰

The workforce capability plan must go hand in hand with increased employment of Aboriginal and Torres Strait Islander people in the family law system. The National FVPLS Forum continues to advocate for the recruitment of Aboriginal and Torres Strait Islander staff in all roles across the family law system, including:

- Aboriginal and Torres Strait Islander Family Report Writers (otherwise known as Family Consultants) who are vital to maintaining cultural accountability, ensuring that Aboriginal and Torres Strait Islander children have the opportunity for meaningful and culturally safe participation in family law proceedings and the Court is enabled with proper evidence to fully consider, promote and protect the cultural rights of Aboriginal and Torres Strait Islander children;⁴¹
- Aboriginal and Torres Strait Islander Liaison Officers to provide culturally appropriate support and information within courts and assist with referrals;
- Aboriginal and Torres Strait Islander registrars in family courts;
- Aboriginal and Torres Strait Islander people in senior leadership positions across the family courts to provide culturally appropriate leadership and ensure culturally competent responses to the needs of Aboriginal and Torres Strait Islander people engaged with the family law system; and
- The cultural safety of all Aboriginal and Torres Strait Islander workers must be central in order for a culturally safer service to be delivered.

⁴⁰ Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper 86*, p 243, paragraph 10.23.

The Discussion Paper states that the proposed workforce capability plan draws from current family violence workforce development reforms in Victoria⁴². Our Victorian member notes there are several key learnings relating to workforce development to highlight:

- The Victorian reforms were ambitious and accompanied by **unprecedented levels of new funding** – an additional pre-requisite to achieve the desired goals;
- The challenges posed to the sector by the rapid pace of wide-spread reform and, accordingly, the **need for phased implementation**;
- The **challenges in building a skilled workforce** in the context of significant growth and competition in the sector, especially following a history of under-resourcing which meant there was a relatively small pool of practitioners with high-level experience; and
- The need to **recognise cultural knowledge and lived experience** alongside formal qualifications.

We support the ‘whole of system’ approach to developing and maintaining core competencies. We note that the Victorian Royal Commission into Family Violence Implementation Monitor’s recent report stresses that the lack of whole of system approach to the Victorian reforms was one of the key shortcomings of that reform implementation. Accordingly, any Family Law workforce capability plan must be rolled out at every level of the family law system and is a fundamental prerequisite to many other reforms.

The recommendations should be accompanied by an implementation timeframe. Certain recommendations will be preconditions for success of other, interlinked recommendations. A thorough plan for the sequencing of recommendations will assist in ‘making sure the right things happen in the right order in the best way.’⁴³ An implementation timeframe will also make it harder for successive governments to cherry pick recommendations and implement some reforms and not others – to the detriment of vulnerable families.

Additional family violence training for legal practitioners (Proposal 10-6)

One unit of additional family violence training annually for legal practitioners undertaking family law work is insufficient. Family violence is so prevalent in family law matters, and there is a wide range of knowledge areas and competencies that need to be developed and maintained through specialist family violence training, which must be accredited, up to date, ongoing and mandatory.

Accreditation of children’s contact services (Proposal 10-7)

We support the proposal that anyone working with children should hold a valid Working with Children Check. It is also important to ensure any steps towards accreditation do not inadvertently decrease access to services for the families who need them the most. We take this opportunity to raise our strong concerns with the availability and affordability of Children’s Contact Services.

⁴² Family Safety Victoria, *Preventing Family Violence & Violence Against Women Capability Framework*, 2017, available at https://www.vic.gov.au/system/user_files/Documents/fv/Preventing%20Family%20Violence%20%26%20Violence%20Against%20Women%20Capability%20Framework.pdf and *Responding to Family Violence Capability Framework*, 2017, available at https://www.vic.gov.au/system/user_files/Documents/fv/Responding%20to%20Family%20Violence%20Capability%20Framework.pdf

⁴³ Victorian Family Violence Reform Implementation Monitor, *Report of the Family Violence Reform Implementation Monitor As at November 2017*, May 2018, p 22, available at https://www.vic.gov.au/system/user_files/Documents/fvrim/Report%20of%20the%20Family%20Violence%20Reform%20Implementation%20Monitor%20As%20at%201%20November%202017.pdf

Judicial officers (Proposal 10-8)

We strongly support the proposal requiring all federal judicial officers exercising family law jurisdiction to have family law and family violence expertise prior to being appointed to the bench. This is particularly important given judicial officers cannot be compelled to attend or participate in training following appointment to the bench. We previously recommended that any judicial officers appointed to hear family law matters must have previously practiced in family law, and are pleased to see that this has been picked up in the Discussion Paper.

We also repeat our recommendation to mandate reference be made to the National Domestic and Family Violence Bench Book in all Family Court judgements involving family and domestic violence and including provision for the National Domestic and Family Violence Bench Book to be relied upon in evidence by either party, their legal representative's or the Independent Children's Lawyer during proceedings.

In response to **Questions 10–4 and 10–5**, regarding changes to the criteria and process for appointment of federal judicial officers exercising family law jurisdiction, we call strongly for increased diversity on the bench. This requires ongoing investment, commitment and capacity building. We recommend a strategy be adopted to work towards establishing identified positions for judicial officers and other court staff for Aboriginal and Torres Strait Islander people. Such measures need to be developed and undertaken in consultation with Aboriginal and Torres Strait Islander-led organisations and communities. We also note that these questions refer only to *federal* judicial officers. This ignores the fact that state and territory magistrates also have jurisdiction to hear family law matters in the local courts, particularly in rural and remote areas. State and territory magistrates exercising family law jurisdiction also need to be urgently up-skilled.

Family report writers (Proposals 10-9 to 10-12)

We welcome the development of a national accreditation system with minimum standards for private family report writers. We also support the proposal for a publicly available list of accredited private family report writers.

The Discussion Paper recognises the need for specific and ongoing training in trauma, child abuse and cultural norms for family report writers and states that the proposed workforce capability plan will address this. We stress that cultural competency is irreducible to superficial knowledge of 'cultural norms'. All family report writers, including private family report writers, require mandatory, ongoing training in cultural competency, with a specific focus on the needs and experiences of Aboriginal and Torres Strait Islander people experiencing or at risk of family violence.

We note that Proposal 10–12 suggests that judges may 'consider appointing an assessor with expert knowledge in relation to the child's particular needs to assist in the hearing and determination of the matter'. We would hope this means prioritising appointing an Aboriginal report writer for Aboriginal and Torres Strait Islander children. We respectfully suggest the ALRC's final report includes stronger recognition of the need to recruit, train and retain Aboriginal and Torres Strait Islander family report writers. We refer the ALRC back to our earlier submission to the Issues Paper for this inquiry where we outlined these recommendations in detail.

Cultural reports for Aboriginal and Torres Strait Islander Children

The National FVPLS Forum strongly supports amending the Act to provide that in parenting proceedings involving an Aboriginal or Torres Strait Islander child, a cultural report should be prepared, including a cultural plan that sets out how the child's ongoing connection with kinship networks and country may be maintained (Proposal 10-4). This was a recommendation in our previous submission. There should be consideration given to the fact that removing a child from kinship and country can present as another form of violence.

The Discussion Paper states:

Cultural reports should include information about the obligations of family members raising children associated with raising totemic and country connection, which can help to inform the decision maker's understanding of, and responsiveness, to the particular cultural issues facing the child, including the child's connection to family, culture, community and country. A cultural plan could address specific issues relating to a child, such as how the child's ongoing connection with kinship networks and country may be maintained, with reference to the care arrangements being proposed in the parenting proceedings. These would include a Cultural Plan, as well as other cultural considerations/information to be taken into account in determining safety and best interests of the child.⁴⁴

The National FVPLS Forum endorses the following remarks from SNAICC:

'Aboriginal and Torres Strait Islander children have specific cultural and spiritual needs beyond this: to know where they come from, know who they are, know who they belong to and where they belong. They have a need and right to practice and maintain cultural values, beliefs and practices. All these needs must be understood in the context of a community that shares that culture.'⁴⁵

Protecting children's rights to enjoy cultural connection requires more than just the appropriate legislative and policy frameworks. It also requires that:

- cultural plans are developed, resourced, and implemented **for every Aboriginal and Torres Strait Islander child**;
- carers and case managers make a commitment to maintaining cultural connections for children in their care and are **held accountable** to this commitment;
- cultural care arrangements are **regularly reviewed and updated** to ensure an enduring commitment to maintaining connections is demonstrated;
- Aboriginal and Torres Strait Islander family and community members are recognised as the **relevant cultural authority** for Aboriginal and Torres Strait Islander children;
- the child's carers are provided with the **appropriate supports** to meet the child's cultural needs.

⁴⁴ Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper 86*, p 261, paragraph 10.101.

⁴⁵SNAICC – National Voice for Our Children, *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation*, p 47.

In response to **Question 10–6**, the National FVPLS Forum strongly believes that cultural reports should be mandatory in all parenting proceedings involving an Aboriginal or Torres Strait Islander child. As noted in our previous submission:

*‘Cultural Reports should be prepared in all cases involving Aboriginal and Torres Strait Islander children, not only ‘where a cultural issue is relevant’. Cultural identity and cultural connection are always relevant issues in matters involving Aboriginal and Torres Strait Islander children’.*⁴⁶

Were family law professionals to have discretionary powers to determine whether or not culture is relevant in any given case, there is the risk that the cultural rights of all Aboriginal and Torres Strait Islander children and the stated aim of Cultural Reports would be significantly compromised. We stress that this reform must be accompanied by appropriate resourcing, training and monitoring of quality and compliance to be effective.

Quality and resourcing

There is no point making a recommendation for cultural reports if they become yet another tick-a-box mechanism. Cultural reports must be thorough, meaningful and tailored to each child’s specific needs and circumstances.


“Cultural plans are often given very little weight. Changing the Act alone is not going to change that.”

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018

It is important to consider the stage of family law proceedings at which a cultural report will be prepared. This relies upon early identification of the Aboriginality of children. It is also essential for family violence awareness to be integrated into cultural reports.

A child’s cultural plan is a planning tool that examines ways to ensure that the child is connected to culture and community. The activities suggested in a cultural plan must be specific to child’s language group and unique cultural needs. They cannot be generic, as illustrated in the quote below: We support SNAICC’s comments regarding what should be included in cultural plans, and the importance of funding being attached to the proposal:

*‘Plans should be comprehensive and practical, specifying the activities that will support a child’s cultural connection, when they will happen, who will be responsible for ensuring they happen, and how they will be resourced.’*⁴⁷



“I remember seeing a cultural plan that came out of the Children’s Court, which said that an Aboriginal child should be able to maintain their connection to culture through attending NAIDOC – in another state! It was completely ridiculous.”

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018

⁴⁶ National FVPLS Forum, *Submission to the Australian Law Reform Commission Review of the Family Law System*, May 2018, p 27.

⁴⁷ SNAICC – National Voice for Our Children, *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation*, p 69.

Responsibility

The National FVPLS Forum notes that the value of cultural reports is dependent on the experience and qualifications of the person writing the reports and the organisation who holds responsibility for overseeing and monitoring that process. We agree with the following comments from SNAICC:

‘Cultural planning should start with and be guided by the child, family, kin, community (especially Elders and those with cultural authority for the child) and ACCOs. Keep in mind that family may be extensive, and in addition to parents and siblings may include grandparents, aunties, uncles and cousins. It is also important to note that the child may be more involved in the development of their cultural plan as s/he becomes older or more mature. [...] ACCO participation in the development, implementation, and monitoring of cultural plans is crucial and these organisations must be supported and resourced to carry out these functions.’⁴⁸

The Discussion Paper suggests that cultural reports could be written by specialist cultural report writers or an Aboriginal and Torres Strait Islander Community Controlled Organisation (‘ACCO’) connected to the child *‘alongside academic information that assists in explaining the experiences of the family, such as intergenerational trauma’*⁴⁹. While we appreciate the need for strong evidence in a court-based system, the National FVPLS Forum cautions against over-reliance on academic information. Aboriginal and Torres Strait Islander people, communities and organisations must be the ones writing reports for Aboriginal and Torres Strait Islander children – not white academic ‘experts’.

As outlined by SNAICC, ACCOs are best placed to assess children’s cultural needs and develop cultural plans in partnership with their family and community. The responsibility and authorship of cultural reports must sit with an ACCO and the family themselves, not a mainstream child and family service or other non-government organisation.

Not only must the cultural report writer hold significant cultural knowledge and community connections. The National FVPLS Forum stresses it must also be someone with a high level of family violence awareness, as well as a strong understanding of family law and its intersections with the child protection system. Specialist culturally safe organisations like ACCOs would be well placed to be involved in the development of cultural plans and must be resourced to do so.

“Organisations like ours are best placed to develop cultural plans. We understand the community connections and family ties. We have specialist expertise in family violence and are unapologetic about taking action to address the risks and barriers this creates for our women and our children.”

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018

⁴⁸ SNAICC – National Voice for Our Children, *The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation*, p 69.

⁴⁹ Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper 86*, p 262.

Further comments

We note that this proposal seeks to bring the Act in line with best practice with other jurisdictions, for example such as Victoria. Our Victorian member observes that prior to the amendments to the *Children, Youth and Families Act 2005* (Vic) in 2016, many Aboriginal and Torres Strait Islander children in out of home care did not have cultural reports. Indeed, one Victorian audit found that only 8% of Aboriginal and Torres Strait Islander children who were mandated by law to have a cultural plan actually had one in place.⁵⁰ Where Cultural Reports were in place, they were too often generic or tokenistic. Fortunately, our FVPLS member in Victoria (Djirra) reports that the legislation is now followed more closely and the quality of cultural reports has improved significantly since 2016 as a result of critical inquiries such as Taskforce 1000 and legislative amendments. Importantly, the Children's court is increasingly willing to refuse approval of cultural reports until they are of a suitable standard.

The Discussion Paper also suggests that cultural reports may be used in parenting proceedings involving children from culturally and linguistically diverse backgrounds and LGBTIQ families⁵¹. While there is a very real need for the family law system to be responsive to the particular needs of each and every child, The National FVPLS Forum is of the view that cultural reports for Aboriginal and Torres Strait Islander children fulfil a very specific function that should not be generalised. Cultural reports recognise and attempt to address the disproportionate rates at which Aboriginal and Torres Strait Islander children continue to be forcibly taken from their families and the real and ongoing risk of profoundly harmful disconnection from culture, community, Country and identity as a result of legal and state intervention. This sits against the backdrop of Australia's history of colonisation and past policies of forced child removal, assimilation and as many would describe 'attempted genocide' of Australia's First Peoples. As such, cultural reports should not be generalised to include other 'diverse' groups. For further information, we refer to our comments at pages 64-66 of this submission regarding the cultural safety framework.

⁵⁰ FVPLS Victoria, *Submission to the Commission for Children and Young People Inquiry into the Child Protection Permanency Amendments*, November 2016, p 18, available at <https://djirra.org.au/wp-content/uploads/2018/02/CCYP-Permanency-Amendments-inquiry-FVPLS-Vic-submission-final-Dec16.pdf>

⁵¹ Australian Law Reform Commission, *Review of the Family Law System: Discussion Paper 86*, p 262, paragraph 10.104.

Information sharing

The National FVPLS Forum acknowledges the importance of integrated and collaborative service delivery. However, information sharing should not be seen as a panacea that will fix deeper systemic issues in the ways that family violence is identified and responded to by the family law system. Indeed, many of the issues with access and appropriateness of the legal system for vulnerable people stem from a chronically underfunded and over-stretched legal assistance, and broader support, sector. (See our earlier recommendations with respect to the urgent funding needs of the sector, including FVPLSs.)

Any potential benefits of information sharing must be carefully balanced against issues of privacy, consent, safety, empowerment and agency for victim survivors of family violence – especially Aboriginal and Torres Strait Islander women and children. This includes an awareness of the likelihood of information sharing reforms to disproportionately (and potentially inadvertently) impact Aboriginal and Torres Strait Islander women and children experiencing family violence in ways that compromise their access to safety and justice. We highlight the following risks:

- There is the risk that information sharing provisions between the family law system and state and territory child protection and family violence systems (Proposal 11-5 and 11-6) could lead to an (actual or perceived) increase in child protection scrutiny over Aboriginal and Torres Strait Islander families. The perception and fear that **information could be shared with child protection** may mean that Aboriginal and Torres Strait Islander women choose not to access much-needed support and therefore such reforms may unintentionally push family violence further underground – leaving vulnerable women and children at further risk.
- It is incredibly disempowering for victim survivors of family violence to have **information shared without their consent**. The fear that personal information is not private and confidential creates a significant loss of trust, leading to disengagement from services and reluctance to report violence and seek support. Disregard for a woman's wishes and individual agency also replicates the coercive control and denigration which are hallmarks of family violence.
- There is a significant risk of harm to victim survivors if **information is wrongly shared with a perpetrator**, particularly where parties are self-represented. For example, in Queensland this year, a victim survivor of family violence was forced to go into hiding after a police officer accessed her personal details on the police database and shared them with her violent ex-partner.⁵²
- There is a danger that the **impact of incorrect or poor information is magnified** in an information sharing system. For example, a particular worker, report or set of case notes may hold information or opinions that derive from a racist or discriminatory worldview, victim-blaming attitudes or a misunderstanding of family violence and the impacts of trauma. The risks arising from the use of inaccurate or inappropriate information increase with the number of times the report is used. In other words, where practitioners, or the court system, receives information containing firm views and conclusions from the outset they may be less likely to objectively assess the circumstances.

⁵² Ben Smee, *Queensland in court fight with domestic violence victim whose details leaked by policeman*, August 2018, available at <https://www.theguardian.com/australia-news/2018/aug/21/queensland-in-court-fight-with-domestic-violence-victim-whose-details-leaked-by-policeman>

- Frontline workers in the courts, police, child protection departments and health services that fall under proposed information sharing provisions may have **insufficient training in family violence or cultural competency**. For example, police frequently misidentify women who are victim survivors of family violence as the primary aggressor during risk assessment.⁵³ The impact of misidentification increases each time this (mis)information is shared and used in different systems. There is then the possibility that **inaccurate information could be admitted as evidence** into other jurisdictions, such as family law, which may then place children in greater danger if they are ordered to spend time with the actual primary aggressor.

“Information sharing is a violation of our right to privacy. We are tired of the same old protectionist attitudes. If you think you have to protect me, you can do whatever you want and I have no right to object. That’s how Aboriginal and Torres Strait Islander people have always been treated, now you are saying that’s how everyone else will be treated too.”

– FVPLS member, National FVPLS Forum consultation with ALRC, 21 November 2018

In addition to the above concerns, we include brief responses to the following specific proposals

Proposal 11-2 to develop and implement a national information sharing framework, which would include all relevant court documents, child protection records, police records, experts’ reports, and any other relevant information.

- We note that information is to be shared about the ‘safety, welfare and wellbeing of families and children’. A family centred approach must not disadvantage Aboriginal and Torres Strait Islander women experiencing family violence, as well as all other victim survivors, for whom family unification is neither possible nor desirable.
- The discussion paper states that a national information sharing framework should be developed through consultation with Federal, state and territory governments. We strongly recommend any such recommendation by the ALRC in its final report expressly include the need for comprehensive consultation with specialist services, not just governments, in the development of any such model to ensure appropriate safeguards and mechanisms to correct inaccurate information. Specialist Aboriginal and Torres Strait Islander legal assistance providers with expertise in family violence, such as FVPLSs, are key to ensuring the lived experience of and unintended risks to Aboriginal and Torres Strait Islander women, children and families are properly considered and accounted for.

⁵³ Women’s Legal Service Victoria, *Policy Paper 1: “Officer she’s psychotic and I need protection”: Police misidentification of the ‘primary aggressor’ in family violence incidents in Victoria*, July 2018, available at <https://www.womenslegal.org.au/files/file/WLSV%20Policy%20Brief%201%20MisID%20July%202018.pdf>

- In particular, the suggestion of sharing child protection records (including presumably case notes) is concerning. There is extensive evidence about the systemic failures Aboriginal and Torres Strait Islander children and their families experience in child protection systems across jurisdictions. Child protection workforces across Australia are under considerable strain – typically across jurisdictions there is high staff turnover and a high number of junior, inexperienced child protection workers working on the frontline with complex and traumatised families. In this context, deficiencies in the quality and oversight of child protection workers’ case notes, records and opinions could result in inaccurate, unhelpful – or indeed racist – information flowing through to family court matters and influencing the outcome of family law proceedings.

Proposal 11-4 to expand the information sharing scheme as part of the National Domestic Violence Order Scheme to include family court orders.

- Members see value in family court and child protection orders being included so as to give a complete picture of the orders in place relevant to risk issues. For example, inaccurate information about arrangements for children could have been given by parties to IVO proceedings which would be relevant to family law proceedings. However, we emphasise the need for ongoing monitoring and strategies to ensure that family court orders remain up to date, with the onus on the courts issuing the orders to register them.

Proposal 11-7 to co-locate child protection and family violence services in family courts. We refer to our comments at page 29 regarding the barriers to accessing support for Aboriginal and Torres Strait Islander victim survivors, predominantly women, if there is the real or perceived risk of increased child protection intervention.

- Our member in Western Australia reports that the co-location of child protection services in the Western Australian Family Court enables the sharing of information in highly complex cases, which our member reports operates well in this jurisdiction. As noted in our previous submission *‘any expansion to further jurisdictions would need to be carefully considered in terms of local application and potential unintended consequences, including close consultation with FVPLSs in that jurisdiction’*. Given that child protection laws vary significantly between states and territories, it may not be appropriate to apply a one size fits all approach.

Proposal 11-9 to develop a template document to support the provision of a brief summary of child protection department or police involvement with a child and family to family law courts.

- We express concerns regarding the proposal to provide a summary of involvement with child protection or the police. Depending on who writes the summary, the training they have received and guidelines that are in place, there is the risk that a broad discretion and deference to ‘professional judgment’ could consolidate unconscious bias and discriminatory attitudes to the detriment of Aboriginal and Torres Strait Islander children, women and families. We note that in most family law matters, documents from child protection or police will be subpoenaed. There could be improved measures to more efficiently provide the full documents, which we would view as preferable to the proposed summary in that parties’ legal representatives have an opportunity to review and interrogate the basis for conclusions reached in the summary.

Safeguards

If, despite the concerns outlined above, information sharing proposals are adopted, safeguards must be put in place *prior* to the rollout of any such scheme to mitigate potential unintended and harmful consequences. Such measures must be developed in consultation with Aboriginal and Torres Strait Islander communities, organisations and peak bodies with specialist expertise such as FVPLSs and the National FVPLS Forum. We also raise the need for monitoring and evaluation of the impacts (including inadvertent/ unintended impacts) of information sharing reforms. Further, state based information sharing regimes are imperfect systems. It is important to address issues at a state based level first, otherwise they will be amplified through being shared with the Commonwealth family law system, with potentially drastic consequences for vulnerable women and children.

Responses to specific questions

In response to **Question 11–1**, we raise the following points regarding other information that should be shared or sought about persons involved in family law proceedings:

Gun Licenses

The National FVPLS Forum agrees that state and territory police should be required to enquire about whether a person is currently involved in family law proceedings before they issue or renew a gun licence; and prevent the issuing of a license where a person is involved in family law proceedings and a Form 4 Notice of Risk has been filed against them.

Notifying police of family violence allegations in family law proceedings

The National FVPLS Forum does not support a proposal that the *Family Law Act 1975* (Cth) be amended to require Family Courts to notify police if a party to proceedings makes an allegation of current family violence. Increased policing is not the answer for Aboriginal and Torres Strait Islander families; Aboriginal and Torres Strait Islander women and men are already over-criminalised and over-incarcerated in every state and territory of Australia.

Going to the police must remain a choice. Women must be supported to make that choice if and when they are ready; not have their agency and control over their own lives further eroded. If an Aboriginal or Torres Strait Islander woman who has experienced family violence chooses to go to the police, it is essential that she have a culturally safe and specialist advocate because of the well-documented poor, inappropriate and unsafe responses from police. She must be linked into services like FVPLSs at the earliest opportunity to ensure she has access to culturally safe and specialised advocacy and support.

In addition, this proposal may directly increase the risk and severity of violence. Many of the women our services work with are threatened with further violence, or even death, if they go to the police. They may also be subject to pressure, backlash or retaliatory violence from members of the perpetrator's family or community if they are perceived to have brought the perpetrator to the attention of police and, particularly, led to him being imprisoned. As such, the lack of trust and fear of police involvement could unintentionally increase barriers for Aboriginal and Torres Strait Islander women and make women reluctant to the family law system, disclose family violence or seek support.

Notify police if fear of safety

The National FVPLS Forum does not support amending the Family Law Act 1975 (Cth) to give family law professionals discretion, and corresponding legal immunity, to notify police if they fear for a person's safety. Where informed consent is present, family law professionals can already assist clients to access supports for their safety – including the police if they so wish. We note that there are existing mechanisms which enable professionals to breach confidentiality where someone is at serious, imminent risk. In some jurisdictions, such as the Northern Territory, there are existing mandatory reporting schemes for family violence.

We reiterate that going to the police must be a choice, and Aboriginal and Torres Strait Islander victim survivors who choose to go to the police must be referred to an FVPLS at the earliest possible stage to ensure that she has an advocate to support her. There must also be safeguards to ensure that all Aboriginal and Torres Strait Islander people engaged with the police have access to culturally safe legal representation from adequately funded Aboriginal and Torres Strait Islander legal assistance services (FVPLSs or ATSILSs) at the earliest possible opportunity.

In response to **Question 11–2**, the National FVPLS Forum does not support the inclusion of health records in a family law information sharing framework. These documents can already be subpoenaed if needed. It is essential to recognise the systemic racism that impacts on many Aboriginal and Torres Strait Islander people utilising the mainstream (or non-Aboriginal and Torres Strait Islander) health system. Despite the valiant efforts of some parts of the health system, there remain challenges with the cultural appropriateness of the mainstream health system and its ability to understand and appropriately respond to the complex and compounding interactions of family violence, intergenerational trauma, mental health, and substance misuse. Accordingly, it is highly likely that a reform like this would disproportionately discriminate against Aboriginal and Torres Strait Islander women. For example, there is a danger that incorrect diagnoses of mental and physical health of Aboriginal and Torres Strait Islander women who have experienced family violence may be used to adversely assess their parenting capacity.

In response to **Question 11–3**, the National FVPLS Forum suggests that careful consideration must be given to proposals to share family law records with family relationships services such as family dispute resolution services, Children's Contact Services, and parenting order program services. Our concerns include the reliance on information provided by family consultants, Independent Children's Lawyers and other practitioners in the absence of consistent standards accreditation or experience in assessing or understanding family violence. Further, without a guarantee of confidentiality, victim survivors may decide not to engage in dispute resolution or seek therapeutic care or parenting support.

In response to **Question 11-4**, we support measures that reduce the need for clients to re-litigate the facts of their matter across different jurisdictions. It may be useful for the courts and parties for child protection to provide a brief and clear statement as to why a child protection agency has determined that the matter does not require (or no longer requires) child protection intervention and is appropriate for family law determination.

In response to **Question 11–5**, we make the following points regarding information sharing between the Families Hubs and the family courts:


- The National FVPLS Forum has strong concerns about the appropriateness of the proposed Families Hubs for Aboriginal and Torres Strait Islander families (as outlined at pages 27-32 of this submission). We do not support the proposed broad information sharing provisions between the Families Hubs and the Family Courts. This proposal runs the risk of being a disincentive for people, especially Aboriginal and Torres Strait Islander clients, to use the Families Hubs if they know their information is likely to be shared without consent.
- In our view, culturally safe and specialist legal advice would be essential to enable Aboriginal and Torres Strait Islander people – particularly Aboriginal and Torres Strait Islander women experiencing family violence – to exercise full and informed consent. We emphasise that detailed information, such as treatment plans in particular, should remain strictly confidential unless there is full and informed consent.
- Without considerable increased cultural competency and family violence sensitivity across the entire family law system, such records would be open to misuse or misinterpretation where family law professionals who have insufficient expertise, training or understanding of family violence, intergenerational trauma, and the barriers and lived experiences of Aboriginal and Torres Strait Islander people – especially women – experiencing family violence.

System Oversight and Reform Evaluation

Family Law Commission (Proposals 12-1 to 12-7)

The National FVPLS Forum does not support the creation the proposed new independent statutory body, the Family Law Commission, to oversee the family law system. We raise the following broad points for further consideration:

- There are **insufficient resources put into the family law system as a whole**; a proposal like this will require significant funding to establish and manage over time;
- There are already **existing bodies and mechanisms** which perform the proposed functions, or could be supported to perform those functions in the future. For example:
 - The Australian Institute of Family Studies, the Family Law Council and state and territory Law Institutes already undertake research and inquiries and manage accreditation and practice complaints;
 - Family law professionals are already accountable to their respective professional bodies; and
 - Development and oversight of training requirements should go to the relevant organisations with established specialist expertise.
- We are concerned that this proposal would **unnecessarily divert resources away from more pressing priorities**, such as the chronically under-funded legal assistance sector, including FVPLSs and ATSILSs, as discussed at page 15 of this submission. We do not want yet another peak body and layer of bureaucracy at the expense of existing specialist services.
- There are **less resource intensive options** for supporting better service integration, collaboration and monitoring.



“Who holds the money? Who acquits the money? Who justifies the statistics? Who writes the reports?”

– FVPLS member, National FVPLS Forum ALRC consultation, 21 November 2018

If a Family Law Commission is ultimately created, despite our concerns, we raise the following points:

- The proposed Family Law Commission must be **accountable to Aboriginal and Torres Strait Islander families, communities, organisations and peak bodies** for all reforms directly impacting Aboriginal and Torres Strait Islander people.
- Aboriginal and Torres Strait Islander people, organisations and peak bodies must have **oversight of the proposed cultural safety framework**, as discussed at pages 64-66 of this submission.

- We seek further information with regards to how the proposed Family Law Commission will **operate alongside the current Family Law Council**.
- Any public awareness or education role of the Family Law Commission should be **complementary to community legal education functions of FVPLSs** (and other services).
- FVPLSs should be **supported and resourced to build their capacity to engage in monitoring and evaluation** of the impacts of FVPLSs' work and the impacts of broader family law reforms on FVPLS clients. The unique nature of our specialist, culturally safe and holistic service model should be reflected in the data and reporting;
- We support Australian Women Against Violence Alliance in calling for an **Aboriginal and Torres Strait Islander Advisory Board**, similar to the Children and Young People's Advisory Board proposed in the Discussion Paper.

Cultural safety framework (Proposals 12-8 to 12-10)

The National FVPLS Forum strongly supports the aim of ensuring all reforms support cultural safety and responsiveness of the family law system. We are pleased to see the Discussion Paper clearly state that the cultural safety framework will be developed in consultation with relevant organisations, including Aboriginal and Torres Strait Islander, Culturally and Linguistically Diverse and LGBTIQ groups.

However, ensuring the family law system is safe and accessible for all families is *not* the same as making it more culturally safe. We make the following points towards ensuring that the proposed cultural safety framework addresses the specific barriers Aboriginal and Torres Strait Islander people, particularly Aboriginal and Torres Strait Islander women and their children experiencing family violence, experience in accessing the family law system.

FVPLSs and ATSILS already have the capacity to provide culturally safe services for Aboriginal and Torres Strait Islander families. Over and above the development of an external cultural safety framework, investment must be directed towards supporting FVPLSs to build and expand their capacity to provide wraparound culturally safe support for Aboriginal and Torres Strait Islander victim survivors engaged in the family law system.

Cultural safety is not a synonym for diversity

While we commend the ALRC for explicitly recognising that many proposals require further consultation with certain communities and their representative organisations, including Aboriginal and Torres Strait Islander, CALD, LGBTIQ and disability groups, we observe that there is a consistent tendency in the Discussion Paper for all 'diverse' groups to be lumped together.

'Cultural safety' is not a synonym for diversity, inclusivity or accessibility. 'Cultural safety' is not a broad all-encompassing term for increasing access to the family law system for all those families who do not fit the implicit 'standard' of white, middle class, able bodied, heterosexual parents and children.

It is generally acknowledged that the term ‘cultural safety’ was developed by Maori midwifery students in New Zealand in the 1980s⁵⁴. A core component of cultural safety is understanding the ways that the history and ongoing processes of colonial violence and dispossession produce contemporary inequities in health, safety or justice outcomes for Indigenous people. The proposed cultural safety framework must recognise that the barriers Aboriginal and Torres Strait Islander people experience in accessing the family law system stem from the legacy and ongoing impacts of invasion and colonisation.

Of course, it is vital to improve the safety of the family law system for all individuals and families who experience discrimination, including victim survivors of family violence from all backgrounds. However, to be effective in creating a family law system that is safe and accessible for Aboriginal and Torres Strait Islander people, the concept of cultural safety must not be watered down or become a ‘tick-a-box’ exercise in diversity.

“Aboriginal people keep getting pooled in with LGBTI groups, disability groups, and so on. We are still fighting for our own space. We are not a ‘special interest group’, we are the First Peoples of this land.”

– FVPLS member, National FVPLS Forum ALRC consultation, 21 November 2018

We note that the examples of cultural safety frameworks which the Discussion Paper proposes to build on are Aboriginal and Torres Strait Islander specific.⁵⁵ In developing the cultural safety framework, it is vital to understand Aboriginal and Torres Strait Islander people have a long history of violent colonial experiences and structural failures when coming into contact with the justice system. Aboriginal and Torres Strait Islander women experience intersecting and compounding forms of discrimination, oppression and barriers to accessing support. To be effective, cultural safety frameworks must centre the unique experiences and needs of Aboriginal and Torres Strait Islander people, including Aboriginal and Torres Strait Islander women and their children who have experienced family violence.

While culturally safety has been used most extensively in the health sector, Aboriginal and Torres Strait Islander cultural safety frameworks have also been developed in the family violence and justice sectors. For example, according to the Victorian *Dhelk Dja: Safe Our Way – Strong Culture, Strong Peoples, Strong Families* Agreement:

*‘Cultural safety is an environment, which is safe for people where there is no assault, challenge or denial of their Aboriginal and Torres Strait Islander identity and experience. It is about shared respect, shared meaning, shared knowledge and experience of learning together with dignity and true listening. Cultural safety is about creating and maintaining an environment where all people are treated in a culturally respectful manner’.*⁵⁶

⁵⁴ Elaine Papps and Irihapeti Ramsden, ‘Cultural Safety in Nursing: The New Zealand Experience’ (1996) 8(5) *International Journal for Quality in Health Care*, p 491.

⁵⁵ See, for example, Australian Health Ministers’ Advisory National Aboriginal and Torres Strait Islander Health Standing Committee, *Cultural Respect Framework 2016–2026 for Aboriginal and Torres Strait Islander Health—A National Approach to Building a Culturally Respectful Health System*, 2016.

⁵⁶ State of Victoria, Department of Health and Human Services, *Dhelk Dja: Safe Our Way – Strong Culture, Strong Peoples, Strong Families*, October 2018, p 31.

Role of cultural safety framework

The Discussion Paper states that the cultural safety framework will address:

- Community education;
- The development of a culturally diverse and culturally competent workforce; and
- The provision of, and access to, culturally safe and responsive legal and support services as well as dispute resolution and adjudication processes.

The National FVPLS Forum advocates unapologetically for the right of Aboriginal and Torres Strait Islander victim survivors to access culturally safe and specialist legal and non-legal support at every stage of their engagement with the family law system. FVPLSs play a vital role in ensuring cultural safety for Aboriginal and Torres Strait Islander women and their children moving through the family law system. The proposed cultural safety framework will therefore be ineffective unless it is accompanied by increased resourcing for specialist Aboriginal and Torres Strait Islander legal assistance services with family violence expertise, such as FVPLSs. The cultural safety framework should adopt holistic and intersectional approaches when working with Aboriginal and Torres Strait Islander people and should prevent the family law system from presenting as another form of structural violence against Aboriginal and Torres Strait Islander victims and survivors of family violence.

The National FVPLS Forum stresses the importance of employing, training and building the capacity of Aboriginal and Torres Strait Islander staff at every level of the family law system, including Aboriginal and Torres Strait Islander Family Consultants, Registrars, Liaison Officers and judges. Without significant and sustained investment in the Aboriginal and Torres Strait Islander workforce, in addition to mechanisms to improve cultural awareness for all family law professionals, the cultural safety framework will be unable to achieve meaningful and sustainable positive change for Aboriginal and Torres Strait Islander people using the family law system.

The Discussion Paper notes that family law service providers should be required to be compliant with the proposed cultural safety framework. The National FVPLS Forum agrees that monitoring is essential to the successful functioning of the framework. We reiterate that the Family Law Commission must be accountable to and engaged in meaningful partnership with Aboriginal and Torres Strait Islander communities, organisations and peak bodies (including the National FVPLS Forum) in the oversight and evaluation of the framework. This must include investment in capacity building for Aboriginal and Torres Strait Islander legal assistance service providers, FVPLSs and ATSILSs, and resourcing for these organisations to undertake ongoing data collection, monitoring and evaluation.

Consultation and co-design

The Discussion Paper acknowledges the need for ‘community-informed co-design’ yet there is no clear indication of what this process will look like. We reiterate our comments made at page 35 that co-design must be firmly in place from the outset. There must be meaningful consultation and partnership with Aboriginal and Torres Strait Islander communities, organisations and peak bodies with relevant specialist expertise, such as FVPLSs and the National FVPLS Forum, right from the start.

Conclusion

In conclusion, the National FVPLS Forum thanks the ALRC for the opportunity to contribute to this important review and we look forward to playing a key role in implementation going forward.

Should you have any queries in relation to this submission please contact Amanda Bresnan, Executive Officer for the National FVPLS Forum on [REDACTED]