

27 November 2018

The Hon Justice Sarah Derrington
President
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: familylaw@alrc.gov.au

Dear Justice Derrington,

Review of the Family Law System - Discussion Paper

1. Women's Legal Service NSW (**WLS NSW**) thanks the Australian Law Reform Commission (**ALRC**) for the opportunity to comment on the Review of the Family Law System Discussion Paper.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
3. WLS NSW has an Indigenous Women's Legal Program (**IWLP**). This program delivers a culturally sensitive legal service to Aboriginal women in NSW and has been operating for over 19 years. We provide an Aboriginal legal advice line, participate in law reform and policy work, and provide community legal education programs and conferences that are topical and relevant for Aboriginal and Torres Strait Islander women.
4. An Aboriginal Women's Consultation Network guides the IWLP. It meets quarterly to ensure we deliver a culturally appropriate service. The members include regional



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community representatives and the IWLP staff. There is a representative from the Aboriginal Women's Consultation Network on the WLS NSW Board.

5. This submission focuses on key proposals and questions relating to our practice, in particular family violence, protected confidences, information sharing, a skilled and supported workforce and improving the accessibility of the family law system for Aboriginal and Torres Strait Islander families.

Simpler and Clearer Legislation

6. We are supportive of efforts to simplify provisions in the *Family Law Act 1975* (Cth) (*FLA*) and its subordinate legislation provided that at the same time the safety of victims-survivors of family violence, sexual violence and child abuse is prioritised.

Proposal 3-3: The principle (currently set out in s 60CA of the Family Law Act 1975 (Cth)) that the child's best interests must be the paramount consideration in making decisions about children should be retained but amended to refer to 'safety and best interests'.

7. We warmly welcome the recognition of the need to include safety and best interests of the child as the paramount consideration in making decisions about children.
8. However, consideration should be given to additional or alternative terms to "safety" to ensure psychological harm is included. Further, given previous family violence is a predictor for future family violence, including lethal violence,¹ it is vital that a history of violence is also considered. These comments also apply to reference to "safety" and "safe" with respect to the objects and principles of Part VII of the *Family Law Act* and the best interests of the child factors.

¹ The Australian Domestic and Family Violence Death Review Network found that of the cases in which a male domestic violence primary abuser killed a female victim, 76.2% of males had previously used physical violence against the female killed, 80% had previously used emotional or psychological violence against the female killed, 61% had previously been socially abusive and 12% were known to be sexually abusive. See *Australian Domestic and Family Violence Death Review Network Data Report 2018*, p29 at http://www.coronerscourt.vic.gov.au/resources/e7964843-7985-4a25-8abd-5060c26edc4d/website+version+-+advdrn_data_report_2018_.pdf

Proposal 3-5: The guidance in the Family Law Act 1975 (Cth) for determining the arrangements that best promote the child's safety and best interests (currently set out mainly in s 60CC), should be simplified to provide that the following matters must be considered:

- *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.*
9. We welcome explicit recognition that harm caused by a perpetrator against an adult victim-survivor is harm perpetrated against the child.
10. We refer to comments above about Proposal 3-3.
11. We recommend *"any history of family violence involving the child or child's family"* be included for the reasons outlined above.
12. Stability is important in the lives of all children and particularly children who have experienced family violence. We therefore also recommend *"the history of the care of the child"* be explicitly included.

Proposal 3-6 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 the child's connection to their family, community, culture and country must be considered.

13. We support the proposal that in determining what arrangements best promote the safety and best interest of an Aboriginal or Torres Strait Islander child, the maintenance of the child's connection to their family, community and culture must be considered.
14. The 2013 Family Law Council (FLC) *Report on Parentage and the Family Law Act* took the view that the current provision in the Family Law Act *"does not adequately recognise*

the ways in which a child's Aboriginal identity and connection to their culture is maintained and enhanced".² WLS NSW agrees.

15. The FLC recommended that s 60CC(3)(h) of the *FLA* "should be strengthened by acknowledging the benefit to Aboriginal and Torres Strait Islander children of enjoying their culture with people who have the responsibility to pass on that culture to the child" (Recommendation 4). WLS NSW endorses this recommendation. However, Aboriginal and Torres Strait Islander staff at WLS NSW have expressed strong concerns about the use of the term "enjoy" in ss 60CC(3)(h) and (6) of the *FLA*. They feel the word "enjoy" belittles and trivialises the tremendous importance of culture to Aboriginal and Torres Strait Islander people. Accordingly, WLS NSW recommends that the *FLA* be amended to reflect the importance of considerations of culture when determining the best interests of Aboriginal and Torres Strait Islander children, including removal of the term "enjoy" from the *FLA*. WLS NSW IWLP team support the wording as suggested in Proposal 3-6.
16. Furthermore, in the NSW Child Protection jurisdiction, there are Aboriginal and Torres Strait Islander child and young person placement principles, which provide guidance for those making decisions in relation to Aboriginal and Torres Strait Islander children in that jurisdiction. The FLC acknowledges that while cultural plans are integral in some child protection jurisdictions they are absent in the family law jurisdiction and there is no requirement of "a clear articulation of how the child's ongoing connection with kinship networks and country will be maintained".³
17. WLS NSW recommends that principles be developed for guidance in family law matters involving Aboriginal and Torres Strait Islander children. These principles should be developed by Aboriginal and Torres Strait Islander people and Aboriginal and Torres Strait Islander organisations, including SNAICC.
18. We note in particular that the NSW Aboriginal and Torres Strait Islander placement principles explicitly state that where an Aboriginal or Torres Strait Islander child is placed with a non-Aboriginal or Torres Strait Islander person, "arrangements must be made to ensure that the child or young person has the opportunity for continuing contact with his or her Aboriginal or Torres Strait Islander family, community and culture".⁴

² Family Law Council (2013) *Report on Parentage and the Family Law*, p34.

³ Family Law Council (2016) *Families with Complex Needs and the Intersection of the Family Law and Child Protection systems, Final Report*, p99 (p107).

⁴ *Children and Young Persons (Care and Protection) Act 1998 (NSW)* s 13(5)(a)

We support the inclusion of a similar provision in any family law principles, but note that such arrangements must not be token, as can occur in child protection matters.

Removal of presumption of equal shared parental responsibility

Proposal 3-7 The decision making framework for parenting arrangements in Pt VII of the Family Law Act 1975 (Cth) should be further clarified by: •

- *replacing the term 'parental responsibility' with a more easily understood term, such as 'decision making responsibility'; and •*
- *making it clear that in determining what arrangements best promote the child's safety and best interests, decision makers must consider what arrangements would be best for each child in their particular circumstances.*

19. The ALRC proposes replacing the term “*parental responsibility*” with “*decision-making responsibility*”. The ALRC notes that “*parental responsibility is primarily about decision-making about children rather than care-time arrangements, and is focused on duties and powers rather than rights*”. We agree the term equal shared parental responsibility is confusing and misunderstood. Any reference to “equal” must be removed.
20. The ALRC acknowledges that it is “*likely*” that the strong community perception that there is a presumption of equal shared care, is “*in part a result of the explicit link drawn between the presumption of equal shared parental responsibility and the requirement to consider equal time or significant and substantial time*”.⁵ We support the removal of the requirement to consider equal time or significant and substantial time.
21. The ALRC proposes it must be made clear that “*in determining what arrangements best promote the child's safety and best interests, decision makers must consider what arrangements would be best for each child in their particular circumstances*”. Families are unique and we support decisions being made on a case-by-case basis.
22. The ALRC's commentary in paragraphs 3.55 to 3.75 highlight the problems and confusion caused by the presumption of equal shared parental responsibility. At paragraph 3.71 the ALRC proposes “*removing the terminology of presumption*”. This is also implied if decision makers are required to consider “*what arrangements would be best for each child in their particular circumstances*” (*emphasis added*).
23. The removal of the presumption of equal shared parental responsibility is an essential change which must be clearly recommended. The reasons for this are outlined above

⁵ ALRC, *Review of the Family Law System Discussion Paper* (2018) p53

and in WLSA's submission in response to the ALRC's Review of the Family Law System Issues Paper (**ALRC Issues Paper**).

24. We believe the removal of the presumption of equal shared parental responsibility is a minimum requirement in order to help shift the strong culture that has developed in favour of equal shared parental decision making and time with children where in our experience it is not safe to do so.

Getting advice and support

Families Hubs

Proposal 4-1 The Australian Government should work with state and territory governments to establish community-based Families Hubs that will provide separating families and their children with a visible entry point for accessing a range of legal and support services. These Hubs should be designed to:

- *identify the person's safety, support and advice needs and those of their children;*
- *assist clients to develop plans to address their safety, support and advice needs and those of their children;*
- *connect clients with relevant services; and*
- *coordinate the client's engagement with multiple services.*

Proposal 4-3 Families Hubs should advance the safety and wellbeing of separating families and their children while supporting them through separation. They should include on-site out-posted workers from a range of relevant services, including:

- *specialist family violence services;*
- *legal assistance services (such as community legal centres);*
- *family dispute resolution services;*
- *therapeutic services (such as family counselling and specialised services for children);*
- *financial counselling services;*
- *housing assistance services;*
- *health services (such as mental health services and alcohol and other drug services);*
- *gambling help services;*
- *children's contact services; and*
- *parenting support programs or parenting education services (including a program for fathers).*

25. There are positive aspects to basing a range of services for families separating in one location including the offering of holistic support to clients, being able to meet and engage a service rather than being provided a phone number and the potential to improve interagency collaboration. The Families Hubs are also described as having a

“case management function”. We can see the benefits of Families Hubs, however we also see their limitations and safety implications and that very significant resources would be required in order for them to be effective services. Consideration should be given to enhancing existing services rather than creating a new service matrix that may not be adequately funded (as existing services are not).

26. Based on our experience, early referrals for legal advice can prevent or limit problem escalation and we strongly support increasing access to legal assistance, including for family law. We also strongly support greater funding of the family law system as a whole - for early access to the supports proposed to be placed in Families Hubs as well as lawyer assisted family dispute resolution and additional resources for the courts such as for additional judicial officers, family consultants and others.
27. There are a range of ways early access to legal assistance can be increased. Health-justice partnerships is one such way where health and legal assistance services work together to provide a person with holistic early support to prevent problem escalation. Health justice partnerships recognise that addressing a person's legal needs appropriately can assist in improving their health. Research conducted by the Law and Justice Foundation of NSW found that people are more likely to tell a health professional about a legal problem than a lawyer.⁶ By basing a lawyer in a health setting such as a hospital or health centre the lawyer can train health professionals to recognise legal issues their clients may have and promote referrals for legal advice. Women's Legal Service NSW has worked in successful partnership with Women's Health Centres, providing health-justice partnerships for over 30 years. Some Women's Health Centres provide other services including counselling, and assistance with housing.
28. Another partnership Women's Legal Service NSW is involved in is with Western Sydney Community Legal Centre and the Family Relationship Centres at Penrith and Blacktown. The community legal centres provide legal advice clinics and some lawyer assisted family dispute resolution at these Family Relationship Centres. It is important that victims-survivors of family violence are able to access family violence and trauma informed lawyer assisted family dispute resolution processes so they have options other than going to court to resolve their family law matters. We recommend sexual and family violence and trauma informed lawyer assisted family dispute resolution processes be expanded as discussed further below.

⁶ Law and Justice Foundation of NSW (2012) *Legal Australia-Wide Survey: Australia Access to Justice and Legal Needs*, Vol 7, p192

29. Consideration needs to be given to how family violence victims-survivors could access the proposed Families Hub safely, noting that separation - be it contemplated, intended or actual separation - is a time of high risk, including for lethal violence perpetrated by males against former female intimate partners.⁷ How would victim-survivors safely access Families Hubs, where perpetrators of violence may also be seeking services?
30. The Families Hubs proposal also raises issues of governance and workforce development.
31. We refer to the No to Violence submission which discusses the experiences of the Orange Door Support and Safety Hubs in Victoria and makes recommendations regarding Families Hubs:

To develop effective teams and inter-agency relationships would require intensive workforce development, careful piloting, and Families Hubs that are tailored to their location and context. Best practice processes are encouraged, including group supervision by an external clinician specialising in family violence and other complex presentations. The presence of a Families Hubs coordinator may facilitate teamwork within the Hubs, and relationships between external organisations and services and the Families Hubs. We note that due to the short timeframe in which the Orange Doors were implemented, workforce training and coordination were not adequately developed. The development of the Orange Doors arose directly from Victoria's Royal Commission into Family Violence. The implementation process has suffered from the absence of a clear theory of change which has resulted in inconsistencies across sites and disciplines and different understandings being held across the service system about the function and desired outcomes of the Orange Doors.⁸

32. We support these recommendations. We also support evaluation of the Orange Door Support and Safety Hubs prior to any proposed implementation of Families Hubs.
33. Consideration could be given to piloting the co-location of services in existing services, services that communities are already accessing, such as Aboriginal and Torres Strait

⁷ Between 10 March 2008 and 30 June 2014, there were 78 intimate partner homicides in NSW which occurred in a context of domestic violence (66 women and 12 men). Actual or intended separation was a characteristic in 50% of all intimate partner homicides. See, NSW Domestic Violence Death Review Team Report 2015-17 page xiv accessed at:

https://www.parliament.nsw.gov.au/lc/papers/DBAssets/taledpaper/WebAttachments/72106/2015-2017_DVDRT%20REPORT%20PDF.pdf

⁸ No to Violence (2018) *Submission to the ALRC Review Discussion Paper*, 2018.

Islander services, culturally linguistically and diverse services, specialist women's services, such as women's health centres.

34. We acknowledge that wherever such a Hub is located it will be accessible for some but not all in the relevant area, with some people having to travel considerable distances.

Dispute Resolution

35. We are supportive of family dispute resolution being required prior to lodging a court application for property and financial matters, subject to exceptions and safeguards outlined in Proposal 5-3.
36. Our support is subject to the necessary workforce development required. In addition to core competencies for all family law system professionals outlined in Proposal 10-3 and discussed further below, there will need to be appropriate training relating to property and financial matters.
37. We note with concern that child support is not included in the terms of reference of this review. We also support inclusion of child support in family dispute resolution.
38. WLSA has previously recommended *“that the Australian Government implement and fund a national legally assisted family dispute resolution program appropriate for family violence cases that is supported by specialist family violence lawyers and family violence and trauma informed family dispute resolution practitioners. The rollout of this program should be preceded by a legal needs analysis, to inform the Australian Government as to the scope of the service required to meet legal need”*.⁹ We continue to support this recommendation and note our work above in family violence and trauma informed lawyer assisted family dispute resolution.
39. Sexual and family violence and trauma informed lawyer assisted dispute resolution should also extend to property and financial matters.
40. We also acknowledge the importance of access to culturally responsive family dispute resolution.

⁹ WLSA (2017) Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into a better family law system to support and protect those affected by family violence*, (WLSA SPLA Family Violence submission) Recommendation 11; *WLSA submission in response to the ALRC Review of the Family Law System*, May 2018, p32.

41. It is essential that the communities affected participate and lead discussions about the reforms they wish to see and co-design these reforms.
42. It is important that these models of family dispute resolution are available to those with limited resources.

Reshaping the Adjudication Landscape

Proposal 6-1 The family courts should establish a triage process to ensure that matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed.

Proposal 6-2 The triage process should involve a team-based approach combining the expertise of the court's registrars and family consultants to ensure initial and ongoing risk and needs assessment and case management of the matter, continuing, if required, until final decision.

Proposal 6-3 Specialist court pathways should include:

- *a simplified small property claims process;*
- *a specialist family violence list; and*
- *the Indigenous list.*

Proposal 6-7 The family courts should consider establishing a specialist list for the hearing of high risk family violence matters in each registry. The list should have the following features:

- *a lead judge with oversight of the list;*
- *a registrar with responsibility for triaging matters into the list and ongoing case management;*
- *family consultants to prepare short and long reports on families whose matters are heard in the list; and*
- *a cap on the number of matters listed in each daily hearing list.*

All of the professionals in these roles should have specialist family violence knowledge and experience

Question 6-1 What criteria should be used to establish eligibility for the family violence list?

Question 6-2 What are the risks and benefits of early fact finding hearings? How could an early fact finding process be designed to limit risks?

Family violence

43. As stated in the WLSA submission in response to the ALRC Issues Paper, *“to protect women and children, the family law system must place safety and risk at the centre of all practice and decision-making.”*
44. We support Proposals 6-1 and 6-2.
45. We support all the features listed in Proposal 6-7 of a specialist family violence list as aspects of a family violence pathway. We welcome the focus on family violence. We support an approach which brings expertise and specialisation to case management. Specialisation is key to ensuring identification of sexual and family violence and child abuse and proper screening and ongoing risk assessment is undertaken.
46. We note the proposal of a specialist family violence list is limited to the hearing of high risk family violence matters. ANROWS has developed National Risk Assessment Principles for domestic and family violence. The resource outlines evidence-based high-risk factors for domestic and family violence include:
- *history of domestic and family violence;*
 - *separation (actual or pending);*
 - *intimate partner sexual violence;*
 - *non-lethal strangulation (choking);*
 - *stalking;*
 - *threats to kill;*
 - *perpetrator's access to weapons;*
 - *escalation (frequency and/or severity);*
 - *coercive control; and*
 - *pregnancy and new birth (Campbell et al., 2009; Glass et al., 2008a; New South Wales. Domestic Violence Death Review Team, 2017).¹⁰*

¹⁰ Backhouse, C and Toivonen, C (2017) *National Risk Assessment Principles for domestic and family violence: Companion resource. A summary of the evidence-base supporting the development*

Risk assessment must also consider the views of the victim-survivor and professional judgment. If a specialist family violence list proceeds the evidence-based high risk factors outlined by ANROWS should be considered.

Early fact finding

47. An important part of establishing a family violence pathway is the question of whether there is a role for early fact finding in relation to family violence. Delays can result in increased risks to the safety of children and the victim-survivor carers and in our view significant resources are required in order for the family law system to reduce delays. Interim hearings have become a solid feature of our court system in response to delays, only adding complexity and cost to an already complex and stretched system. The dilemmas associated with early fact finding hearings about family violence are outlined below.

The UK experience of early fact finding

48. The ALRC Discussion Paper at 6.31 refers to the UK experience of early fact finding hearings. We see benefit in looking more closely at this experience and in particular the work of Women's Aid in 2004 and subsequent developments.
49. The UK uses early fact finding hearings in some family law matters where domestic violence is raised. This has developed through guidelines, case law, Practice Directions and The President's Guidance. *Practice Direction 12J: Residence and Contact Orders: Domestic Violence and Harm* was first issued on 9 May 2008. Practice Direction 12J was in response to Women's Aid first report on children's homicides in 2004.
50. In 2004, Women's Aid published its first report on children's homicides: *Twenty-nine child homicides: Lessons to be learnt on domestic violence and child protection*. This report catalogued 29 children's homicides in England and Wales from 1994-2004 in the context of formal and informal contact arrangements with their father who had perpetrated family violence.
51. Lord Justice Wall was commissioned to review the 5 cases in which there was judicial involvement and provide a report to the President of the Family Division on Women's

and implementation of the National Risk Assessment Principles for domestic and family violence (Sydney: ANROWS) p26 accessed at:

https://dh2wpaq0gtxwe.cloudfront.net/ANROWS_NRAP_Companion%20Resource.1.pdf

Aid 2004 report.¹¹ In the report Lord Justice Wall expressed concern about the reliance in a number of places in the files on the *“proposition that it may be safe to order contact where domestic violence had been perpetrated on the mother, but not on the child”*, citing the evidence of Doctors Sturge and Glaser in *Re L* [2001] Fam 260 at 271, that domestic violence involved *“a very serious and significant failure in parenting”*. Lord Justice Wall stated:

*It is, in my view, high time that the Family Justice System abandoned any reliance on the proposition that a man can have a history of violence to the mother of his children but, nonetheless, be a good father.*¹²

Where violence is directed to the mother but not the child, Lord Justice Wall recommended:

*Reinforcement needs to be given to the lead provided by Drs Sturge and Glaser (and accepted by the Court of Appeal in Re L) that it is a non-sequitur to consider that a father who has a history of violence to the mother of his children is, at one and the same time, a good father. The opportunity should be taken, either in a judgment or a lecture to make this point, with the concomitant that it needs to be considered in all cases where there is domestic violence. This would, in my view, ensure a more rigorous approach to safety in these case.*¹³

52. Following Lord Justice Wall's report, the Family Justice Council was asked to prepare a report for the President of the Family Division about the approach the courts should take to proposed consent orders in contact cases where domestic violence is an issue.
53. The Family Justice Council recommended a culture change was required *“from ‘contact is always the appropriate way forward’ to ‘contact that is safe and positive for the child is always the appropriate way forward.’”*¹⁴ They further recommended the development

¹¹ Lord Justice Wall (2006) *Report to the President of the Family Division on the publication by the Women's Aid Federation of England entitled Twenty-nine child homicides: Lessons to be learnt on domestic violence and child protection with particular reference to the five cases in which there was judicial involvement*, accessed at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/report_childhomicides.pdf

¹² Ibid paragraph 8.22.

¹³ Ibid, paragraph 8.28.

¹⁴ Family Justice Council, (2007) *Report to the President of the Family Division on the approach to be adopted by the Court when asked to make a contact order by consent, where domestic*

of a Practice Direction¹⁵ based on the decision in *Re: L (Contact: Domestic Violence); Re: V (Contact: Domestic Violence); Re: M (Contact: Domestic Violence); Re: H (Contact: Domestic Violence)* [2000] 2FLR 334. The Council also recommended a risk assessment be undertaken in every case where domestic violence was alleged or admitted before a consent order could be made. The Council also recommended the family court process be included in the Serious Case or Domestic Violence Homicide Reviews.¹⁶

54. Despite Lord Justice Wall's recommendation and the Family Justice Council recommendations, the survey results in Hunter and Barnett's 2013 report to the Family Justice Council found, "*the cultural shift called for by the Family Justice Council before Practice Direction 12J [Child Arrangements and Contact Orders: Domestic Abuse and Harm] was issued is incomplete*".¹⁷
55. The Practice Direction has been revised on a number of occasions, including the definition of domestic abuse being expanded to include coercive and controlling behaviour in 2014 and further changes that came into effect in 2017. The Practice Direction requires the consideration of domestic abuse "*at all stages of the proceeding*" with a focus on contested facts being "*tried as soon as possible*".¹⁸
56. In 2010 the President of the Family Division introduced *The President's Guidance in relation to Split Hearings*. Split hearings are hearings divided into two parts - a fact finding hearing and a second hearing at which the court, based on the findings which it makes, decides the case. The President's Guidance notes "*Over recent months and years it has become apparent to me that split hearings are: (1) taking place when they need not do so; and (2) are taking up a disproportionate amount of the court's time*

violence has been an issue in the case, p27 accessed at: <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/FJC/Publications/Reportoncontact.pdf>

¹⁵ *Practice Direction 12J: Residence and Contact Orders: Domestic Violence and Harm* was first issued on 9 May 2008. It has recently been revised with changes taking effect on 2 October 2017. See: <https://www.judiciary.uk/publications/president-of-family-division-circular-practice-direction-pd12j-domestic-abuse/>

¹⁶ Family Justice Council, Note 14, p4-5

¹⁷ Rosemary Hunter and Adrienne Barnett (2013) *Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm - A Report to the Family Justice Council*, p8.

¹⁸ *Practice Direction 12J: Child Arrangements and Contact Orders: Domestic Violence and Harm*, paragraph 5.

and resources.”¹⁹ The Guidance states “A fact finding hearing should only be ordered if the court takes the view that the case cannot be properly decided without the hearing”²⁰ and this hearing need not be separate from the substantive hearing. It is the President’s view that “it will be a rare case in which a separate fact finding hearing is necessary”.²¹

57. At the same time, anecdotal evidence suggested “that even where findings of domestic violence were made, direct contact might be ordered despite concerns expressed by Children and Family Reporters, and that consent orders were not fully scrutinised” contrary to the Practice Direction.²²
58. The Family Justice Council Domestic Abuse Committee decided its Work Plan for 2010-11 “should include monitoring the impact of the Domestic Violence Practice Direction”.²³ This research was undertaken by two of its members, Professor Rosemary Hunter and Adrienne Barnett and resulted in a report to the Family Justice Council in 2013.
59. As part of this research, a national survey of over 600 judicial officers and practitioners working in the UK family law system (including legal practitioners as well as non-legal practitioners, such as social workers) was undertaken 2011. The majority of those who responded estimated fact finding hearings took place in 0 to 25% of cases. There were differing views as to whether fact finding hearings were being held as often as required.²⁴ A further study was undertaken by Adrienne Barnett which was published in 2015.
60. Some of the positive aspects of fact finding hearings that were identified through these studies and case law include:

¹⁹ *The President's Guidance in relation to Split Hearings* , May 2010 at paragraph 1 accessed at: https://www.familylaw.co.uk/system/uploads/attachments/0000/6106/Practice_Guidance_Split_Hearings_May_2010.pdf

²⁰ Ibid, paragraph 6.

²¹ Ibid, paragraph 7.

²² Hunter and Barnett, Note 17, p10.

²³ Hunter and Barnett, Ibid.

²⁴ 72% of Children and Family Court Advisory and Support Service (Cafcass) officers (social worker) who responded to the survey felt early fact finding hearings were not being held as often as required. See Hunter and Barnett, Note 17, p 5.

- A focused approach to domestic violence (it was previously felt domestic violence was minimised and sometime ignored) with a focus on contact without separate fact finding hearings on domestic violence.²⁵
- Bracewall J in *Re S (Care Proceedings: Split Hearing)* [1996] 2 FLR 773 noted views of the Children Act Advisory Committee that advantages of determining the facts at an early stage “would enable the substantive hearing to proceed more speedily” and would enable the court to “focus on the child’s welfare with greater clarity”.²⁶

61. Some of the concerns raised about fact finding hearings include:

- They have tended to focus on a “*narrow, incident-based description of family violence*”²⁷ (noting the definition of domestic abuse in Practice Direction 12J was only amended in 2014 to include coercive and controlling behaviour)
- Parties are often asked to limit the number of allegations to be tested²⁸
- In some courts there is a focus on recent and serious incidents which removes context (with a lack of understanding about the importance of considering history of violence and until 2014 reference to coercive and controlling behaviour was not included in the definition of domestic abuse in Practice Direction 12J so there was a focus on physical violence)²⁹
- The expertise of those working in the family law system in identifying and responding to family violence³⁰

²⁵ Barnett, A (2015) “Like Gold Dust These Days’ - Domestic Violence Fact-Finding Hearings in Child Contact Cases”, 23 *Feminist Legal Studies* p1.

²⁶ Cited in *The President’s Guidance in relation to Split Hearings* , May 2010 at paragraph 11.

²⁷ Barnett, Note 25, p1 & p16. See also Hunter and Barnett, Note 25, p16.

²⁸ Hunter and Barnett, Note 17, p40.

²⁹ Hunter and Barnett, Note 17, p32.

³⁰ Barnett interviewed 29 barristers, solicitors and Family Court Advisors in her study. Some respondents in Barnett’s study considered a lack of “independent” evidence of domestic violence was “proof” that domestic violence had not happened. See Barnett, Note 25, p26.

- Limited resources to undertake thorough section 7 reports (in which Cafcass workers provide recommendations of actions for the welfare of the child) and fact finding hearings themselves³¹
- Delays in a fact finding hearing and in concluding the case following the fact finding hearing³²
- The technical complexity of fact finding hearings make them difficult for unrepresented litigants³³
- Several respondents commented that findings of fact can be ignored with one survey respondent stating:

Even in those cases where findings are made, or admissions are forthcoming, quite often, the judge who made the findings then dismisses them as being of little account as they are either old, occurred during the stressful period while the relationship was breaking down, or simply do not let these make any difference to the outcome. The victim is left wondering whether it was worth putting themselves through the incredible stress of making the allegations, making a statement, being cross examined on their evidence, and in the end, feeling very let down. A great deal of time and money has been spent on a wasted exercise.³⁴

- Barnett asserts based on case law and interviews *"it appears that [the lower courts'] approach is to ignore allegations of domestic violence if they do not consider that a separate fact-finding hearing is necessary".³⁵*

62. Barnett's further study found early fact finding hearings may be listed but not heard where perpetrators made limited but *"sufficient admissions of domestic violence"*, which resulted in agreements women described as *"watered down compromises"* which did not necessarily consider all issues of risk.³⁶

³¹ Hunter and Barnett, Note 17, p26.

³² Hunter and Barnett, Note 17, p41

³³ Hunter and Barnett, Note 17, p60.

³⁴ Hunter and Barnett, Note 17, p55

³⁵ Barnett, Note 25, p31.

³⁶ Barnett, Note 25, p12

63. While some have suggested it would be beneficial to hold a composite hearing as the issue of domestic violence is than considered within the context of parenting,³⁷ Barnett notes in 2015 that there had only been one reported case in which a composite hearing was held *Re S (A Child)* [2012] EWCA Civ 1031 where “*findings of abusive and coercive controlling behaviour were made against the father at a final hearing*”.³⁸
64. In response to being asked to suggest improvements to the current approach to dealing with allegations of domestic violence in family law matters, respondents to the national survey suggested:
- More court time and judicial resources
 - The need for more associated services, including risk assessments and services for women and children and men's behaviour programs for perpetrators of violence as well as supervised contact centres
 - Tight case management
 - More training on domestic violence
 - Judicial officers in particular “*urged the need for continuing, competent legal representation for both parties*”.³⁹

Our casework experience and recommendations

65. We have found in our own casework that once a woman is disbelieved about family violence it can be very difficult to establish family violence.

Case study

Kylie and Paul were together for 15 years. The relationship was characterised by physical violence and significant psychological abuse and coercive and controlling behavior, including Paul frequently threatening to kill himself if Kylie did not do as Paul asked. Paul has also been violent towards the children.

Kylie and Paul separated several times. Each time they separated the violence escalated.

³⁷ Participant in Barnett's study, Note 25, p29.

³⁸ Barnett, Note 25 p 29.

³⁹ Hunter and Barnett, Note 17, p8.

They have three children.

Kylie and Paul engaged in family law proceedings. Kylie sought no contact orders with the father on the grounds of family violence and child abuse.

A family report was ordered. In the report the family report writer referred to the fact the mother had separated and then reconciled with the father as evidence that she did not fear him. The family report writer questioned the mother's credibility. Furthermore, rather than seeing the frequent threats to commit suicide as coercive and controlling behaviour, the family report writer believed Paul's suicide ideation was a result of family court proceedings and could be resolved by allowing Paul contact with his children.

The ICL also supported the children having contact with their father.

Interim orders were made for the children to have supervised contact with their father. During one of the supervised contact visits the father perpetrated significant domestic violence for which he was charged. The visit was terminated immediately.

Final orders were ultimately made for no contact with the father.

66. Early fact findings hearings would require:

- a thorough understanding of the nature and dynamics of family violence that recognised the significance of a history of violence, the increased risk of abuse during and following separation and that was not limited to a narrow incident-based approach which largely focuses on incidents of physical violence
- all family law system professionals involved in relevant matters having expertise in family violence, sexual violence and trauma informed practice; child development; cultural competency; and disability awareness; including judicial officers, registrars, family consultants, legal practitioners and support workers
- assessments by professionals with clinical experience and expertise in family violence, sexual violence, child abuse, risk assessment and child development to guide the judiciary
- recognition of the need for consistent legal representation and greater access to family violence services, men's behaviour change programs and accredited children's contact centres where appropriate

- testing of a victim's-survivor's evidence that does not require independent corroboration
- increased resources to ensure adequate time for early fact finding hearings
- the prioritising of safety of the child and adult victim-survivor from sexual and family violence and child abuse
- safeguards also need to be in place where family violence is not identified or recognised early so the door is not closed on considering family violence.⁴⁰

67. Family violence may also be an issue in matters presenting in the Indigenous List and in small property claims (Proposal 6-3). Given the high number of matters involving sexual and family violence in the family courts, identifying and responding to sexual and family violence is the core business of the family courts. This highlights the whole family law system needs to better incorporate and respond to risk and safety concerns.

68. We are not confident that establishing a single 'specialist family violence list' without further detail about how this would be implemented in practice, would be a sufficient way to establish a specialist family violence pathway in the court. Early fact finding has limitations which must be considered. We recommend that minimum standards for or best practice for the development of a family violence pathway be undertaken in consultation with domestic and family violence and sexual violence experts. Further, we support the establishing of a sexual and family violence expert advisory committee, to guide the development and implementation of a specialist family violence pathway.

Specialist Indigenous list

69. We welcome the recommendation that there be a specialist court pathway and an Indigenous list for Aboriginal and Torres Strait Islander people. It is important that

⁴⁰ The AIFS Evaluation of the 2012 family violence amendments found while there have been improvements, the family law system still has difficulty identifying and assessing family violence. AIFS found in 2014, 38% of parents reported holding either or both family violence and safety concerns and not disclosing these concerns to family law professionals. 46% of parents did not disclose in the FDR context, 28% did not disclose to lawyers and 22% did not disclose to courts. In relation to courts, the AIFS Evaluation found an increase in parents reporting being asked about family violence and child safety following the 2012 reforms, from 50% in 2012 to 61% in 2014, but 31% of court users in 2014 reported they had not been asked about either concern. Kaspiw, R., Carson, R., Dunstan, J., Qu, L., Horsfall, B., De Maio, J. et al. (2015). *Evaluation of the 2012 family violence amendments: Synthesis report* Melbourne: Australian Institute of Family Studies.

Aboriginal and/or Torres Strait Islander people be able to elect whether or not they choose this pathway.

70. The NSW WLS's Indigenous Women's Legal Program (IWLP) has supported and represented clients through the Indigenous list operating in the Federal Circuit Court in the Sydney Registry. Clients have felt more included in the process when seated at the one table, including with the Judge and being directly asked questions by the Judge. Based on our experience in the Indigenous list, WLS NSW supports the expansion of the Indigenous list, including to regional, rural and remote areas, noting the need to consult locally with Aboriginal and Torres Strait Islander communities and organisations about what is needed and how it can be implemented.
71. The WLS NSW IWLP team recommends that each Indigenous list or each Court if more than one Indigenous list is required at a court be guided by an Aboriginal and Torres Strait Islander Advisory Committee.
72. All professionals working with Aboriginal and/or Torres Strait Islander clients must be culturally competent and undertake ongoing accreditation and training in cultural competency.
73. We refer to the Family Law Council's (FLC) 2012 report: *Improving the Family Law System for Aboriginal and Torres Strait Islander clients* and the Family Law Council's *Families with Complex Needs and the Intersection of the Family Law and Child Protection systems* report. We support implementation of the recommendations, including embedding Aboriginal and Torres Strait Liaison Officers in each family court registry; funding for Aboriginal and Torres Strait Islander Family Consultants;⁴¹ building an Aboriginal and Torres Strait Islander Workforce in the family law system; a focus on accessible and culturally responsive community education about family law, care and protection and family violence; promoting cultural competency across the family law system, including through ongoing training.
74. It is important that there be a number of Aboriginal and Torres Strait Islander Liaison Officers/Community Access Officers working within each Court. We believe that it is important that there be both male and female Aboriginal and Torres Strait Islander Community Access Workers and that there be representatives from different communities to best facilitate community participation in the Court process.

⁴¹ Noting the importance of all family consultants also being sexual and family violence and trauma informed.

75. We believe it is extremely important that the Indigenous list be adequately resourced so that there can be regular list days and to ensure that there is sufficient time to deal with each matter.
76. It is our experience that many of the matters in the Indigenous list also involve serious and complex issues involving family violence. Accordingly, it is essential that the whole family law system, including the Indigenous list is able to effectively incorporate and respond to risk and safety concerns.
77. As with any matter involving family violence, there needs to be appropriate safety planning, including about accessing the court buildings, for example, staggered arrival and departure times; different entrances and exits for the different parties; the victim-survivor and their family/support being met by and accompanied by security staff within the court precinct as well as, for example, to a car. It is important these protections are also available in regional, rural and remote areas.
78. We acknowledge child rearing practices within Aboriginal and Torres Strait Islander families involve extended family members. There need to be safety rooms and meeting rooms in courts large enough to accommodate larger groups, including in regional, rural and remote areas.
79. We are also supportive of a specialist pathway for a simplified small property claims process and are hopeful that any small property claims process could be incorporated into the Indigenous list so that Aboriginal and Torres Strait Islander families are not excluded from any benefit of a such a specialist list.

Reducing harm

Proposal 8-1 The definition of family violence in the Family Law Act 1975 (Cth) should be amended to:

- *clarify some terms used in the list of examples of family violence and to include other behaviours (in addition to misuse of systems and processes (Proposal 8- 3)) including emotional and psychological abuse and technology facilitated abuse; and*
- *include an explicit cross-reference between the definitions of family violence and abuse to ensure it is clear that the definition of abuse encompasses direct or indirect exposure to family violence.*

80. We support Proposal 8-1.

Question 8-2 Are there issues or behaviours that should be referred to in the definition, in addition to those proposed?

81. The NSW State Coroner in the *NSW Domestic Violence Death Review Team Report 2015-17* notes:

*A theme throughout this report is the importance of viewing domestic violence holistically, as episodes in a broader pattern of behaviour rather than as incidents in isolation of one another.*⁴²

82. The importance of this is reinforced through the criticism of early fact finding hearings in the UK being focused on a “*narrow, incident-based approach that compartmentalises consideration of family violence*”.⁴³

83. Domestic violence is not always viewed holistically in the family law system. The definition of family violence should be amended to make this clearer.

84. Consideration should also be given to including threats of suicide as an example of family violence.

Proposal 8-2 The Australian Government should commission research projects to examine the strengths and limitations of the definition of family violence in the Family Law Act 1975 (Cth) in relation to the experiences of:

- *Aboriginal and Torres Strait Islander people;*
- *people from culturally and linguistically diverse backgrounds; and*
- *LGBTIQ people.*

85. We support this proposal.

86. Given the high rates of violence perpetrated against people with disability and particularly women with disability, research projects to examine the strengths and limitations of the definition of family violence in the *Family Law Act* should also be commissioned in relation to the experiences of people with disability.

⁴² *NSW Domestic Violence Death Review Team Report 2015-17*, page v accessed at: [http://www.coroners.justice.nsw.gov.au/Documents/2015-2017_DVDRT_Report_October2017\(online\).pdf](http://www.coroners.justice.nsw.gov.au/Documents/2015-2017_DVDRT_Report_October2017(online).pdf)

⁴³ ALRC (2018) *Review of the Family Law System Discussion Paper*, paragraph 6.31.

Proposal 8-3 The definition of family violence in the Family Law Act 1975 (Cth) should be amended to include misuse of legal and other systems and processes in the list of examples of acts that can constitute family violence in s 4AB(2) by inserting a new subsection referring to the 'use of systems or processes to cause harm, distress or financial loss'.

87. We welcome recognition of systems and processes abuse beyond legal systems and processes as a form of family violence. We support Proposal 8-3. There should be monitoring of such a provision to ensure it is not misused by the perpetrator of family violence.

Proposal 8-5 The Family Law Act 1975 (Cth) should provide that, in considering whether to deem proceedings as unmeritorious, a court may have regard to evidence of a history of family violence and in children's cases must consider the safety and best interests of the child and the impact of the proceedings on the other party when they are the main caregiver for the child.

88. We support this proposal.

89. For the reasons outlined earlier we believe a history of family violence must be considered.

Proposal 8-6 The Family Law Act 1975 (Cth) should provide that courts have the power to exclude evidence of 'protected confidences': that is, communications made by a person in confidence to another person acting in a professional capacity who has an express or implied duty of confidence. The Act should provide that:

- Subpoenas in relation to evidence of protected confidences should not be issued without leave of the court.*
- The court should exclude evidence of protected confidences where it is satisfied that it is likely that harm would or might be caused, directly or indirectly, to a protected confider, and the nature and extent of the harm outweighs the desirability of the evidence being given. Harm should be defined to include actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).*
- In exercising this power, the court should consider the probative value and importance of the evidence to the proceedings and the effect that allowing the evidence would have on the protected confider.*
- In family law proceedings concerning children, the safety and best interests of the child should be the paramount consideration when deciding whether to exclude evidence of protected confidences. Such evidence should be excluded where a court is satisfied that admitting it would not promote the safety and best interests of the child.*
- The protected confider may consent to the evidence being admitted.*
- The court should have the power to disallow such evidence on its own motion or by application of the protected confider or the confidant. Where a child is the protected confider, a representative of the child may make the claim for protection on behalf of the child.*
- The court is obliged to give reasons for its decision.*

90. We support this proposal.

91. We referred in our submission in response to the Issues Paper to a paper produced by Women's Legal Services NSW - *Sense and Sensitivity: Family Law, Family Violence and Confidentiality*.

92. This paper raises concerns about information sharing, including *"the need for genuine commitment of preserving the confidentiality of sensitive records for reasons of safety, therapeutic integrity and the protection of victims from the misuse of court processes*

*by perpetrators aiming to harm, intimidate and undermine their recovery and parenting capacity”.*⁴⁴

93. This paper discusses the need for family law professionals to commit to adopting victim-survivor centric practices which should include guidelines for seeking least intrusive forms of evidence first. This would acknowledge that improving responsiveness to victims-survivors of family violence includes preserving therapeutic relationships and protecting against misuse of court processes.
94. Proposal 8.6 draws on aspects of s126B of the *NSW Evidence Act* about exclusion of protected confidences. Section 126B(4)(d) refers to the court taking into account *“the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates”*.
95. In determining whether to grant leave for a subpoena for sensitive records, we recommend the court be required to consider the availability of a less intrusive source of evidence. This could include, for example, a short form report by a therapist upon request.
96. A short form report upon request could include:
 - 96..1 How many sessions have been attended over a specified period of time
 - 96..2 A short summary of key issues discussed, including family and sexual violence

The content of such a report could be discussed further by the group proposed to be convened in Proposal 8-7.

⁴⁴ Carolyn Jones (2016) *Sense and Sensitivity: Family Law, Family Violence and Confidentiality* (Sydney: Women's Legal Service NSW) p 41 (43)

Proposal 8-7 The Attorney-General's Department (Cth) should convene a working group comprised of the family courts, the Family Law Section of the Law Council of Australia, the Royal Australian and New Zealand College of Psychiatrists, the Australian Psychological Society, the Royal Australian College of General Practitioners, Family & Relationship Services Australia, National Legal Aid, Women's Legal Services Australia and specialist family violence services peak bodies and providers to develop guidelines in relation to the use of sensitive records in family law proceedings. These guidelines should identify:

- *principles to consider when a subpoena of sensitive records is in contemplation;*
- *obligations of professionals who are custodians of sensitive records in relation to the provision of those records;*
- *processes for objecting to a subpoena of sensitive records; and*
- *how services and professionals need to manage implications for their clients regarding the possibility that material may be subpoenaed and any potential consequences for their clients if a subpoena is issued.*

97. We support this proposal and further recommend including specialist sexual assault services. There is great value in a multi-disciplinary working group - so the different professionals can understand each other's roles and points of view.

Additional Legislative Issues

Proposal 9-8 The definition of family member in s 4(1AB) of the Family Law Act 1975 (Cth) should be amended to be inclusive of Aboriginal and Torres Strait Islander concepts of family.

98. WLS NSW supports this proposal.

99. The WLS NSW IWLP team are supportive of using the wording "*related according to Aboriginal or Torres Strait Islander kinship rules or are both members of some other culturally recognised family group*". This is the wording used in Section 8 of the *Intervention Orders Prevention of Abuse Act 2009* South Australia.

100. We believe that the legislation can be further improved to accommodate Aboriginal and Torres Strait Islander concepts of family by amending the provision providing for persons who have standing to commence parenting proceedings and by amending the definition of parent.

101. Section 65C of the *FLA* sets out who may apply for a parenting order, with standing being limited to parents, the child, grandparents, or a “*person concerned with the care, welfare or development of the child*”.
102. Where a person is not a parent or grandparent of the child, the person does not have an automatic right to seek orders, rather the Court must determine whether or not the applicant is a “*person concerned with the care, welfare or development of a child*”.
103. In the case of Aboriginal and Torres Strait Islander children, there may be people in the child's kinship group other than parents and grandparents, who ought to be able to bring an application for parenting orders, but for whom the need to seek leave creates an unnecessary hurdle. An application may be appropriate where the parents are not in a position to care for the child - perhaps to avoid state child protection proceedings, or it may be needed to ensure that the unique kinship obligations and child rearing practices of Aboriginal and Torres Strait Islander cultures are carried out.
104. Therefore, in order to facilitate the recognition of appropriate and necessary kinship care arrangements, WLS NSW recommends that s 65C of the *FLA* be amended to give standing to members of the child's Aboriginal and Torres Strait Islander kinship group as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs.
105. Aboriginal and Torres Strait Islander peoples have child rearing practices and approaches to family structure that differ from non-Indigenous cultures. In particular, we note that in most Aboriginal cultures, non-parents have responsibilities for Aboriginal children, particularly where the parent has passed away or is unable to care for the child.
106. The 2013 Family Law Council *Report on Parentage and the Family Law Act* recommended that:
- The definition [of “parent”] should include a provision that recognises that a parent “may include a person who is regarded as a parent of a child under Aboriginal tradition or Torres Strait Islander custom.” (Recommendation 3).*
107. WLS NSW supports this recommendation.

A Skilled and Supported Workforce

Proposal 10-1 The Australian Government should work with relevant non- government organisations and key professional bodies to develop a workforce capability plan for the family law system.

108. We support this proposal.

Proposal 10-2 The workforce capability plan for the family law system should identify:

- *the different professional groups working in the family law system;*
- *the core competencies that particular professional groups need; and*
- *the training and accreditation needed for different professional groups.*

109. We support this proposal.

Proposal 10-3 The identification of core competencies for the family law system workforce should include consideration of the need for family law system professionals to have:

- *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.*

Question 10-1 Are there any additional core competencies that should be considered in the workforce capability plan for the family law system?

110. We are very supportive of introducing core competencies for all professionals working in the family law system and recognise the importance of ongoing training and experiences to meet core competencies.

111. With regards to a core competency relating to “*understanding of family violence*” we would like to see more detail included. For example, “*an understanding of the nature*”

and dynamics of family violence, including identifying the primary victim and aggressor; an understanding of how perpetrators use violence, including to undermine the parenting capacity of the adult victim-survivor; and an understanding of how to respond to family violence". We further support recognition of the gendered nature of family violence, noting that family violence is most often perpetrated by men against women and children.

112. We further refer to the NSW Coroner's comments in the *Domestic Violence Death Review Team 2015-17 report* mentioned above:

A theme throughout this report is the importance of viewing domestic violence holistically, as episodes in a broader pattern of behaviour rather than as incidents in isolation of one another.⁴⁵

113. We believe care should be taken in the reliance on typologies of violence. Citing Prof Chisholm, Jane Wangmann warns:

One of the risks of using the work on typologies in legal environments is that arguments will focus on which category or box the violence sits in, rather than helping "us attend to and understand the nature of violence in each particular case".⁴⁶

This could result in a loss of focus on the impact of violence.

114. Women's Legal Service NSW has co-developed and is co-delivering workshops with Jon Graham, Clinical Director, Institute of Specialist Dispute Resolution focused on helping professionals working within the family law system to identify, understand and respond to family violence. The workshops focus on screening for sexual and family violence, risk assessment and safety planning. The workshops, aimed at family law solicitors, family dispute resolution practitioners, family advisors, counsellors, social workers and others working in the family law system, have been provided through the Greater Sydney Family Law Pathways Network and other Family Law Pathways Networks. Such workshops should form part of key competencies training.

115. We would also welcome utilising the work of Linda Coates, Allan Wade and David Mandel in training related to core competencies, so people are aware of the language

⁴⁵ NSW Domestic Violence Death Review Team Report 2015-17, page v accessed at: [http://www.coroners.justice.nsw.gov.au/Documents/2015-2017_DVDRT_Report_October2017\(online\).pdf](http://www.coroners.justice.nsw.gov.au/Documents/2015-2017_DVDRT_Report_October2017(online).pdf)

⁴⁶ Jane Wangmann (2016) "Different types of intimate partner violence – What do family law decisions reveal?" *Australian Journal of Family Law*, Vol. 30, No. 2, p107.

they use to ensure their language does not “*obscure violence, mitigate perpetrator responsibility and/or blame/pathologise the victim*”.⁴⁷

116. We recommend specific reference to a core competency of an understanding of sexual violence. This is particularly important given the high rates of sexual violence in the context of family violence and the reluctance of those who have experienced sexual violence to disclose such violence, as discussed above. By naming sexual violence this helps to make sexual violence visible and to break down barriers to disclosing such violence, including shame and stigma. This could be described as “*an understanding of the dynamics and impacts of sexual violence, particularly sexual violence perpetrated within the context of domestic and family violence*”.

117. We would also welcome a core competency relating to an understanding of child development.

118. It is imperative that all professionals working with Aboriginal and Torres Strait Islander clients are culturally competent and undertake ongoing training in cultural competency. This includes, judicial officers, family consultants, expert report writers, court staff, Independent Children's Lawyers, solicitors and family dispute resolution practitioners.

119. There should be training specific to Aboriginal and Torres Strait Islander culture and it should be meaningful, substantive and run by appropriately trained experts as recommended by members of Aboriginal and Torres Strait Islander communities.

120. It is of vital importance that judicial officers, Independent Children's Lawyers, family consultants, expert report writers and family dispute resolution practitioners who will be involved in the Indigenous list or who will work with Aboriginal and Torres Strait Islander participants in the family law system be required to meet minimum cultural competency requirements. This could be met through a mix of regular training and experience in working with Aboriginal and Torres Strait Islander people determined by an independent panel of relevantly qualified Aboriginal or Torres Strait Islander people.

121. In order to ensure that family law system professionals working with Aboriginal and Torres Strait Islander families are culturally competent there should be ongoing obligations on such professionals relating to training and/or experience in working with

⁴⁷ See, for example, Centre for Response Based Practice: <https://www.responsebasedpractice.com> and Safe and Together: <https://safeandtogetherinstitute.com/>

Aboriginal and Torres Strait Islander people and oversight mechanisms to ensure meaningful compliance.

122. We believe that there should also be a complaints process within the Court system, including for complaints about a professional's cultural competency. The Family Law Commission could play this role.

123. Noting the importance of Aboriginal and/or Torres Strait Islander specialist workers in the family courts to improve the access of Aboriginal and Torres Strait Islander families to the family law system,⁴⁸ how can Aboriginal and Torres Strait Islander families be assured of access to such workers? These workers could also play a key role in working with Independent Children's Lawyers, family consultants, expert report writers and helping Aboriginal and Torres Strait Islander families to liaise with these family law system professionals.

124. We welcome inclusion of *"an ability to identify and respond to risk, including the risk of suicide"*. However, care needs to be taken so there is an awareness and understanding that threats of suicide can be used as a form of perpetrating family violence against women and children.

125. We question what is meant by the expression *"ongoing conflict"* in *"an understanding of the impact on children to exposure to ongoing conflict"*. It is important that language is not do used to minimise, mutualise or mask family violence.

Proposal 10-4 The Family Law Commission proposed in Proposal 12-1 should oversee the implementation of the workforce capability plan through training – including cross-disciplinary training – and accreditation of family law system professionals.

126. We support this proposal. We note the success of the Family Law Pathways Networks as cross-disciplinary networks which also provide cross-disciplinary training for family law solicitors, family dispute resolution practitioners, family advisors, counsellors, social workers and others working in the family law system. Such training and networking opportunities assist the different professionals to better understand each other's roles and points of view.

127. We support accreditation of all family law system professionals.

⁴⁸ Josephine Akee,(2006) "The role of Indigenous Family Liaison Officers in the Family Court of Australia", *Family Matters*, No 75.

Proposal 10-5 In developing the workforce capability plan, the capacity for family dispute resolution practitioners to conduct family dispute resolution in property and financial matters should be considered. This should include consideration of existing training and accreditation requirements.

128. We support this proposal.

Proposal 10-6 State and territory law societies should amend their continuing professional development requirements to require all legal practitioners undertaking family law work to complete at least one unit of family violence training annually. This training should be in addition to any other core competencies required for legal practitioners under the workforce capability plan.

129. We support mandating annual training for all legal practitioners undertaking family law work in family violence.

130. While outside this review's terms of reference, we note that family violence cuts across many areas of law - for example, tenancy, consumer law, debt, social security, to mention but a few. We recommend not limiting the mandating of annual family violence training to those undertaking family law only.

131. We refer to the training discussed above at para 114 as an example of family violence training.

132. In NSW, solicitors must earn 10 continuing professional development units a year. One unit of continuing professional development is generally one hour. We question if one hour is sufficient.

Proposal 10-7 The Family Law Act 1975 (Cth) should provide for the accreditation of Children's Contact Service workers and impose a requirement that these workers hold a valid Working with Children Check.

133. We support this proposal.

Proposal 10-8 All future appointments of federal judicial officers exercising family law jurisdiction should include consideration of the person's knowledge, experience and aptitude in relation to family violence.

Question 10-4 What, if any, other changes should be made to the criteria for appointment of federal judicial officers exercising family law jurisdiction?

134. We support Proposal 10-8 and also add and "knowledge, experience and aptitude in relation to sexual violence" for the reasons outlined earlier.

135. We refer to paragraph 10.57 of the ALRC Discussion Paper which suggests *“federal judicial officers should be expected to have the same core competencies as other family law system professionals”*. We support this.

Question 10-5 What, if any, changes should be made to the process for appointment of federal judicial officers exercising family law jurisdiction?

136. We refer to the comments in the ALRC Discussion Paper at paragraph 10.63. We support *“the use of appointment processes that advertise, interview and assess candidates for judicial appointment as a way to ensure greater diversity on the bench, including the appointment of judicial officers from Aboriginal and Torres Strait Islander and culturally and linguistically diverse communities”*.

Proposal 10-9 The Australian Government should task the Family Law Commission (Proposal 12-1) with the development a national accreditation system with minimum standards for private family report writers as part of the newly developed Accreditation Rules.

137. We support the accreditation of all professionals within the family law system. There should also be a monitoring and complaints mechanism. We understand it is proposed the Family Law Commission take on this role.

Proposal 10-11 When requesting the preparation of a report under s 62G of the Family Law Act 1975 (Cth), the family courts should provide clear instructions about why the report is being sought and the particular issues that should be reported on.

138. We support this proposal. It is also important the family consultant has the relevant expertise.

Proposal 10-12 In appropriate matters involving the care, welfare and development of a child, judges should 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.

139. We support this proposal.

Proposal 10-14 The Family Law Act 1975 (Cth) should be amended 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.

140. WLS NSW believes that it is essential that in any matter involving an Aboriginal or Torres Strait Islander child that the Court be properly informed about the child's cultural needs to ensure that the child's ongoing connection with kinship and country may be

maintained and protected to the highest extent possible. This evidence should come from appropriate people within that child's own community and kinship group. It is vital that this evidence be provided to the Court in a culturally appropriate way.

141. Concern has been expressed about who would write a cultural report, including the privileging of formal academic qualifications over lived experience and knowledge of culture and community. Rather than a formal written cultural report, the WLS NSW IWLP team proposes evidence could best be provided by way of a Cultural Circle where Elders and relevant persons from a child's own community and kinship group meet with the Judge to talk about the child's cultural needs and to set out how the child's ongoing connection with kinship networks and country can best be maintained.

Proposal 10-15 The Australian Government should, as a condition of its funding agreements, require that all government funded family relationships services and family law legal assistance services develop and implement wellbeing programs for their staff.

142. We support this proposal and recommend additional funding be available for the implementation of these important programs.

Information sharing

Proposal 11-1 State and territory child protection, family violence and other relevant legislation should be amended to:

- *remove any provisions that prevent state and territory agencies from disclosing relevant information, including experts' reports, to courts, bodies and agencies in the family law system in appropriate circumstances; and*
- *include provisions that explicitly authorise state and territory agencies to disclose relevant information to courts, bodies and agencies in the family law system in appropriate circumstances.*

The relevant agencies can be identified through the proposed information sharing framework (Proposals 11-2 and 11-3).

Proposal 11-2 The Australian Government should work with state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety, welfare and wellbeing of families and children between the family law, family violence and child protection systems. The framework should include:

- *relevant federal, state and territory court documents;*
- *child protection records;*
- *police records;*
- *experts' reports; and*
- *other relevant information.*

Proposal 11-3 The information sharing framework should include the legal framework for sharing information and information sharing principles, as well as guidance about:

- *why information needs to be shared;*
- *what information should be shared;*
- *circumstances when information should be shared;*
- *mechanisms for information sharing, including technological solutions;*
- *how information that is shared can be used;*
- *who is able to share information;*
- *roles and responsibilities of professionals in the system in relation to information sharing;*
- *interagency education and training;*
- *interagency collaboration; and*
- *monitoring and evaluation of information sharing initiatives.*

Proposal 11-4 The Australian Government and state and territory governments should consider expanding the information sharing platform as part of the National Domestic Violence Order Scheme to include family court orders and orders issue under state and territory child protection legislation.

Proposal 11-6 The family courts should provide relevant professionals in the family violence and child protection systems with access to the Commonwealth Courts Portal to enable them to have reliable and timely access to relevant information about existing family court orders and pending proceedings.

Proposal 11-7 The Australian Government should work with states and territory governments to co-locate child protection and family violence support workers at each of the family law court premises.

Proposal 11-9 The Australian Government and state and territory governments should work together 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 courts.

143. Efforts to improve responsiveness to family violence disclosures are welcomed but it is important that information sharing is not seen as the panacea. Information sharing “*will not solve systemic problems such as delays or inexperience in responding to family violence*”.⁴⁹

144. We support the development of an information sharing framework focused on agency and safety for victims-survivors of family violence.

145. We are supportive of the national register of intervention orders and that it be extended to also include family law and child protection orders. We recommend this information be available to all court systems in real time.

146. We are concerned by suggestions that information sharing extend to “*summary reports*”, “*expert reports*” and reference to “*other relevant information*”, which is a vague and potentially catch-all term.

147. If, for example, child protection agencies are providing a summary of information in their database the author of such a report needs to have the appropriate skills to analyse the information, be able, for example, to correctly identify the primary victim and aggressor and robust guidelines and training would be required to promote consistency in summary reports. Templates would also need to be developed.

148. We are concerned that expert reports are untested, can carry weight, and that facts may have changed from the drafting of the expert report. While there may be an opportunity to subpoena the author to give evidence in proceedings and for the report to be challenged through cross-examination, there also seems to be the possibility of information-sharing extending beyond the courts without the benefit of testing the evidence.

⁴⁹ Carolyn Jones, (2016) *Sense and Sensitivity: Family law, Family Violence and Confidentiality* (Sydney: Women's Legal Service NSW) p40

149. Will expert reports be used to refuse legal aid where a party seeks orders inconsistent with the expert report?

150. What is the process proposed to correct incorrect information - eg primary aggressor and primary victim? It is problematic when incorrect information follows you.

151. If relevant professionals in the family violence and child protection systems should have access to the Commonwealth Courts Portal, we believe they should be restricted to accessing orders only.

Question 11-1 What other information should be shared or sought about persons involved in family law proceedings? For example, should:

- *State and territory police be required to enquire about whether a person is currently involved in family law proceedings before they issue or renew a gun licence?*
- *State and territory legislation require police to inform family courts if a person makes an application for a gun licence and they have disclosed they are involved in family law proceedings?*
- *The Family Law Act 1975 (Cth) require family courts to notify police if a party to proceedings makes an allegation of current family violence?*

152. We support state and territory police being required to enquire about whether a person is currently involved in family law proceedings before they issue or renew a gun licence.

153. We support state and territory legislation requiring police to inform family courts if a person makes an application for a gun licence and they have disclosed they are involved in family law proceedings. We further recommend this information be made available to parties through the Commonwealth Courts Portal.

154. We do not support the *Family Law Act 1975 (Cth)* requiring family courts to notify police if a party to proceedings makes an allegation of current family violence. This is because in NSW if a party fears reporting to police the person in need of protection has other options for protection such as applying to the court for a private apprehended domestic violence order (ADVO) rather than the police applying for an ADVO.

Question 11-2 Should the information sharing framework include health records? If so, what health records should be shared?

155. We do not support the sharing of health information without a subpoena unless with informed consent.

Question 11-3 Should records be shared with family relationships services such as family dispute resolution services, Children's Contact Services, and parenting order program services?

156. We do not support the sharing of records with family relationship services such as family dispute resolution services, Children's Contact Services, and parenting order program services.

Question 11-4 If a child protection agency has referred a parent to the family courts to obtain parenting orders, what, if any, evidence should they provide the courts? For example, should they provide the courts with any recommendations they may have in relation to the care arrangements of the children?

157. We support Recommendation 19-3 in the 2010 ALRC *Family Violence - A National Legal Response* report:

Where a child protection agency investigates child abuse, locates a viable and protective carer and refers that carer to a family court to apply for a parenting order, the agency should, in appropriate cases:

- a) provide written information to a family court about the reasons for the referral;*
- b) provide reports and other evidence; or*
- c) intervene in the proceedings*

158. We argue this should include a mother who has been the victim of domestic violence and who is taking protective action through the family courts, for example, by applying for no contact or supervised contact orders.

159. Consistent with this we recommend the child protection agency provide the court with written information:

- that they referred a parent/primary caregiver to the family courts
- the reasons for referring a parent/primary caregiver to the family courts
- a summary of the child protection history
- recommendations in relation to the care arrangements of the children

160. Such information could be in the form of a letter and should be available to the courts and should also be able to be used to assist with an application for Legal Aid.

161. It is the experience of our clients that such evidence is not forthcoming. Furthermore, if the father does not participate in mediation, our clients are left not knowing whether they should pursue the matter further by filing a family law application. If they do file such an application they generally cannot afford legal representation and are not eligible for a grant of Legal Aid because the children are living with them, and so are left to self-represent. Furthermore, when clients contact the child protection agency (Department of Family and Community Services (**FaCS**)) to seek evidence to support their family law application in such circumstances, FaCS routinely refuses to provide such evidence.
162. With regards to information sharing between the Families Hubs if they proceed and the family courts (Question 11-5), we believe information sharing should generally require informed consent. If people know their information will be shared, they may not engage with services or they may engage but not disclose or fully disclose issues such as family violence.
163. There would also need to be training regarding any information sharing framework. In addition to understanding the information sharing framework it will also be important for there to be training about making file notes. As mentioned above it is important people are aware of the language they use to ensure their language does not “*obscure violence, mitigate perpetrator responsibility and/or blame/pathologise the victim*”.

System Oversight and Reform Evaluation

Proposal 12-1 The Australian Government should establish a new independent statutory body, the Family Law Commission, to oversee the family law system. The aims of the Family Law Commission should be to ensure that the family law system operates effectively in accordance with the objectives of the Family Law Act 1975 (Cth) and to promote public confidence in the family law system. The responsibilities of the Family Law Commission should be to:

- *monitor the performance of the system;*
- *manage accreditation of professionals and agencies across the system, including oversight of training requirements;*
- *issue guidelines to family law professionals and service providers to assist them to understand their legislative duties;*
- *resolve complaints about professionals and services within the family law system, including through the use of enforcement powers;*
- *improve the functioning of the family law system through inquiries, either of its own motion or at the request of government;*
- *be informed by the work of the Children and Young People's Advisory Board (Proposal 7-13);*
- *raise public awareness about the roles and responsibilities of professionals and service providers within the family law system; and*
- *make recommendations about research and law reform proposals to improve the system.*

164. We support this proposal.

Proposal 12-2 The Family Law Commission should have responsibility for accreditation and oversight of professionals working across the system. In discharging its function to accredit and oversee family law system professionals, the Family Law Commission should:

- *develop Accreditation Rules;*
- *administer the Accreditation Rules including the establishment and maintenance of an Accreditation Register;*
- *establish standards and other obligations that accredited persons must continue to meet to remain accredited, including oversight of training requirements;*
- *establish and administer processes for the suspension or cancellation of accreditation; and*
- *establish and administer a process for receiving and resolving complaints against practitioners accredited under the Accreditation Rules.*

165. We support this proposal.

Proposal 12-3 The Family Law Commission should have power to:

- *conduct own motion inquiries into issues relevant to the performance of any aspect of the family law system;*
- *conduct inquiries into issues referred by government relevant to the performance of any aspect of the family law system; and*
- *make recommendations to improve the performance of an aspect of the family law system as a result of an inquiry.*

166. We support this proposal.

167. We further recommend there be a requirement for the government to respond to recommendations in a timely manner and publish reasons if they decide not to implement recommendations.

168. We believe the Family Law Council, for which there are currently no members appointed, plays a vital advisory role to government. Section 115(3) of the *Family Law Act* provides:

It is the function of the [Family Law] Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning:

- (a) the working of this Act and other legislation relating to family law;*
- (b) the working of legal aid in relation to family law; and*
- (c) any other matters relating to family law.*

169.If the Family Law Commission is to take on this role, which we believe it should, it is important that there is a cross-section of people working within the family law system that are involved in this aspect of the work, including legal practitioners with family violence expertise.

Proposal 12-7 The Australian Government should build into its reform implementation plan a rigorous evaluation program to be conducted by an appropriate organisation.

170.We support this proposal.

Proposal 12-8 The Australian Government should develop a cultural safety framework to guide the development, implementation and monitoring of reforms to the family law system arising from this review to ensure they support the cultural safety and responsiveness of the family law system for client families and their children. The framework should be developed in consultation with relevant organisations, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, and LGBTIQ organisations.

Proposal 12-9 The cultural safety framework should address:

- *the provision of community education about the family law system;*
- *the development of a culturally diverse and culturally competent workforce;*
- *the provision of, and access to, culturally safe and responsive legal and support services; and*
- *the provision of, and access to, culturally safe and responsive dispute resolution and adjudication processes.*

171.WLS NSW is supportive of the development of a cultural safety framework.

172.While acknowledging the need for cultural competency with respect to working with Aboriginal and Torres Strait Islander people, culturally and linguistically diverse communities, LGBTIQ communities and the importance of disability awareness in improving access to the family law system there should be a stand alone/separate cultural safety framework with respect to Aboriginal and Torres Strait Islander people. This would recognise the singular place that Aboriginal and Torres Strait Islander people hold, combined with the unique differences, experiences and challenges that Aboriginal and Torres Strait Islander people face in attempting to access the family law system.

173. We support Proposal 12-9. Key to this, as discussed above, is ensuring there are more Aboriginal and Torres Strait Islander workers in the family law system - as judicial officers, legal practitioners, family consultants, family dispute resolution practitioners and community access workers. This can be supported through funding for training and availability of relevant courses.
174. We support the cultural safety framework being developed in consultation with Aboriginal and Torres Strait Islander people and Aboriginal and Torres Strait Islander organisations and reiterate that any reforms impacting upon Aboriginal and Torres Strait Islander people must be led and co-designed with Aboriginal and Torres Strait Islander people. There also needs to be accountability and oversight mechanisms to ensure the cultural safety framework is being effectively implemented.
175. In order for Aboriginal and Torres Strait Islander women to access the family law system they need to be able to identify they have a legal need and know where to go and who can assist them. Culturally responsive community legal education, outreach and community development work is key to making this happen.
176. In the words of WLS NSW's Indigenous Women's Legal Program (IWLP) team members "*it's about being, knowing and doing and core Aboriginal and Torres Strait Islander values of caring, sharing and respect*". IWLP community engagement and outreach takes place at places where Aboriginal women gather and through opening up conversations in a safe way, for example, a yarn while participating in arts and craft activities. Adopting trauma informed principles and focusing on cultural safety, clients are met in a space where they feel safe, their culture and beliefs are respected and where they are supported by a community access worker as well as a lawyer. The provision of this type of legal assistance should be made available to Aboriginal and Torres Strait Islander participants in the family law system to ensure that their legal needs are met in a culturally safe and appropriate way.

If you would like to discuss any aspect of this submission, please contact Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,

Women's Legal Service NSW

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