

SUBMISSION

ALRC Review of the Family Law System

Response to discussion Paper

Prepared by Women’s Legal Service Victoria

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About Women’s Legal Service Victoria

Women’s Legal Service Victoria (WLSV), established in 1981, is a state-wide not for profit organisation providing free and confidential legal information, advice, referral and representation to financially disadvantaged women across Victoria. Our principal areas of work are family law, child protection, family violence intervention orders and victims of crime compensation.

In addition to providing legal services to women, WLSV ensures that clients’ experiences inform the development of policy and legislation. Our client group consists of women from a range of different cultural, ethnic and religious backgrounds. The majority of women we represent are family violence victim survivors and financially disadvantaged.

WLSV also has more than 20 years of experience in the design and delivery of evidence-based family violence training, and is the state-wide specialist provider of family violence legal education, training and professional development. Our legal educators are qualified trainers as well as experienced, practising lawyers. The education and engagement program works across the continuum of the public health approach from the primary prevention of violence against women, to building the capacity of the tertiary response sector to respond to the legal needs of women impacted by family violence.

**Acknowledgement**

WLSV acknowledges and thanks the women who have shared their stories, expertise and lived experiences with us for the purposes of this submission. All stories have been de-identified for legal and privacy reasons.

# Executive summary

WLSV has considered the proposals outlined in the discussion paper against WLSV’s six priority areas for reform, which were outlined in our submission to the issues paper.

The six areas of reform that WLSV is focusing on, for the purposes of this review, are:

* Early identification of family violence and early judicial decision making;
* Access to justice through the use of interpreters;
* Expansion of legally assisted dispute resolution (“LAFDR”);
* Removal of the legislative Presumption of Equal Shared Parental Responsibility;
* WLSV’s Small Claims, Large Battles report recommendations;
* Systems abuse reform.

WLSV’s education and engagement program has considered the proposals that relate to education and training. The team has significant experience and expertise in this area. Their response seeks to strengthen and inform the proposals around education, training and workforce capability and can be found at pp 6-8.

WLSV applauds the ALRC for considering and supporting many of the recommendations included in WLSV’s Small Claims, Large Battles report. In particular the recommendations around streamlining court processes for small claims, improving mandatory financial disclosure, simplifying superannuation splitting, dealing with joint debt and taking family violence into account in property divisions. This submission considers the proposals in detail to assist the ALRC to strengthen the proposals further.

WLSV commends the ALRC for attempting to redraft the current provisions under Part VII of the current Act, to improve and simplify the decision making pathways for parenting arrangements which will place a stronger emphasis on “safety”. WLSV submits however, that the proposals should include a clear proposal that the presumption for equal shared parental responsibility will be removed, to avoid any confusion.

One of the pressing reform proposals that WLSV presented to the ALRC, in the issues paper submission, that has not been given enough attention in the discussion paper, is the early determination of family violence. Determining family violence as soon as an application is made to the court in contested matters is crucial to ensuring the safety of women and children, throughout the family law process. WLSV supports the SPLA report recommendation and has formed the view that the most efficient way for the court to determine family violence allegations at the earliest practicable opportunity after filing proceedings, would be by way of an early preliminary evidentiary hearing. Risks identified can be addressed by ensuring that adequate safeguards are put in place. They are outlined at p.11 of this submission. WLSV acknowledges that the ALRC has proposed that the new triage process will include ongoing needs and risk assessment and that the safety concerns of family violence is being addressed. However, the main purpose of risk assessments is to ensure safety needs are addressed and managed.. Early determinations are also needed. They will enable the court to make a finding of fact as to the existence and extent of family violence, its impact on the parties and relevance to the matters to be determined. Without fully testing allegations of family violence, in the early stages of a matter, court processes and orders will continue to place the onus of managing risk, safety and economic recovery on family violence victims until the final resolution stage, which can take years.

WLSV supports the roll out of LAFDR across the family law system, for parties experiencing family violence who cannot afford legal representation. In WLSV’s experience, LAFDR is an effective alternative dispute resolution model for resolving parenting and property disputes for family violence victims, in certain circumstances. The ALRC has proposed that the Australian Government should further the development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters, including LAFDR and for guidelines to be developed. WLSV supports these proposals but notes that if LAFDR is to be rolled out effectively across the system, the Australian Government would need to commit to an increase in funding, to Legal Aid Commissions and Community Legal Centres, to broaden the availability of funding for priority clients. Currently a number of Community Legal Centres provide legal representation in LAFDR which is arranged directly with centres providing FDR services. They are not funded by government to do so. WLSV submits that LAFDR should be available to all parties

WLSV submits that the ALRC should examine in more detail, as a matter of urgency, the barriers that women from culturally and linguistically diverse backgrounds are facing in accessing interpreters who understand the dynamics of family violence and are trauma informed. If these barriers are not addressed in the review, the system’s ability to address and appropriately respond to the needs of CALD women, who rely heavily on interpreters to communicate their experience and the experiences of their children through the family law system, will continue to be compromised.

WLSV acknowledges that the ALRC has attempted to address the problems associated with systems abuse and supports amendments to the family violence definition to include misuse of process. WLSV also supports strengthening the courts powers to dismiss vexatious and unmeritorious proceedings. The new adjudication landscape as set out in chapter 6 of the discussion paper and the information sharing reforms will also contribute to the system change that is needed to prevent perpetrators of family violence from using the system to commit further abuse

………………..

# Part 1: Education and workforce development

ALRC proposals and questions considered in this section include:

* **Proposal 2** – Education, awareness and information
* **Proposal 4** - Getting advice and aupport
* **Proposal 5** - Dispute resolution
* **Proposal 10** - A skilled and supported workforce

*Proposal 4 - Getting advice and support*

Critical to the success of the Families Hubs as a multi-disciplinary response to family breakdown is:

* access to legal assistance and
* building the capacity of practitioners to screen for legal need across the range of jurisdictions that family violence victim-survivors commonly encounter, and refer appropriately for legal assistance.

From our experience in working with community health and welfare practitioners the identification of legal need by non-lawyers provides for early legal intervention. The WLSV Critical Legal Issues Map (“The Map”) was developed in 2011 and has been used by non-legal practitioners in Victoria to identify critical legal issues and refer for urgent legal help across family violence law, family law (children and property), child protection law, finances, housing, and victims of crime assistance.

WLSV would welcome the opportunity to share our experience of developing the Map to ensure that practitioners in the Hubs are effectively identifying the cluster of legal issues people experiencing family relationship breakdown encounter.

*Proposal 5 - Dispute resolution*

Proposal 5-10

*Multi-disciplinary professional training – LAFDR*

In addition to our submission above in relation to proposal 5.10, WLSV also recommends delivery of multi-disciplinary training to support any practice guidelines developed to maximise the benefit to the parties in the FDR with legal assistance.

WLSV’s education and engagement team was funded by the Australian Government in 2010 to lead the design and delivery of inter-professional training for lawyers and family dispute resolution practitioners (FDRPs) as part of the Building Better Partnerships between Family Relationship Centres (FRCs) and Legal Assistance Services Program (‘the building better partnership program’). This training, enhanced the knowledge and understanding of lawyers and FDRPs respective roles, perspective and practices and imbedded best practice models of working together in legally assisted family dispute resolution.

*Education about family law for parties involved in FDR*

WLSV further recommends the development of learning tools for parties in family dispute resolution, around the family law, to ensure that parties are well prepared and understand their rights and responsibilities on parenting and financial matters.

This is particularly important for victim survivors and perpetrators of family violence, as key messages will reiterate rights and responsibilities, and set parameters around expectations about the law and legal system.

WLSV has developed resources and legal information sessions for family dispute resolution as part of the Australia government funded building better partnerships program.

The resources have been widely used by FRCs and CLCs across Victoria, and included train the trainer sessions for CLC lawyers to deliver legal information sessions at their local FRCs.

Expanding on this, WLSV has also developed e-learning videos on understanding family law issues relating to parenting and financial matters post separation for parties undertaking FDR, including dispelling misconceptions/myths and tips in preparing for the FDR. The videos are accompanied by resources to help parties understand the law, and prepare for their FDR. These resources have been in use by Melbourne Family Relationship Centre and Better Place Australia.

*Proposals 2-8, 2-4, 2-5 and 10-1 - Collaboration*

WLSV welcomes involvement in consultations/collaborations proposed in the proposals 2-8, 2-4, 2-5 and 10-1.

Our education and engagement staff are qualified educators as well as experienced, practising lawyers. As the statewide specialist provider of family violence legal education in Victoria, the aim of our community development and legal education programs is to strengthen women’s ability to make informed decisions about their relationships and navigate complex legal systems.

WLSV supports the proposal to minimise duplicating existing resources outlined in proposal 2-8, and would be pleased to contribute our information resources that may be of value to the family law system information package.

WLSV endorses the need to consult with community groups and user-test information products for accessibility. We recommend that family violence victim-survivors who have been through the family law system be consulted in the development of information products, as they bring invaluable expertise in the lived experience of navigating the family law system and intersecting areas of law.

WLSV supports the development of a workforce capability plan for the family law system and the involvement of relevant non-government organisations and key professionals.

WLSV’s education and engagement has been heavily involved in the industry taskforce set up by the Victorian government in respond to the findings of theRoyal Commission into Family Violence. As members in the industry experts sub-groups, we actively contributed to planning on implementation of workforce development and qualifications requirements.

*Proposal 10 - A skilled and supported workforce*

Proposal 10–1 – see above comments

Proposal 10–2

WLSV supports the identified areas for the workforce capability plan listed in proposal 10-2.

WLSV’s education and engagement team has a number of professional development packages that mirror some of the areas identified in the list outlined in proposal 10-2, which are tailored for different professionals, in particular practitioners working in family law, family violence and child protection. These training packages were developed based on capability frameworks, informed by the latest research on training, workforce development and capacity building.

*Proposal 10–6*

WLSV supports the inclusion of annual family violence training as part of legal practitioners’ continuing professional development. WLSV education and engagement team has over 20 years’ experience in designing and delivering training to lawyers on family violence (and intersecting jurisdictions), developing lawyers skills in working effectively with victim survivors of family violence.

From our experience, we would recommend that the suite of training offered should initially involve foundational understanding of family violence, and more advanced family violence training should be gradually developed and offered to ensure the progressive increase in skill and knowledge of legal practitioners.

To ensure that this training is effective and practical to legal practitioners, the training should be tailored specifically to that legal practitioner. There is a risk if family violence training is generic and compulsory then legal practitioners will undertake the training as a formality without transferring learnings into practice.

We would recommend that the training be developed and managed by experienced trainers who have expertise in training design and delivery, family violence and legal practice experience.

# Part 2: Six priority areas for reform

# 1. Early identification of family violence and early judicial decision making

ALRC proposals and questions considered in this section include:

* **Proposal 3-2** – simplification of forms
* **Proposal 3-4 to 3-8** - parenting arrangements re child’s safety and best interests
* **Proposal 3-11** – taking family violence into account in property divisions
* **Proposal 5-3** – FDR for property matters and the family violence exception
* **Proposal 5-9 & 5-10** - further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters e.g. LAFDR
* **Proposal 6-1 & Question 6.2**– triage and specialist pathways and early hearings
* **Proposal 8-1** - definition of family violence
* **Proposal 10-3** - identification of core competencies for the family law system workforce including family violence and trauma informed practice, ability to identify & respond to risk etc.
* **Proposal 11-1** –legislative reform for information sharing

WLSV strongly supports the following statement in the discussion paper,

…. “*greater identification of family violence is desirable in order to allow* *appropriate safety planning, and to ensure that power balances are addressed in mediation and court processes…”.[[1]](#footnote-1)*

Identifying family violence in the early stages of a matter will not only ensure the safety of women and children but will also assist the court to manage matters involving family violence more efficiently and effectively.

WLSV has formed the view that the most effective and efficient way for the court to determine family violence allegations, at the earliest practicable opportunity after filing proceedings, would be by way of an early preliminary evidentiary hearing. In forming this view, WLSV reiterates its support for recommendation 7 of the SPLA report which recommended same. [[2]](#footnote-2) WLSV acknowledges that the court has the power to make interim findings of fact however the capacity of the court to exercise this power is limited. What is needed, to enable the exercise of this power, is additional staff, family violence expertise and also the allocation of additional resources. The Australian Government should provide additional funding for preliminary hearings. WLSV submits that the additional funding will enable cost savings to court time and resources through the more effective triaging and referrals of matters. It will also increase the likelihood of the earlier resolution of matters in dispute

In considering the proposal for interim hearings, the following issues need to be addressed:

* interim hearings and the new adjudication landscape;
* additional funding and resources;
* improving pleadings to fully test the evidence and to move away from “incidents” reporting; and,
* building safeguards in the process to protect victims of family violence.

***Interim hearings and the new adjudication landscape***

The proposed new triage process will involve registrars and family consultants working together to case manage applications and to manage and assess risk. A distinction needs to be made between the management and assessment of risk and the factual determination of family violence.

WLSV supports the expansion of LAFDR, including litigation intervention LAFDR to family violence matters as discussed at p.13 herein. An early determination of family violence will enable Registrars to triage more effectively to determine whether the matter would be appropriate for a LAFDR referral or not, according to agreed guidelines.

The ALRC should also consider how early determinations of family violence will assist judges in the exercise of their discretion, to determine whether a perpetrator of family violence is allowed to directly cross examination a victim of family violence or not, under the Bill that is currently before the Australian Parliament. [[3]](#footnote-3)

***Additional funding and resources***

Judicial registrars, registrars or duty judges could be responsible for conducting preliminary hearings and the making of interim family violence orders. Under the current Act all judicial officers can exercise the power to make findings of fact on an interim basis[[4]](#footnote-4). The issue however, as noted above, is that the current court resources and processes do not allow for such hearings to take place.

One way to determine who should ultimately be given responsibility for conducting preliminary hearings would be to examine who in the system and in the early stages of a matter, would have the specialist family violence knowledge and experience to conduct such a hearing. The ALRC may also wish to consider how interim findings of fact would fit into the new adjudication landscape, in particular the triaging and case management of matters into specialist pathways.

***Improving pleadings to fully test the evidence and to move away from “incidents” reporting***

As noted by the ALRC in the discussion paper, one of the risks associated with the early determination of family violence approach is the risk that, through pleadings, only incidents will be reported, which would undermine a comprehensive understanding of the cumulative nature of family violence.[[5]](#footnote-5) WLSV acknowledges this risk but is of the view that the risk can be addressed by improving pleadings and introducing safeguards to protect the safety and wellbeing of victims of family violence. This risk is also outweighed by the risks associated with not fully testing allegations early on in proceedings, such as agreeing to unsafe consent arrangements whilst waiting for final orders, which can take up to several years to finalise. Repeating our submission from the issues paper submission, a significant problem(amongst many), that our clients experience, is the pressure they often facein the early stages of a matter, to enter into interim arrangements, by agreement, from the family law system itself, in combination with an abusive parent. An early determination of the family violence allegations will ensure that the burden of managing safety and risk concerns is not placed entirely on the family violence victim as they travel through the system.

One proposal that the ALRC could consider is that improvements to pleadings could be made by introducing forms which will require applicants to fill out a question and answer style form similar to the WA family court’s case information affidavit [[6]](#footnote-6)(refer to **Attachment A**). The form requires an applicant to provide the court with all information relating to any safety orders, any police involvement and concerns that a parent may have around a child’s safety and family violence behaviour. The form could also include the proposed definition of family violence and invite parties to address all behaviours outlined in the proposed definition.

***Building safeguards into the process to protect victims of family violence***

Safeguards can be built into the interim hearings proposal to protect family violence victims. One of the main safeguards for family violence victims in the family law system is access to legal representation. This has recently been acknowledged by the Australian Government through the *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018*[[7]](#footnote-7). WLSV submits that legal representation should be made available to parties who do not have the financial means to pay for legal representation, for the purpose of pursuing a finding in an interim hearing.

Other safeguards, that should continue to apply, include the range of existing protections available to the court, under the current Act, which serve to control the conduct of hearings to reduce potential trauma to victims of family violence. These protections include[[8]](#footnote-8):

* ban on cross examination of victims by perpetrators
* directing or allowing a person to give testimony and/or appear by video or audio link
* disallowing questions asked in a manner or tone that is inappropriate
* changing the venue of a hearing to a safer location
* closing the court to the public or excluding specific persons from the courtroom
* giving directions or making orders about how particular evidence is to be given[[9]](#footnote-9) and
* receiving into evidence the transcript of evidence in any other proceedings before the court or another court or tribunal, and drawing from that transcript any conclusions of fact that it thinks proper, and adopting any of the recommendations, findings, decisions or judgment of those bodies [[10]](#footnote-10)

# 2. Cultural safety framework and access to justice through use of interpreters

ALRC proposals and questions considered in this section include:

* **Proposal 2-2** – national education and awareness campaign available in different languages in consultation with CALD communities
* **Proposal 2-10** – national information package available in different languages
* **Proposal 12-8 to 12-10** – development of a cultural safety framework including access to legal and support services.

WLSV’s submission in response to the issues paper, argued for improved access to trained family violence and trauma informed interpreters. WLSV notes, with some concern, that issues presentedwere not addressed in any detail and that the issue of access to interpreters was only briefly referred to in the discussion paper. WLSV submits that the ALRC examine in more detail, as a matter of urgency, the barriers that women from culturally and linguistically diverse backgrounds are facing in accessing interpreters who understand the dynamics of family violence and are trauma informed. If these barriers are not addressed in the review, the system’s ability to address and appropriately respond to the needs of CALD women, who rely heavily on interpreters to communicate their experience and the experiences of their children through the family law system, will continue to be compromised. Other proposals outlined in the discussion paper[[11]](#footnote-11) have taken into account problems relating to language barriers and include recommendations aimed at ensuring people from CALD have access to information and training materials that have been translated into different languages. These proposals should be extended to improve access to family violence trained and trauma informed interpreters and resourced accordingly.

While WLSV supports the ALRC’s proposal for a community-informed co-design model for the development of a cultural safety framework in consultation with relevant community organisations, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, and LGBTIQ organisations, WLSV submits that the co-designed process needs to include safeguards to ensure that the lived experiences of CALD women are reflected in the model. Participation in the community informed co-designed model should include Community organisations who are able to demonstrate specialist violence expertise

# 3. Expansion of legally assisted dispute resolution (“LAFDR”)

ALRC proposals and questions considered in this section include:

* **Proposal 5-3 to 5**-**5** – FDR for property matters and the family violence exception
* **Proposal 5-9 to 5-10** - further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters e.g. LAFDR
* **Proposal 6-1 & Question 6.2**– triage and specialist pathways and early hearings

WLSV supports proposals 5-9 and 5-10 which provide that the Australian Government should further the development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters and develop effective practice guidelines for the delivery of legally assisted dispute resolution (LAFDR) for parenting and property matters.

WLSV notes that proposal 5-9 includes an examination of the feasibility of means-tested fee for service and cost recovery models to be provided by legal aid commissions and community organisations such as Family Relationship Centres. Whilst an examination of the feasibility of legal aid funding is welcomed, in order for LAFDR to be rolled out effectively across the system, the Australian Government would need to increase funding to Legal Aid Commissions and Community Legal Centres, to broaden the availability of funding for priority clients. Currently a number of Community Legal Centres provide legal representation in LAFDR arranged directly with centres providing FDR services. They are not funded by the Australian government to do so. WLSV submits that funding for LAFDR should be available to all parties who are not able to afford to pay for legal representation.

WLSV supports proposal 5-10, that the Australian Government work with FDR providers to develop guidelines for LAFDR which include “*effective practice in screening, assessing and responding to risk arising from family violence, child safety concerns, mental ill-health, substance misuse and other issues that raise questions of risk”*  WLSV supports the previous submission of WLSA referred to at paragraph 5.77 that a *“well-supported mediation process …can be empowering an process for a victim-survivor of family violence”.*

Relevant to the discussion relating to the roll out of LAFDR across the system are proposals 5-3, 5-4 and 5-5. These proposals will require parties to attempt FDR prior to lodging an application for property and financial matters. A limited range of exceptions will apply including an imbalance of power e.g. family violence and where there are reasonable grounds to believe there is non- disclosure and also systems abuse. Whilst WLSV supports these exceptions, it is our view that LAFDR can play an important part in property and financial matters where family violence is present in the relationship. As with parenting matters, LAFDR provides a safe setting for victims of family violence to mediate an agreement and should be considered as an alternative to the court processes. WLSV recommends that the ALRC consider embedding a referral to LAFDR and the application of the guidelines into this proposals.

The ALRC should also consider how the proposed triage process will intersect with proposals 5-9 and 5-10, which support the further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters and the development of effective practice guidelines for the delivery of LAFDR for parenting and property matters. We note that in developing the guidelines, the ALRC is proposing that they include “*practices relating to referrals from and to the family courts*”. WLSV has been advocating for the increased availability and funding of LAFDR for property matters.[[12]](#footnote-12) Many women are not able to resolve their property disputes because of the cost, complexity and trauma associated with issuing proceedings. The increased availability of LAFDR will enable these parties to reach a timely and cost-effective property settlement.

Another reason is that LAFDR already provides effective FDR for family violence victims and should be more widely available to vulnerable parties with property disputes. The new triage process could include a LAFDR referral process which would see property matters that meet the proposed practice and funding guidelines referred to LAFDR for resolution. The initial risk and needs assessment conducted by teams could include an assessment as to whether a referral to LAFDR should be made or not.

# 4. Removal of the legislative presumption of equal shared parental responsibility

ALRC proposals and questions considered in this section include:

* **Proposal 3-3** – child’s safety and best interests paramount consideration
* **Proposal 3-4** – objects and principles to assist interpretation
* **Proposal 3-5** – best interests factors
* **Proposal 3-7 and Question 3**-**1** – clarification of decision making framework and matters for consultation between parents
* **Proposal 3-8** – varying final parenting orders
* **Proposal 3-9** – evidence based information resources for parents

WLSV submitted, in response to the issues paper, that the presumption of equal shared parental responsibility (“the presumption”) and the language of equal shared time should be removed from the Act. WLSV notes that the academic research, the SPLA committee report and other submissions to this review support the removal as noted in the discussion paper

WLSV commends the ALRC for attempting to redraft the current provisions under Part VII of the current act, to improve and simplify the decision making pathways for parenting arrangements and to place a stronger emphasis on “safety”. WLSV submits however that the proposals don’t go far enough and should expressly stipulate that the presumption for equal shared parental responsibility will be removed, as the proposals set out in the discussion paper do not, in our view, clearly do this. The lack of clarity around the proposals is further outlined below.

In considering the proposals that clarify the principles, elevate considerations of safety and require that decision makers must consider each case based on the circumstances, it seems that the decision making pathway is being significantly altered and the presumption of ESPR is being removed. However, the ALRC needs to clarify this by expressly stating that the presumption will be removed in order to address any misunderstandings that currently exists and which have been well documented in relation to the application of the presumption.

Farrah’s story demonstrates why the presumption needs to be clearly removed and also the misunderstanding that continues in relation to how the presumption applies:

“*Farrah moved to Australia with her husband 10 years ago. Throughout the marriage her husband engaged in emotionally abusive behaviour towards her and her two young children, now aged 5 and 9. Over time, the emotional abuse escalated into physical abuse and was witnessed by the children on several occasions, causing emotional distress and harm. The abuse against Farrah also included sexual abuse. After Farrah sought safety and left her husband, with the children in tow, the police successfully applied for a full no contact intervention order for her and the children for 3 years. This order was breached on several occasions (charges were laid and proven). Farrah sought the assistance of Women’s Legal Service Victoria to resolve disputes around parenting and property arrangements. Farrah’s husband commenced property and parenting proceedings. Farrah sought final orders for sole parental responsibility due to long term safety concerns and to address her husband’s attempts to exert unreasonable control over the decisions around the children’s religious activities and schooling. Interim orders were made in the Federal Circuit Court which only allowed the father to have limited supervised contact at a contact centre, once a fortnight. The contact centre observed the father’s emotionally abusive behaviour towards the children and detailed this in a report. Despite the family report writer having access to all of this information, including the history of family violence, the family report included a recommendation for equal shared parental responsibility* *without detailing any reasons for this.”*

WLSV acknowledges that the ALRC indicated in the discussion paper that it will remove the terminology of a presumption and will maintain the provision that each parent has parental responsibility or parental decision making for a child, unless this position is altered by a court order. However, WLSV submits that changing the language from “parental responsibility” to “parental decision making” will not address the potential for misunderstanding if the presumption is not clearly removed from the legislation. WLSV notes that the ALRC did discuss the linkage and concluded that if the circumstances of each child is taken into consideration as outlined in proposal 3-7, the link will be broken. Again further clarification from the ALRC is required to expressly remove the linkage between parental decision making and equal arrangements.

………

*Question 3–1 How should confusion about what matters require consultation between parents be resolved?*

If the ALRC does decide to recommend changing the language to “parental decision making”, WLSV submits that a non-exhaustive list of matters could be made available to guide parents on which matters require long term consultation, in the context of a child’s safety and best interests.

The legislation or guide should make it clear that these matters for consultation are not relevant where sole parental responsibility or decision making applies or is ordered.

In WLSV’s experience, usually matters that require consultation can be grouped under the following areas of decision making:

* Religion
* Education
* Place of residence
* Legal name of child(ren)
* Significant health decisions

………

WLSV supports proposal 3-3 and the inclusion of safety. WLSV agrees that the amendment would send a “*strong message to families who rely on the legislation about the centrality of safety to a child’s best interests, and its fundamental importance as a consideration in all matters relating to parenting arrangements”.[[13]](#footnote-13)* To ensure that safety is not interpreted narrowly, WLSV submits that the ALRC include a proposed definition to ensure that safety is broadly defined to include not only physical safety.

WLSV supports proposal 3-4. While WLSV supports the focus on the child’s safety and best interests, it is submitted that parenting arrangements also need to take into consideration the safety of women who have experienced family violence also.

# 5. WLSV’s Small Claims, Large Battles report [[14]](#footnote-14)and recommendations

ALRC proposals and questions considered in this section include:

* **Proposal 3-10** – clearly articulate process for dividing property
* **Proposal 3-11** – taking family violence into account in property divisions
* **Proposal 3-12** – further research
* **Proposals 3-13 to 3-13** – dealing with joint debts
* **Proposal 3-14** – superannuation splitting information
* **Proposal 3-16** – standard superannuation splitting orders
* **Proposal 3-17** – superannuation splitting tools
* **Question 3-2** – early release of superannuation
* **Proposals 5-9 to 5-10**: cultural appropriate and safe FDR eg LAFDR
* **Proposal 8-3**- family violence definition, misuse of legal and other systems and processes

## Streamlining court processes (recommendations 1-3)

Recommendations 1-3 of the Small Claims, Large Battles report included proposals for reform to streamline court processes for small property disputes. Recommendation 1 proposed that the family courts set up a streamlined case management process available upon application to the court, with simplified procedural and evidentiary requirements. Recommendation 2 deferred the decision of who would be eligible for the new process to the Australian Government. Recommendation 3 sought the inclusion of matters that may also be running concurrent unresolved parenting matters.

WLSV supports **proposals 6-1 to 6-4** and commends the ALRC for proposing that:

* a case triage process should be set up in the courts to direct matters to new specialist court pathways and alternative dispute resolution pathways
* a simplified small property claims process should be included in the new specialist court pathway
* a registrar and family consultant team based case management approach to direct matters into a specialist court pathway
* initial and ongoing risk and needs assessment and case management should be established
* new simplified court procedure to apply to small property pool matters including relaxing formal court rules and legal technicalities on a case by case basis.

WLSV notes that the team based case management approach will work effectively subject to the effective implementation of the proposed workforce capability plan and education and training in family violence.

The ALRC should consider how the proposed triage process will intersect with proposals 5-9 and 5-10. These proposalssupport the further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters and the development of effective practice guidelines for the delivery of legally assisted dispute resolution (LAFDR) for parenting and property matters. We note that in developing the guidelines, the ALRC is proposing that they include “*practices relating to referrals from and to the family courts*”. WLSV has been advocating for the increased availability and funding of LAFDR for property matters.[[15]](#footnote-15) One of the main reasons WLSV has been arguing for the increased availability of LAFDR has been the fact that many women have not been able to resolve their property disputes because of the cost and complexity and trauma associated with issuing proceedings. Another reason is that LAFDR’s already provide effective FDR for family violence victims and should be more widely available to vulnerable parties with property disputes. The new triage process could include a LAFDR referral process which would see property matters,that meet the proposed practice and funding guidelines, referred to LAFDR for resolution. The initial risk and needs assessment conducted by teams could include an assessment as to whether a referral to LAFDR should be made or not.

**Eligibility for small claims process:**

As noted in the discussion paper[[16]](#footnote-16), recommendation 2 of the Small Claims, Large Battles report delegated the development of the eligibility criteria for small claims to the Australian Government. WLSV notes that the ALRC has attempted to develop the eligibility criteria in Proposal 6-5, which sets out the proposed list of factors that the courts should consider in determining eligibility for the new simplified small claims process. WLSV supports proposal 6-5 and the focus on complexity as a factor. WLSV envisages that large property pools involving small claims should be capable of being referred to the small property list. WLSV has represented clients involved in short marriages who have experienced family violence and seek access their fair share of entitlements.

In developing the Small Claims, Large battles recommendations, WLSV also deferred the development of a case management process to the Australian Government in consultation with the family courts. Proposal 6-6 provides a list of provisions that the family courts should consider, in developing case management protocols, to support the implementation of the simplified process for matters with smaller property pools. Proposal 6-6 recommends that provision be made for case management by court registrars to establish, monitor and enforce timelines for procedural steps, including disclosure. Proposal 6-6 is in line with Recommendation 4 of the Small Claims, Large Battles report which recommended a similar provision. WLSV’s recommendation 4 recommended improving financial disclosure through the broadening of the role of registrars to increase interim case oversight to check compliance with disclosure. WLSV supports the conciliation proposal subject to legal assistance being made available to those who cannot afford private legal representation. Registrars responsible for conducting conciliation conferences would also need to have specialist family violence expertise.

## Improving financial disclosure (recommendation 4)

Despite the obligation on parties to family law proceedings to make full and frank disclosure of their financial position and the power vested in courts to enforce this requirement through penalties, two thirds of the women represented in WLSV’s Small Claims, Large Battles project experienced problems with financial disclosure by uncooperative former partners. Without adequate financial disclosure parties have no way of knowing their property and financial entitlements. WLSV is of the view that this is the number one priority reform that requires immediate attention.

Recommendation 4 of the Small Claims, Large Battles report deferred the strengthening of mandatory financial disclosure to the Australian Government and listed a number of reforms for the Australian Government to consider. Recommendation 4(a) proposed that the role of Registrars be broadened to increase case oversight to check compliance with disclosure. The ALRC should consider how this recommendation intersects with the proposed case managed triage process and the role that the team based case management process could play. Also refer to p.17 for submissions on how mandatory financial disclosure would impact on proposals to require parties to engage in FDR before an application for a property order is made to the courts.

Since the Report was launched in March this year, WLSV has been exploring, with the Australian Government, the ATO, Treasury and key representatives in the superannuation industry, the role that the ATO could play in setting up an administrative mechanism for the release of information about the identity of a former partner’s superannuation fund and its value. The ATO has indicated that the scheme is a cost effective and accessible option. Privacy considerations have been addressed in the proposal, which requires the ATO to release the information directly to the courts, upon application.

WLSV is of the view that once the administrative scheme is set up and is running, the administrative scheme could be extended to cover all other financial information that the ATO has at its disposal where there is non-compliance.

WLSV supports proposal 5-6 and reforms aimed at codifying mandatory financial disclosure in the Act and extending the provisions to FDR. Issues with non-disclosure often lead women to initiate what can be lengthy and costly legal proceedings where they might have otherwise been able to negotiate a property settlement without litigating. The proposals for a new triage process into specialist pathways will assist women to access fair financial entitlements but simply codifying the requirement in the legislation will not go far enough. Failure to make proper financial disclosure can be wilful. Obstructive former partners might withhold information about their financial situation to delay settlement and continue the pattern of economic abuse. Tara’s story highlights the extent to which perpetrators of family violence will go to try and control their former partners financially through family law processes:

***Tara’s story[[17]](#footnote-17)***

*Tara’s partner Gareth was physically and emotionally abusive towards her and their three children throughout their relationship. He was financially controlling of Tara and secretive about his income and finances. Within months of their relationship ending Gareth withdrew around $63,000 of savings from his account, of which Tara had no knowledge. With the help of lawyers, Tara sought an injunction to prevent Gareth from making further withdrawals. She also obtained procedural court orders for Gareth to make full and frank financial disclosure and account for the money he withdrew. For eight months Gareth, who had legal representation, failed to provide documents by way of financial disclosure. No negotiations or agreement could occur at a conciliation conference because Gareth’s financial situation was not known. Tara was forced to make an urgent application for property orders for her to receive 100% of the balance of Gareth’s savings. Tara, who had care of their three children, received the meagre balance of Gareth’s account which was known to her, being around $28,000.*

Proposal 5-7 does not address the problems of enforcement of non-disclosure for financially disadvantaged small claimants as outlined in the Small Claims Large Battles report:

*“Despite the consequences for failing to disclose, including penalties and the awarding of costs against the non-disclosing party, the problem of non-disclosure remains. In practice if there is a small amount of property in dispute, the court is unlikely to impose such penalties. To do so may reduce the available property pool. A fine or time in prison could jeopardise mortgage repayments or servicing other debts, particularly if a family violence victim is a full time stay at home carer. Staying or dismissing an application would prolong the financial relationship between separating parties who are trying to divide assets*.”[[18]](#footnote-18)

WLSV supports proposal 5-8 in that legal professionals currently hold obligations to advise clients on a range of matters to fulfil their professional obligations.

## Superannuation (recommendations 5 – 8)

For 21% of the women represented in the Small Claims, Large Battles Project, superannuation was the only significant asset. As noted in the Small Claims, Large Battles report and the discussion paper, the process for obtaining a superannuation split is too complex to navigate.

There are two main barriers that parties must overcome:

1. accessing the simple details of all superannuation fund interests include fund name and values;
2. navigating complex, legalistic format of superannuation splitting orders and procedural requirements.

Whilst Proposal 3–15is welcomed in that our clients generally report that they were notaware that superannuation a property asset for family law purposes, the major barriers to superannuation splitting, outlined above need to be addressed also.

1. ***Disclosure of superannuation fund information:***

Without a former spouse voluntarily disclosing the name of their superannuation fund(s), there are no effective mechanisms by which an individual can find the fund of their former partner. There are few effective disincentives for non-disclosure and alternative information finding processes, such as issuing subpoenas are costly and not guaranteed to return the required information

One of the key recommendations from the Small Claims, Large Battles report that the WLSV has been pursuing in 2018 is recommendation 5:

*“The Australian Government provide an administrative mechanism for the release of information about the identity of a former partner’s superannuation fund and its value*”

WLSV has been advocating at the federal level for the administrative mechanism to be administered through the ATO and for the release of information to be provided directly to the family law courts upon application. The ATO and key decision makers in the superannuation industry have been supportive of this proposal. Privacy issues have been addressed through the proposal requiring the information to be provided directly to the courts upon application. The proposal is timely, affordable and can be easily implemented by the ATO. If implemented, one of the barriers for vulnerable and disadvantaged women accessing a fair superannuation split will be removed.

WLSV supports recommendations 3-17 insofar as they propose that the Australian Government should develop a tool, with appropriate safeguards, to identify the superannuation accounts held by a former partner from the ATO records. WLSV urges the ALRC to consult with the WLSV and the Australian Government, on the response of the Australian Government to this proposal.

Relevant to this discussion is the proposed case management process which would assist parties to obtain full and frank financial disclosure with the help of registry staff. The ALRC may need to also consider developing the proposal further to include increased Registrar powers to which would enable Registrars to obtain the information directly from the ATO in the event that an administrative mechanism is set up.

1. ***Reducing the complexity of superannuation splitting orders***

To simplify the superannuation splitting process, recommendation 7 of the Small Claims, Large Battles report recommended that the Australian Government should allow unrepresented parties to complete a simplified form. WLSV strongly supports proposal 3-16 which will require superannuation trustees to develop standard superannuation splitting orders on common scenarios which will also satisfy procedural fairness. Our lawyers experience on a regular basis problems with superannuation trustees rejecting standard orders that may have been previously accepted, without adequate reasons.

WLSV notes that the ALRC has further developed the recommendations from the Small Claims, Large Battles recommendations and applauds the ALRC for including proposal 3-17**.** Proposal 3-17includes additional tools which will work to assist self-represented parties to access their superannuation entitlements, particularly where superannuation is the only asset. The ALRC should consider how the proposed team based triage process and small claims pathway will be interact with these processes.

***Question 3–2*** *Should provision be made for early release of superannuation to assist a party experiencing hardship as a result of separation? If so, what limitations should be placed on the ability to access superannuation in this way? How should this relate to superannuation splitting provisions?*

Please refer to Women's Legal Services Australia’s submission to the Treasury's review of the early release of superannuation benefits under compassionate and financial hardship grounds and for victims of crime compensation, which was submitted in February this year[[19]](#footnote-19).  WLSV endorsed the submission which supported the early release of superannuation in circumstances of family violence as a last resort, noting the competing policy concerns of women's financial recovery from family violence, the superannuation gap for women and women's poverty in later life.  WLSA also emphasised the ongoing responsibility of state and federal governments to meet the needs of women and children escaping family violence through the provision of adequate housing, health, social security, legal and other services. Treasury has indicated publicly that it will make recommendations to the Government in mid-2018. WLSV submits that access to the early release of superannuation should be separated from the process of the early release of superannuation as it should only be applied for as a last resort.

Dealing with joint debts (recommendation 9)

WLSV acknowledges that dealing with joint debts is a complex area. WLSV supports proposal 3-13 if the protocols that are established include measures that will strengthen the power of the court to alter debts on relationship breakdown. (Pursuant to the current 90AE provisions). Proposal 3-13 is line with Recommendation 9 of the Small Claims, Large Battles report proposed that engaging with industry bodies should be for the purpose of strengthening court powers to alter joint debts. WLSV further submits that proposal 3-14 should not be dependent on the outcome of proposal 3-13 and the two can operate in tandem.

WLSV cautions against relying solely on voluntary industry action as the solution, as it will not bring about the urgent change needed to protect victims from the impact of continued financial abuse after relationship breakdown. Since the Stepping Stones and the Royal Commission into Family Violence reports were released, a significant amount of advocacy work has gone into persuading the Australian Banking Association (ABA) to include a reference in the banking code of practice[[20]](#footnote-20) to guide a bank to negotiate a debt with one borrower without requiring the consent of the other in the context of family violence. While significant, this only addresses a small part of the issue. Reform has been slow. In the meantime, WLSV’s financial counsellor continues to represent, on a daily basis, family violence victims dealing with joint debt and economic abuse. The outcomes of applications vary on a case by case basis depending on the credit provider and professional case manager. Inconsistency in outcomes can also be addressed in the meantime through efforts aimed strengthening court powers to make orders.

In consideringproposal 3-14**,** WLSV has formed the view that it needs to be developed further. The courts can and should play a role in altering joint debts and that the Australian Government should work at an urgent pace to explore options to strengthen the current provisions in the Act[[21]](#footnote-21). WLSV supports the proposal that the Australian Government should consider relaxing the requirement that it not be foreseeable, at the time the order is made, that to make the order would result in the debt not being paid in full, in appropriate cases. In the Small Claims, Large Battles report this requirement was highlighted as one of the major barriers to courts making orders.[[22]](#footnote-22) Relaxing this requirement however only addresses one of the barriers that courts face in exercising powers under s.90AE.

Other barriers include legal costs and process requirements that creditors are obliged to follow. As noted in the discussion paper, applying for an order under s.90AE exposes the party applying for an order to the legal costs of the third party creditor who must be joined to the proceedings, with no guarantee of resolving the debt issue.[[23]](#footnote-23) The Stepping Stones report also explained the main reasons why the family law courts do not routinely exercise their powers under s.90AE. The main reason being because banks and other creditors generally oppose such orders because of the possibility that the debt will not be repaid and they will have to reassess each party’s capacity to repay the loan.[[24]](#footnote-24)

WLSV submits that the ALRC should further consider how the barriers outlined could be addressed to make it easier for the courts to exercise its powers under s.90AE to resolve joint debts. WLSV submits that one way of assisting the courts would be to include additional factors in s.90AE to guide and assist the court in the exercise of the discretion as follows:

* the financial capacity of the parties
* the financial hardship caused by the debt
* whether a benefit has been received
* the impact (if any) the debt was having on the credit report of a party

A consideration of these factors will also equip the credit provider with all of the information needed to make an informed commercial decision about the debt.

The ALRC should also consider how the proposed new adjudication landscape, outlined in the discussion paper, may assist the courts to deal directly with joint debts. The new streamlined case management process may lead to reduced costs and could involve the greater involvement of registrars in case managing applications which seek to resolve disputes around joint debts. If proposals 13-3 and 13-4 are successfully implemented the ALRC may wish to consider how joint debt applications can be referred to the small claims pathway.

## Responding to family violence (recommendations 10-12)

The main intention behind recommendation 10(a) and (b) of the small claims, large battles report was the codification in legislation of what is already understood and recognised by the courts when making *Kennon* adjustments: family violence, including financial abuse and control, significantly impacts women’s ability to financially contribute in a relationship and will impact their future financial position.[[25]](#footnote-25) It is encouraging that the ALRC has clearly acknowledged, in the discussion paper, that property division under the current family law system relates directly to the short and long term economic security of family violence victim following separation.

WLSV supports the discretionary approach to the division of property which should be determined on a case by case basis. WLSV congratulates the ALRC for including proposal 3-11 and notes that some of the concerns raised in the discussion paper relating to the factual determination of family violence could be resolved through WLSV’s preliminary hearings proposal to determine family violence early. WLSV supports the proposal to take into account future needs as proposed by Belinda Fehlberg and Lisa Sarmas. [[26]](#footnote-26) WLSV’s research has consistently demonstrated the long term financial impact that relationship breakdown has been having on women and children[[27]](#footnote-27). WLSV supports this proposal which will provide for the long term economic security of women and children who have experienced family violence.

# 6.Systems abuse reform

ALRC proposals and questions considered in this section include:

* **Proposal 6** - New team based case managed triage process and specialist pathways
* **Proposal 8-3** – family violence definition to include misuse of systems and processes
* **Proposal 8-4** - dismissal of proceedings that are frivolous, vexatious, an abuse of process
* **Proposal 11-** information sharing reforms

In WLSV’s submission in response to the issues paper, Mae’s story was included to demonstrate the lived experience of many family violence victims who are dealing with skilled perpetrators working the system to commit systems abuse. WLSV acknowledges that the ALRC has attempted to address the problems of systems abuse and supports the extension of the family violence definition outlined in proposal 8-3. WLSV also supports proposal 8-4 and believes that this will also go some way to addressing the problems that family violence victims face in the court system.

The new adjudication landscape as set out in chapter 6 of the discussion paper and information sharing reforms will also work to ensure that perpetrators will be prevented from using the system to continue the abuse.

WLSV notes that safeguards need to be put in place to protect the safety of victims of family violence and to prevent unintended consequences that information sharing may cause.

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1. Discussion paper p. 63 [↑](#footnote-ref-1)
2. Recommendation 7. [↑](#footnote-ref-2)
3. Family law amendment (Family Violence and Cross-Examination of parties) bill 2018https://www.aph.gov.au/Parliamentary\_Business/Bills\_Legislation/Bills\_Search\_Results/Result?bId=r6152 [↑](#footnote-ref-3)
4. Section 68ZR [↑](#footnote-ref-4)
5. Discussion paper p.14 [↑](#footnote-ref-5)
6. <https://familycourt.wa.gov.au/> [↑](#footnote-ref-6)
7. Ibid 4 [↑](#footnote-ref-7)
8. Ibid 4 Refer to explanatory memorandum Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 [↑](#footnote-ref-8)
9. Ibid 8 – in child related proceedings only [↑](#footnote-ref-9)
10. Ibid 8 in child related proceedings only [↑](#footnote-ref-10)
11. Proposals 2-2, 2-10 [↑](#footnote-ref-11)
12. Women’s Legal Service Victoria, Small Claims, Large Battles: Achieving Economic Equality in the Family Law System, 2018, Recommendation 11 [↑](#footnote-ref-12)
13. Discussion paper p.46 [↑](#footnote-ref-13)
14. Women’s Legal Service Victoria, *Small Claims, Large Battles: Achieving economic equality in the family law system* (2018) [↑](#footnote-ref-14)
15. Ibid 14, recommendation 11 [↑](#footnote-ref-15)
16. Discussion paper p.130 [↑](#footnote-ref-16)
17. Ibid 14 [↑](#footnote-ref-17)
18. Ibid 14 p.24 [↑](#footnote-ref-18)
19. http://www.wlsa.org.au/uploads/submission-resources/Early\_Release\_of\_Super\_WLSA\_submission\_14\_Feb\_2018.pdf [↑](#footnote-ref-19)
20. The Australian Banker’s Association issues a Code of Banking Practice to guide good banking practices [↑](#footnote-ref-20)
21. S.90AE FLA [↑](#footnote-ref-21)
22. P.30 [↑](#footnote-ref-22)
23. P.30 [↑](#footnote-ref-23)
24. Stepping stones: Legal barriers to economic equality after family violence (2015) p29 [↑](#footnote-ref-24)
25. Ibid 16 p.35 [↑](#footnote-ref-25)
26. Belinda Fehlberg and Lisa Sarmas, “Australian family property law - Just and Equitable outcomes?” (2018) 32 Australian Journal of Family Law [↑](#footnote-ref-26)
27. Ibid 14 & 24 [↑](#footnote-ref-27)