



Women's Legal Services Australia

# ALRC Review of the Family Law System

## Response to Discussion Paper

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## Table of Contents

About WLSA .....	2
Definitions and Terminology.....	3
General Comments .....	4
Response to Terms of Reference .....	5
Chapter 1: Executive Summary.....	6
Chapter 2: Education, Awareness and Information.....	7
Chapter 3: Simpler and Clearer Legislation.....	13
Chapter 4: Getting Advice and Support.....	37
Chapter 5: Dispute Resolution.....	41
Chapter 6: Reshaping the Adjudication Landscape .....	54
Chapter 7: Children in the Family Law System .....	66
Chapter 8: Reducing Harm.....	70
Chapter 9: Additional Legislative Issues .....	75
Chapter 10: A Skilled and Supported Workforce .....	81
Chapter 11: Information Sharing .....	88
Chapter 12: System Oversight and Reform Evaluation .....	96
Acknowledgments.....	98
Further Resources and Information .....	98

## About WLSA

Women's Legal Services Australia (WLSA) is a national network of community legal centres specialising in women's legal issues, which work to support, represent and advocate for women to achieve justice in the legal system. We seek to promote a legal system that is safe, supportive, non-discriminatory and responsive to the needs of women. Some of our centres have operated for over 30 years.

Our members provide free and confidential legal information, advice, referral and representation to women across Australia in relation to legal issues arising from relationship breakdown and violence against women. Our legal services are directed to vulnerable and disadvantaged women, most of whom have experienced family violence. Therefore, our primary concern when considering any proposed legal amendments is whether they will make the legal system fairer and safer for our clients – vulnerable women.

Our members' principal areas of legal service work are family violence (family violence intervention orders), family law, child protection and crimes compensation. Our members also deliver training programs and educational workshops to share our expertise regarding effective responses to violence and relationship breakdown.

Finally, both WLSA and its individual member services work to contribute to policy and law reform discussions, primarily focused on family violence, to ensure that the law does not unfairly impact on women experiencing violence and relationship breakdowns.

We are informed by a feminist framework that recognises the rights of women as central.

## Definitions and Terminology

Below is a list of the abbreviations used in this submission:

AIFS	Australian Institute of Family Studies
ALRC	Australian Law Reform Commission
ANROWS	Australia's National Research Organisation for Women's Safety
AWAVA	Australian Women Against Violence Alliance
BFA	Binding Financial Agreement
CALD	Culturally and Linguistically Diverse
CLC	Community legal centres
CFDR	Co-ordinated Family Dispute Resolution
DP	ALRC Discussion Paper
IHRA	Intersex Human Rights Australia (formerly OII Australia)
FCA	Family Court of Australia
FCC	Federal Circuit Court
The Family Court Restructure Bills	Federal Circuit and Family Court of Australia Bill 2018, Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018
FDR	Family Dispute Resolution
FLC	Family Law Council
FVPLS	Family Violence Prevention Legal Service
ICL	Independent Children's Lawyer
LAC	Legal Aid Commissions

Other Measures Bill	Family Law Amendment (Family Violence and Other Measures) Bill 2018
LGBTIQ+	Lesbian Gay Bisexual Transgender Intersex Queer
PWDA	People with Disabilities Australia
RCFV	Royal Commission into Family Violence
VLA	Victoria Legal Aid
WLSA	Women's Legal Services Australia
WLS NSW	Women's Legal Service NSW
WLSV	Women's Legal Service Victoria

## General Comments

### Need for broader consultation to implement specific proposals

Throughout the ALRC Discussion Paper (DP), there is reference to the need for consultation with “community groups including children and young people, Aboriginal and Torres Strait Islander people, people from CALD, LGBTIQ people and people with disability”.

WLSA agrees with the need for consultation with the above groups, but considers that consultation needs to be broader and include community groups such as:

- Older people
- Faith communities
- Rural, regional and remote communities
- Women in prison
- Women working in the sex industry

This is also consistent with the community grounds suggested in the Victorian Royal Commission into Family Violence.<sup>1</sup>

Reforms which directly impact on Aboriginal and Torres Strait Islander people should ultimately be led by Aboriginal and Torres Strait Islander controlled and led organisations.

### Need for adequate funding

WLSA remains concerned about lack of adequate funding across the entire family law system, including for both generalist and specialist legal assistance services, including specialist women's legal services and programs, which we believe leads only to further

<sup>1</sup> See Volume V accessed at <http://files.rcfv.com.au/Reports/Final/RCFV-All-Volumes.pdf>

downstream costs and must be reversed for a future effectual and robust family law system.

WLSA agrees with the comment by Women's Legal Service Victoria (WLSV) that "those who are not able to afford to pay for legal representation and funded accordingly should be able to access legal representation."<sup>2</sup>

Prompt access to justice and to effective legal representation is critical for women and children seeking to escape family violence. Many women who are victim-survivors of family violence are also the victims of economic abuse, and are simply unable to access legal advice without legal assistance services, such as community legal centres, including specialist women's legal services and programs; specialist community controlled Aboriginal and Torres Strait Islander legal services, such as Family Violence Prevention Legal Services and Aboriginal and Torres Strait Islander Legal Services; and Legal Aid Commissions. This in turn affects their capacity to access the court system and other services, and their ability to escape their violent circumstances.

WLSA accepts that funding for the family law system is not unlimited. However, in 2014 the Productivity Commission recommended the legal assistance sector receive an immediate annual \$200 million increase in funding for civil law.<sup>3</sup> In determining the funding priority to be given to the various sectors of the family law system, priority must be given to the services which support the most vulnerable families (and children) in that system.

We refer to and reiterate our previous comments regarding funding for the family law system and legal assistance services in our earlier submission to the ALRC Issues Paper on the Review of the Family Law System and our recommendation that there needs to be an increase of funding for all aspects of the family law system, including:<sup>4</sup>

- legal assistance services providers
- family dispute resolution (FDR),
- specialist social support services,
- contact services,
- family consultants,
- judicial officers; and
- ongoing training for those working in the family law system.

## Format of this Submission

This submission will respond to the questions and proposals in the DP under the headings of each of the 12 chapters.

We don't comment specifically on each proposal but where we respond to a proposal or question this has been noted for ease of reference.

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<sup>2</sup> See WLSV Submission in response to this ALRC Discussion Paper.

<sup>3</sup> Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report - Overview*, 2014, p. 63, Recommendation 21.4.

<sup>4</sup> Accessed at: [http://www.wlsa.org.au/uploads/submission-resources/WLSA\\_submission\\_to\\_ALRC\\_Review\\_of\\_the\\_Family\\_Law\\_System\\_%28fa%29.pdf](http://www.wlsa.org.au/uploads/submission-resources/WLSA_submission_to_ALRC_Review_of_the_Family_Law_System_%28fa%29.pdf), p 11-12.

## Chapter 1: Executive Summary

### Public Health Approach

The DP proposes the use of a public health approach to frame its plan for change. In Australia, the public health model has been recognised by all governments as the appropriate framework for working to ensure the safety and wellbeing of children, as set out in the National Framework for Protecting Australia's Children.

The DP states a 'public health approach' will assist to identify risk indicators and develop mechanisms for responding to them. This approach comprises three levels of intervention – primary, secondary and tertiary interventions.

WLSA notes that such an approach must also take into account the harm caused to many family violence victim-survivors by participating in the family law system, including re-traumatisation and anxiety resulting from coming back into contact with perpetrators of violence and re-visiting past trauma. Such harm must be addressed in any redevelopment of the family law system and be reflected upon on an ongoing basis.

WLSA supports the proposed three levels of intervention but note the need to equally prioritise tertiary interventions to ensure the safety and recovery needs of women and children affected by family violence are addressed.

### Collaborative joined-up service delivery

The family law system is delivering services to many families at a time of heightened vulnerability. Interaction with the system offers a critical opportunity for interventions with families that can potentially reduce the factors that might compromise a child's wellbeing. The DP accepts that data [from AIFS] shows that safety concerns for children are now a common feature of the family law system's workload, and that many of its client families have multiple legal and support needs associated with issues such as family violence, mental illness or substance misuse. The DP notes the need for professional practices that do not disempower clients but maximise their control over the resolution of their problems.

WLSA agrees that a central part of redeveloping the family law system should involve a move away from inward-looking approaches towards practices that emphasise collaborative and joined-up service delivery, including with services and courts outside the family law system.

## Chapter 2: Education, Awareness and Information

### Response to Proposals

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

**Proposal 2–1** The Australian Government should develop a national education and awareness campaign to enhance community understanding of the family law system.

WLSA sees benefit in a national education and awareness campaign to help to address cultural attitudes which ultimately shape the response to family violence and family law in Australia.

It is the experience of our members that a lot of unsafe outcomes for women and children arise due to the pressure that is placed or exerted on women which is based on a misunderstanding about the family law system.

In addition to the matters identified in the DP, the awareness campaign should include:

- focus on the best interests of the children and rights and safety of children as the primary focus (and emphasise that parents have obligations, not rights or entitlements, to their children);
- explain practical ways in which parents and others can act in the best interests of their children (for example, it is not in the best interests of children to be exposed to conflict or family violence etc); and
- clearly explain what family violence is, how it impacts on children and how best interests and safety means that the family law system will prioritise protecting children from a violent parent. This should include information to raise awareness of the more subtle covert ways a parent coerces and controls and not just focus on the obvious examples of family violence.

WLSA agrees with the DP that the campaign should prioritise children's safety but consider this needs to be expanded to include the safety of women in the family as well.

Children's safety depends on their mother also being safe.

#### Consultation for national education and awareness campaign (Proposal 2–2)

**Proposal 2–2** The national education and awareness campaign should be developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations and be available in a range of languages and formats.

WLSA agrees that the national education and awareness campaign should be developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations and the additional community groups

referred to earlier in this submission to ensure the content meets the specific needs of people from such communities.

Noting the significant number of family law matters in which family violence is a factor, WLSA considers that consultation should be expanded to include peak family violence organisations and those representing women including but not limited to:

- Our Watch
- ANROWS
- WLSA
- AWAVA
- National Family Violence Prevention Legal Services Forum
- State Domestic Violence bodies (e.g. DV Vic, DV NSW etc)
- National Association of Services Against Sexual Violence
- Elder Abuse and Older Persons Rights groups (noting that this is a vulnerable group in society who are often involved in their own family law matters as well as those of their children and can be more likely than other groups to have an understanding of the family law system which is not accurate or up to date).

The information needs to be available in a range of languages and formats. Broad consultation will assist to identify the specific formats, language and means of accessibility required to improve how the information is both accessed and understood.

### **Promotion of campaign through health and education systems (Proposal 2-3)**

**Proposal 2–3** The Australian Government should work with state and territory governments to facilitate the promotion of the national education and awareness campaign through the health and education systems and any other relevant agencies or bodies.

WLSA considers there is benefit of a family law education campaign being taught as part of secondary school curriculums. The current rate of divorce and separation in Australia means that more families than not have experienced divorce or separation. The effects this can have on children can be traumatic.

WLSA considers a good example of an early intervention program could be an education campaign in secondary schools which:

- educates children about their rights (as children in proceeds);
- teaches them the principles of the family law system being focused on the best interests and safety of children; and



- Teaches them about family violence and how it develops, what is acceptable behaviour and how family violence is damaging (the aim being to instil in them the core principles of being children and safety focused for when they become parents themselves in the next decade or so).

### **Need for proper funding to improve referral relationships to family law services (Proposal 2–4)**

**Proposal 2–4** The Australian Government should work with state and territory governments to support the development of referral relationships to family law services, including the proposed Families Hubs (Proposals 4–1 to 4–4), from

- universal services that work with children and families, such as schools, childcare facilities and health services; and
- first point of contact services for people who have experienced family violence, including state and territory specialist family violence services and state and territory police and child protection agencies

WLSA is supportive of increased development of referral relationships to family law services, including from universal services working with families and first contact services for people who have experienced family violence.

However, our members note that many in the community who would be referred under the above proposal could not afford private legal representation and would be seeking the services of legal assistance services, including CLCs and FVPLS.

As raised earlier there needs to be increased funding to legal assistance services, including community legal centres, including specialist women’s legal services and programs as well as specialist Aboriginal and Torres Strait Islander community controlled legal services to respond to increased referrals.

### **Family law system information package (Proposals 2-5 to 2-8)**

**Proposal 2–5** The Australian Government should convene a standing working group with representatives from government and non-government organisations from each state and territory to:

- advise on the development of a family law system information package to facilitate easy access for people to clear, consistent, legally sound and nationally endorsed information about the family law system; and
- review the information package on a regular basis to ensure that it remains up-to date.

**Proposal 2–6** The family law system information package should be tailored to take into account jurisdictional differences and should include information about:

- the legal framework for resolving parenting and property matters;
- the range of legal and support services available to help separating families and their children and how to access these services; and
- the different forums and processes for resolving disputes.

**Proposal 2–7** The family law system information package should be accessible in a range of languages and formats, including:

- electronically via a central website;
- as printed material available at key entry points to the family law system and universal services; and
- through interactive means, including a national telephone helpline and a national web-chat service.

**Proposal 2–8** The family law system information package should be:

- developed with reference to existing government and non-government information resources and services;
- developed in consultation with Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations; and user-tested for accessibility by community groups including children and young people, Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse communities, LGBTIQ people and people with disability.

WLSA agrees that:

- There should be a standing working group convened with representatives from government and non-government organisations from each state and territory to advise on the development of a family law system information package to facilitate easy access to clear, consistent, legally sound and nationally endorsed information about the family law system;
- The package should be tailored to take into account jurisdictional differences and should include information about:
  - the legal framework for resolving parenting and property matters;
  - the range of legal and support services available to help separating families and their children and how to access these services; and
  - the different forums and processes for resolving disputes.
- The package needs to be national and not just restricted to those states who are participating jurisdictions in the federal family law courts to ensure that Australians are aware of the family law system as it may operate anywhere in Australia. We note that many families move interstate and it is common for different family members to be in different states and territories around Australia and require legal advice about the interaction between the Family Court of Western Australia and federal family law courts.
- The package should be developed with reference to existing government and non-government information resources and services and developed in consultation with all of the community groups referred to earlier in this submission.
- Again, broad consultation is required to inform the range of languages and formats that the information package should be available in to ensure it is accessible by

anyone needing the information. This could include electronically via a central website as well as hard copy material available at key entry points to the family law system and universal services (including health justice partnerships), through interactive means, including a national telephone helpline and a national web-chat service as well as in person services noting that for many people face to face communication can be the most (and sometimes only) effective means of communication.

Technology should assist to communicate but not replace in person communication and dissemination of information. CLCs and the legal assistance sector plays an information role in this through the community legal education services they provide to and with local community groups. Consideration should be given to specifically funded CLCs who already are connected with their local communities to perform this in person information dissemination role.

- It should be user-tested for accessibility by community groups.

### **Other information to include in Package**

Noting how many family law matters involve family violence, WLSA members consider that the information package should also include an overview of how the family law system interacts with other state based systems including care and protection, criminal law and relevant civil law (noting that financial abuse often involves the abuse of documents including powers of attorneys as well as through the creation of corporate entities and complex trust structures).

On a practical level, it is noted that the wording of the information package should be plain language and as straightforward as possible.

WLSA members consider the information package should be circulated as widely as possible once available. Consideration should be given to circulation via resources such as Austlii,<sup>5</sup> as well as through other channels to reach as many potential service users in Australia as possible.

WLSA endorses the recommendations made by NFVPLS that the information package:

- be co-designed with Aboriginal and Torres Strait Islander communities, organisations and peak bodies with relevant specialist expertise;
- be accompanied by appropriate resourcing for Aboriginal and Torres Strait Islander organisations to engage in the consultation process, including resourcing for peak bodies such as the National FVPLS Forum to participate in the proposed standing working group (Proposal 2-5);
- include information about specialist family violence ACCOs such as FVPLSs including local service provision and referral pathways
- be available in all relevant local Aboriginal and Torres Strait Islander languages; and

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<sup>5</sup> Austlii is a free public resource which is expanding into publishing free Law Handbooks as part of its community pages. E.g. the WA Law Handbook is available at <http://austlii.community/foswiki/WALawHbk/WebHome>, the NT Law Handbook available at <http://austlii.community/foswiki/NTLawHbk/NTLawHandbook>

- be available in a range of formats, such as visual and video materials in addition to written resources.
- The national information package must be accompanied by locally devised and targeted face to face community legal education to successfully reach and be accessible to Aboriginal and Torres Strait Islander communities.
- An investment into FVPLSs to lead and supplement the national information package with tailored and targeted community legal education, information and resources for Aboriginal and Torres Strait Islander victim/survivors of family violence is essential to ensure the relevance, effectiveness and cultural safety of the proposal for Aboriginal and Torres Strait Islander women, children and families.

## Chapter 3: Simpler and Clearer Legislation

WLSA supports the simplification of legislation as a way to allow for greater access to the family law system, as long as there is adequate consideration of the impact of any changes on safety to women and children.

Key provisions should be tested and any testing including focus groups must include members of specific community groups referred to earlier in the submission.

WLSA considers that the most important legislative change required is the removal of the presumption of equal shared parental responsibility and it does not seem this is being specifically proposed in the DP.

WLSA considers removal of the presumption is required to simplify the legislative pathway. This is discussed further below in this chapter.

### Response to Proposals about Children's Care Arrangements

#### Redraft to simplify the Family Law Act and subordinate legislation (Proposal 3-1)

**Proposal 3–1** The *Family Law Act 1975* (Cth) and its subordinate legislation should be comprehensively redrafted with the aim of simplification and assisting readability, by:

- simplifying provisions to the greatest extent possible;
- restructuring legislation to assist readability, for example by placing the most important substantive provisions as early as possible;
- redrafting the Act, Regulations and Rules in ordinary English, by modernising language, and as far as possible removing terms that are unlikely to be understood by general readers, such as legal Latin, archaisms, and unnecessarily technical terms;
- user testing key provisions for reader comprehension during the drafting process, for example, through focus groups, to ensure that the legislation is understood as intended;
- removing or rationalising overlapping or duplicative provisions as far as possible;
- removing provisions establishing the Family Court of Australia and the Australian Institute of Family Studies to separate legislation;
- removing provisions defining parentage for the purposes of Commonwealth law to separate legislation; and
- considering what provisions should be contained in subordinate legislation rather than the Act.

WLSA agrees that relocating the provisions that deal with establishing the Family Court of Australia and the Australian Institute of Family Studies and that define parentage to separate legislation would substantially reduce the length of the *Family Law Act 1975* (Cth), and make it easier for court users and professionals to read and understand the substantive aspects of the Act.

The *Family Law Act 1975* (Cth) should be redrafted with plain language considerations in mind and WLSA agrees that the Act should be redrafted to remove terms that are unlikely to be understood by general readers, such as legal Latin, archaisms, and unnecessarily technical terms.

Examples of such terms which should be removed to enhance court users' understanding the *Family Law Act 1975* (Cth) include:

- “Leave” of the court – a term such as ‘permission’ is more readily understood of lay persons. Leave has a legal meaning but is not understood to mean permission by those outside of the legal community and is particularly difficult for people for whom English is not their first language.
- “Minute”, e.g. minute of final orders sought – this term is again confusing as it has multiple meanings in English and has a legal meaning but is not understood to mean permission by those outside of the legal community and is particularly difficult for people for whom English is not their first language.

### **Review of Family Court forms (Proposal 3-2)**

**Proposal 3–2** Family law court forms should be comprehensively reviewed to improve usability, including through:

- only gathering information that is absolutely required, and simplifying how information is gathered (eg through use of check-boxes);
- using smart forms, to pre-populate information from previously completed forms (such as name and address), ask contextual questions based on previous answers, and provide contextual help within the form;
- using real-time help functions, such as a live-chat functionality, and links to audio-visual help;
- providing collaborative functions in circumstances where forms require information from both parties to allow them both to easily enter information;
- ensuring that all forms are drafted in ordinary English and where possible providing alternative forms in Easy English to assist litigants with limited literacy or English skills;
- providing a paper form for use by individuals without access to technology; and
- providing a single set of forms for all courts exercising jurisdiction under the *Family Law Act 1975* (Cth).

WLSA supports the review and simplification of court forms, but again cautions that safeguards need to be put in place to ensure the proper and safe disclosure of family violence.

For example, the risk to court users may be reduced if there was provision with the forms themselves to have freeform comments to include any information which is not covered by the form which might be relevant to the judge in that particular registry hearing the family law matter before them.

WLSA also cautions against the use of check boxes noting that there is a tendency if a court user doesn't understand the question to 'just tick a box if in doubt'. A free form comment box is a better alternative to allow the court user to explain in their own words what information they have or what their understanding is of the relevant questions being asked. A difficulty with the current forms is that when they are locked down, this can result in important information being omitted if the court user doesn't understand how that

information fits into other parts of the form (or it might be something for which there is no current question on the form).

Forms should be drafted so they are accessible for those who experience barriers to accessing the family law system. Consultation with legal assistance services would be best to capture this feedback.

As discussed in our earlier submission to the ALRC Issues Paper on the Review of the Family Law System we again call for a revision of forms to allow for greater inclusivity. For example, forms should provide the option for a choice of preferred pronouns that are easy to implement and vital for transgender and people with intersex variations.<sup>6</sup>

Consultation should be broadened to include the community groups referred to earlier to ensure that forms meet the needs of everyone in the community.

### **Simplifying Forms should not be instead of legal representation**

WLSA agrees with NFVPLS that:

- the simplification of family court forms must not be seen to legitimise measures supporting increased self-representation in family law matters across the board.
- self-representation is not appropriate for vulnerable clients such as Aboriginal and Torres Strait Islander victim/survivors of family violence,
- culturally safe legal representation at all stages of family law proceedings is vital.
- Without ongoing access to culturally safe legal advice and representation, Aboriginal and Torres Strait Islander victim/survivors are at increased risk of being pressured or intimidated by the perpetrator into agreeing to unsafe, unfair or unworkable arrangements, potentially leaving them and their children at risk of continuing or escalating violence.

### **Single set of forms for all courts exercising family law jurisdiction (Proposal 3-2)**

WLSA is supportive of initiatives that reduce and simplify the procedural requirements of the family law system to increase its accessibility to those needing urgent assistance, especially in relation to orders to increase safety of women and children experiencing or at risk of family violence.

However, while there is merit in having a single set of forms for all courts exercising jurisdiction under the *Family Law Act 1975* (Cth), there is also concern about what those forms would look like noting the increased number of courts which would be required to consult and agree on the forms.

WLSA members are unsure how practical this proposal is, when, for example, parties in family violence protection order proceedings in a state magistrate's court appear before that court seeking some limited family law orders. The benefits of the 'one judge/one family' principle may be undermined if those parties were unable to have urgent family

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<sup>6</sup> Accessed at: [http://www.wlsa.org.au/uploads/submission-resources/WLSA\\_submission\\_to\\_ALRC\\_Review\\_of\\_the\\_Family\\_Law\\_System\\_%28fa%29.pdf](http://www.wlsa.org.au/uploads/submission-resources/WLSA_submission_to_ALRC_Review_of_the_Family_Law_System_%28fa%29.pdf), p 17-18.



law orders made and were required to have the matter adjourned and file further forms.

Forms should be used to assist parties convey relevant information before the Court but discretion should always be maintained to ensure that urgent applications that have substantive merit aren't rejected because they fail to meet the strict formatting standards.

### **Technology and use of smart forms (Proposal 3-2)**

WLSA welcomes the recognition made by the ALRC in the DP that the increased use of online and smart forms still requires the availability of paper forms for use by individuals who do not have access to technology or the technological literacy to use them safely.

The use of smart forms in the legal assistance service sector can also present barriers and issues with assisting clients to use those forms when the services themselves often lack the technology to assist with this.

For example, at present through the Commcourts Portal access is only provided to law firms who file a Notice of Address for Service or for unrepresented parties those who are sufficiently technologically literate to register to access. Many of the clients who present to WLSA members do not understand how to use Commcourts Portal and our members (as legal assistance services) are not funded to have the resources to go on the court record for every client they assist. This can present problems with providing such clients with advice on how to complete forms.

The use of collaborative forms may also be problematic where one of the parties is not technologically literate and/or requires discrete assistance from the legal assistance service. Consideration ought to be given for guidelines as to when parties are required to complete collaborative forms. WLSA members can envisage situations where the financial stronger party engages private legal representation and wishes to use collaborative forms and the other financially weaker party feels pressured into this even though it may make it difficult for that party to obtain legal advice and assistance to do so. Imposing a requirement to use collaborative forms may in such situations inflame or exacerbate conflict between the parties.

### **Redrafting *Family Law Act 1975* (Cth) – focus on safety for parenting matters (Proposals 3-3 to 3-6)**

**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'.

**Proposal 3–4** The objects and principles underlying pt VII of the *Family Law Act 1975* (Cth) set out in s 60B should be amended to assist the interpretation of the provisions governing parenting arrangements as follows:

- arrangements for children should be designed to advance the child's safety and best interests;
- arrangements for children should not expose children or their carers to abuse or family violence or otherwise impair their safety;
- children should be supported to maintain relationships with parents and other people who are significant in their lives where maintaining a relationship does not expose them to abuse, family violence or harmful levels of ongoing conflict;



- decisions about children should support their human rights as set out in the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities; and
- decisions about the care of an Aboriginal or Torres Strait Islander child should support the child's right to maintain and develop the child's cultural identity, including the right to:
  - (a) maintain a connection with family, community, culture and country; and
  - (b) have the support, opportunity and encouragement necessary to participate in that culture, consistent with the child's age and developmental level and the child's views, and to develop a positive appreciation of that culture.

WLSA commends the prioritisation of safety in Proposal 3-3 and welcomes the acknowledgement that safety is paramount and should be separately recognised in family law legislation.

WLSA agrees that the principle currently in s60CA 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'.

However, while we commend the prioritisation of safety, we feel that perhaps more is needed to ensure the term 'safety' covers all that may be encompassed in family violence.

Current required considerations may be considered broader than the term 'safety', for example:

- the current primary consideration 'the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence' under s60CC(2)(b) may be considered to be broader than the term 'safety'; and
- the current additional considerations under s60CC(3) include the history of how parties have behaved in the past and any inferences that can be drawn from family violence restraining orders.

Any change to the *Family Law Act 1975* (Cth) thus must include safeguards to ensure the term 'safety' in a broader sense which encompasses psychological and other non-physical harms and there must be adequate focus on the history of abuse. We recommend consideration be given to either:

- including factors that encompass past behaviour or history of family violence; and/or
- a requirement for the proposed factors to be considered in light of past behaviour or the history of family violence.

Further consultation, research and testing is needed, particularly amongst different community groups including Aboriginal and Torres Strait Islander communities, CALD communities, people with disability, LGBTIQ communities and the other community groups referred to earlier in this submission, in order to determine how these proposed provisions will operate and be interpreted in practice.

With the above comments in mind, WLSA agrees, in principle:

- with the amended objects and principles;
- the guidance for determining arrangements that best promote a child's safety and best interests currently set out in s60CC of the *Family Law Act 1975* (Cth) should be simplified to assist in their interpretation; and
- the factors to determine the best interests of children as set out in s60CC of the *Family Law Act 1975* (Cth) be simplified.

### **Determining best interests - compulsory considerations (Proposal 3-5)**

**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.

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

However, WLSA believes further consideration is required in regards to the points discussed in the sub-heading above.

### **Specific considerations for Aboriginal and Torres Strait Islander children (Proposal 5-6)**

**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.

WLSA agrees in principle that 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.

WLSA endorses NVPLS recommendation that connection to culture is a foundational right for Aboriginal and Torres Strait Islander children, not simply one among many 'additional considerations'.

WLSA agrees with NVPLS that it is essential that this provision applies equally to all Aboriginal and Torres Strait Islander children while, at the same time, recognising that the implementation of this provision will mean different things for each and every Aboriginal and Torres Strait Islander child.

WLSA recommends there be further consultation with Aboriginal and Torres Strait Islander led organisations and legal assistance services including FVPLS in relation to:

- how this should specifically be worded in the Act;
- any guidance material to assist with the interpretation of the Act;
- cultural awareness and competency training for judicial officers and all professionals involved in the family law system

to better understand the cultural needs and rights of Aboriginal and Torres Strait Islander children and to ensure that the legislative reform has a meaningful effect in practice.

### **Remove the presumption for equal shared parental responsibility (ESPR)**

WLSA considers that the most important legislative change required is the removal of the presumption of ESPR, and that its removal is required to simplify the legislative pathway.

WLSA very strongly considers, and has long advocated for the presumption of ESPR to be removed, on the basis that:

- the terminology creates a perception in the public that it means equal time;
- it is confusing to understand the legislative pathway to determining care arrangements for children if the presumption applies; and
- this confusion leads to increased drain of resources as it increases the time required for judges to write their judgements and increases the time it takes lawyers, including those from legal assistance services, to explain to their clients.

WLSA agrees with the submission of WLSV that:<sup>7</sup>

- the ALRC should be commended 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";
- but that the proposals should include a clear proposal that the presumption for equal shared parental responsibility will be removed to avoid any confusion.

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<sup>7</sup> See WLSV Submission in response to this ALRC Discussion Paper.

WLSA also agrees with the submission of NVPLS that it is crucial to challenge the assumption that working towards the ultimate goal of unsupervised time/contact is always possible and desirable.

There should be no requirement to consider equal or shared and significant time.

WLSA considers more clarity is required around what will replace the ESPR. There needs to be more information as to how removing the ESPR will work in practice. For example, what factors will be considered for decision making responsibility and practical arrangements? WLSA contends these factors need to be tied in with safety and best interests factors.

We also propose severability of decision making for both long and short term decisions in family violence matters subject to orders of the court and post order reviews.

### **Terminology – parental responsibility (Proposal 3-7)**

**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.

WLSA agrees there is merit in replacing the term ‘parental responsibility’ with a more easily understood term and that it should be made clearer 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.

Replacing the term ‘parental responsibility’ with a more understandable term like ‘decision making responsibility’ may assist in cases where the carer of the child is not the child’s parents and where it might inflame conflict within that family for the carer to be seeking orders for ‘parental responsibility’ (i.e. there may be a perception that the carer is trying to replace the parents in the life of the child).

However, we don’t consider this will make a significant difference as it is not the term *per se* that creates the issues. Changing the wording to ‘parental decision making’ will not lead to clarity in outcomes for families. It is the existence of the ESPR and the convoluted pathway it creates when applied that is the problem.

As stated above, the presumption of ESPR should be removed.

The criteria should be the safety and best interests of the child with consideration of the principles in Proposal 3.5 as discussed above.

### **Include *Rice v Asplund* principle in *Family Law Act 1975* (Cth) (Proposal 3-8)**

**Proposal 3–8** The *Family Law Act 1975* (Cth) should be amended to explicitly state that, where there is already a final parenting order in force, parties must seek leave to apply for a new parenting order, and that in considering whether to allow a new application, consideration should be given to whether:

- there has been a change of circumstances that, in the opinion of the court, is significant; and
- it is safe and in the best interests of the child for the order to be reconsidered.

WLSA supports this proposal.

To assist parties make this application for leave, there should be guidance on the Family Court website with pro forma forms and templates which prompt them to explain the change of circumstances and guides them on how to seek leave (and what leave is).

### **Development of multi-disciplinary commission to oversee family law resources (Proposal 3-9)**

**Proposal 3–9** The Attorney-General's Department (Cth) should commission a body with relevant expertise, including in psychology, social science and family violence, to develop, in consultation with key stakeholders, evidence-based information resources to assist families in formulating care arrangements for children after separation that support children's wellbeing. This resource should be publicly available and easily accessible, and regularly updated.

WLSA agrees in principle that the Attorney-General's Department (Cth) should commission a body with relevant expertise, including in psychology, social science and family violence, to develop, in consultation with key stakeholders, evidence-based information resources to assist families in formulating care arrangements for children after separation that support children's wellbeing.

This resource should be publicly available and easily accessible, and regularly updated.

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

**Response:** WLSA considers that the current definition of major long term issues in s4 of the *Family Law Act 1975* (Cth) should be maintained as it is relatively straightforward to explain to clients what it means, particularly with the list provided and the qualification that a new relationship is not included.

It would assist if further examples were provided in the Act itself (in much the same way as examples of family violence are provided in the Act to assist in people's understanding of what may meet the definition).

Specific examples which may assist parties in issues which may arise on a day to day basis include:

- Major long term health issues (for example, an irreversible procedure, but not one which is a special medical procedure and which falls outside of parental

responsibility and not going to the doctor or to emergency for an accident or needing consent to administer Panadol etc);

- Religion (for example, doesn't include which church on a week by week basis the child attends, but rather focuses on religious decisions which have long term consequences including exposing the child to opportunities to learn about the religion of both parents etc).

## Response to Proposals about family law financial (property) matters

### Determining property settlement entitlements (Proposal 3-10)

**Proposal 3–10** The provisions for property division in the *Family Law Act 1975* (Cth) should be amended to more clearly articulate the process used by the courts for determining the division of property.

WLSA agrees that the *Family Law Act 1975* (Cth) should be amended to make it clearer how property settlement entitlements of parties are determined.

WLSA considers that it would assist parties to understand their financial entitlements in family law if the multi-stepped process which is used, by and large, by family law professionals and the courts to explain the process was captured in the Act itself.

This should include the following steps in the following order:

1. Identifying the assets, liabilities and financial resources;
2. Assessing contributions to property (noting the three main types of contributions with none being provided greater weight than others);
3. Considering whether there should be an adjustment to the contributions based assessment having regard to s75(2) factors;
4. Assessing whether it is just and equitable to make any order altering the interests of parties in property and if so, whether the proposed orders effect a just and equitable outcome.

At present, it is confusing for parties when they receive legal advice which purports to explain how the Court currently determines property settlement entitlements, including words to the effect of;

- Apart from identifying the assets and financial resources, there is no requirement for the Court to follow the steps in any particular order;
- While the Court usually expresses their opinion in terms of a percentage, there is no legal requirement for this to happen. It can be in dollar figure; and
- The Court can only make orders altering the interests of parties when it finds it is just and equitable to do so, and when making the orders it will also have regard



as to whether the proposed orders are just and equitable.

The level of understanding of family law case law to understand how property settlement entitlements are calculated means it takes many years of specialising in family law to provide comprehensive proper advice to clients. This increases costs to parties in obtaining such specialist advice and also makes it difficult for legal assistance services to practice in this area, noting the legal assistance sector tend to offer services in more than one practice area (and provide more holistic support).

The *Family Law Act 1975* (Cth) should make clear that the paramount principle is a just and fair outcome (which may mean in a particular case that one party receives all of the available property for example where there has been family violence and/or the house is required to safely house the family violence victim-survivor and their children).

### **Clarifying the definition of property in the *Family Law Act 1975* (Cth)**

The definition of property in the *Family Law Act 1975* (Cth) should be specific and include examples to assist court users understand how wide the definition is and that it may include interest in a discretionary trust. At present, it requires quite a detailed understanding of equity and trusts to be able to identify equitable interests of the parties. In cases where there is family violence and financial abuse it is common for the party in control of assets to not properly disclose.

In matters where there are third parties and equitable interests being claimed it can be too expensive for the party to pursue as such matters tend to require the involvement of:

- specialist family lawyers;
- accountants;
- valuers; and
- sometimes assistance from tax lawyers, equity lawyers or barristers.

These matters tend to be too complicated for many parties to pursue their legal entitlements without assistance. For example, it can be common in family law matters where parties are intimately known to each other for there to be equitable claims which are based on representations and promises a party made to the other which were then relied on to that parties' detriment.

Without legal representation and non-legal support, the unrepresented party may be unable to articulate in detail the representations made by the other party over the relationship which may form the basis of an argument of promissory estoppel argument and possibly a constructive trust argument. In some cases, this can be the difference to a party being able to retain the family home or being left without a house to live in or sufficient resources or income earning capacity to acquire another permanent residence. This is especially so in matters where there is family violence and when the victim-survivor is still trying to recover from the trauma of the family violence in the wake of the further trauma triggered by the family law proceedings.

While a party who can afford legal representation will arguably always be better placed to pursue their legal rights, the current disparity between a represented and

unrepresented party creates a significant access to justice issue and is one of the reasons why women in Australia are more likely to experience poverty particularly in their age of retirement<sup>8</sup>.

In a similar way to how the family violence definition in the *Family Law Act 1975* (Cth) includes a non-exhaustive list of examples to aid interpretation, WLSA considers the definition of property should also include a list and go into detail to explain equitable claims and interests and that there should be template wording and checklists developed to assist parties to know if they may have an equitable interest and how to present their evidence about same.

### **Consideration of family violence in family law property matters (Proposal 3-11 to 3-12)**

**Proposal 3–11** The provisions for property division in the *Family Law Act 1975* (Cth) should be amended to provide that courts must:

- in determining the contributions of the parties, take into account the effect of family violence on a party's contributions; and
- in determining the future needs of the parties, take into account the effect of any family violence on the future needs of a party.

WLSA agrees and has long advocated for family violence to be a specific consideration that the Court must take into account when assessing the property entitlements of parties.

We support Proposal 3-11.

We consider this proposal to be a step in the right direction.

We also advocate for the recommendation made in the WLSV *Small Claims, Large Battles* report for the Court to have the power to make orders which ensure that no party financially benefits from the family violence they have perpetrated.<sup>9</sup>

This should be extended so that any awards of compensation received by a victim-survivor for family violence perpetrated by the other party should be excluded from being taken into account, including as an adjustment factor, when determining the property settlement entitlements of the parties to a relationship. This is discussed further below under the sub-heading "Quarantining compensation awards and claims arising from family violence".

### **Family violence relevant to assessment of contributions**

At present, *Kennon* is the primary case relied on in support of the argument that in determining the contributions of the parties, the Court must take into account the effect of family violence on a party's contributions (part one of the above proposal). The issue with *Kennon* in practice is that:

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<sup>8</sup> See Belinda Fehlberg and Lisa Sarmas, "Australian family property law - Just and Equitable outcomes?" (2018) 32 Australian Journal of Family Law.

<sup>9</sup> Accessed at

<https://womenslegal.org.au/files/file/WLSV%20Small%20Claims%2C%20Large%20Battles%20Research%20Report%202018.pdf>, see Recommendation 10.



- The onus placed on the applicant alleging family violence is significant and it can often be difficult to prove especially when the victim-survivor is already trying to recover from the trauma of the violence and ongoing trauma being triggered from the family law proceedings;
- The result when *Kennon* is established is only a small adjustment of 5-10%; and
- This outcome is often not enough to outweigh the further trauma and harm the applicant must go through to allege family violence and is a pivotal reason why WLSA has advocated for reform as to how family violence is considered in family law property cases.

An example which illustrates the type of matter where such reform may make a significant and meaningful difference to the life of a family violence victim-survivor is below.

#### **Example from a WLSA member**

This was a Family Court matter where both parties were in their late seventies at the time of the family court proceedings.

The husband perpetrated family violence against the wife over fifty years of marriage. The husband was eventually charged and for which he was facing criminal proceedings. It had taken the wife many years of counselling to get to a stage where she could speak about what had happened to her without being afraid of the responses and fear of reprisal from the husband.

Nearly 20 years after their separation and informal property settlement, the husband commences family court proceedings to seek orders for the sale of the house the wife lived in and which she had understood was to be hers from their informal property settlement (despite the house remaining in their joint names as neither wished to pay to have the names removed). The wife was also living and caring for her adult dependent son who had special needs and who relied on her for his daily care and residence.

The proceedings to date focused on the contributions of the parties. The husband has not disclosed the family violence. The wife was unrepresented after her legal aid grant expired. She had disclosed some family violence but was too traumatized by the proceedings that had commenced so long after their separation, the fear of becoming homeless in her seventies and that her husband was still able to inflict harm so many years after that chapter in her life was meant to be over.

She was unable to disclose the violence she experienced in sufficient detail for the Court to flag any *Kennon*-type argument. From the wife's perspective, she struggled to understand how it was 'just and equitable' that a man who abused her and her children for so much of their lives was able to sell the house out from underneath her and leave her and her adult dependent child homeless while he continued to work and was financially supported by his current partner. There were potential arguments she could have used to assist her case but she lacked the knowledge and competency to run a complicated equitable interest argument herself without legal representation (which she couldn't afford as she relied solely on the old age pension). She felt that just defending the proceedings was traumatic enough and made her feel she was being victimized all over again.

## **Family violence should be a specific s75(2) adjustment factor**

The impact of family violence in relation to the current s75(2) factors is wider than how it affects the income earning capacity of the applicant. It also includes future expenses, especially medical and counselling expenses, and in the long term the physical consequences of exposure to trauma from the family violence can lead to significant health issues and a shortened life span.

See the ANROWS report “Examination of the health outcomes on intimate partner violence against women: State of Knowledge Paper.”<sup>10</sup>

Under the current legislation, there is scope for perpetrators to argue that a reduced life span for the victim-survivor is grounds for the victim-survivor receiving a reduced adjustment otherwise in their favour. This is hardly a just and equitable outcome. Reform to avoid this should be considered.

## **Quarantining compensation awards and claims arising from family violence**

Many family violence victim-survivors who receive assistance from legal assistance services also have claims for compensation arising from the injuries they sustained, including psychological harm, from the other party. Depending on which state, the schemes may be known as victims of crime schemes or criminal injury compensation schemes.

At present, an award of compensation received by one party may be taken into account as a financial resource of that party and could be used (depending on the facts of the case) as grounds for an adjustment being made in favour of the party who did not receive the award (but who in a family violence matter may have been the perpetrator of violence for which compensation was provided).

WLSA considers that the *Family Law Act 1975* (Cth) should also be amended to specifically exclude compensation awards and claims arising from family violence between the parties from being considered in the assessment of the parties’ property settlement entitlements.

At present in many states compensation can be refused if the perpetrator may benefit. Specifically excluding compensation awards where the parties are the same as those in family law property settlement proceedings may assist victim-survivors in obtaining successful compensation awards as it would clarify that the perpetrator will not benefit from the compensation award by reason of any concurrent or future family law property settlement proceedings.

## **Establishing protocols for the division of debt (Proposal 3-13 to 3-14)**

**Proposal 3–13** The Australian Government should work with the financial sector to establish protocols for dividing debt on relationship breakdown to avoid hardship for vulnerable parties, including for victims of family violence.

<sup>10</sup> Accessed at <https://www.anrows.org.au/publications/landscapes-0/health-outcomes-intimate-partner-violence-against-women>.

**Proposal 3–14** If evaluation of action flowing from this Inquiry finds that voluntary industry action has not adequately assisted vulnerable parties, 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.

WLSA is supportive in principle of initiatives to avoid hardship for vulnerable parties arising from debt following the breakdown of relationships, especially for women and children who have experienced family violence.

As discussed in WLSV *Small Claims, Large Battles* report if a victim-survivor is pursued for the whole of a joint debt after a relationship breakdown the recovery of joint debts can pose a threat to her credit ratings and impede economic recovery.<sup>11</sup> Such debts can also be an on-going continuation of abuse (for example, where the perpetrator purposefully refuses to make payments), and this additionally conflicts with the principles in family law to finalise the financial relationship between the parties.<sup>12</sup>

Section 90AE of *Family Law Act 1975* (Cth) currently gives courts power to make orders which bind third parties such as creditors and could make creditors reapportion debt liability, however case law indicates that it is not commonly used.<sup>13</sup> Reasons for this include risk of being held liable to contribute to the costs of financial institutions and creditors and the extensive legal process. The WLSV *Stepping Stones: Legal barriers to economic equality after family violence* (2015) report explained the main reasons why the Family Law Courts do not routinely exercise their powers under s.90AE.<sup>14</sup> 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.<sup>15</sup>

WLSA supports the submissions by WLSV 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.*

*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.*

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<sup>11</sup> Accessed at

<https://womenslegal.org.au/files/file/WLSV%20Small%20Claims%2C%20Large%20Battles%20Research%20Report%202018.pdf> p 29-31.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid p 30.

<sup>14</sup> Accessed at [https://www.womenslegal.org.au/files/file/Stepping%20Stones%20Report\(1\).pdf](https://www.womenslegal.org.au/files/file/Stepping%20Stones%20Report(1).pdf)

<sup>15</sup> Ibid.

*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*

WLSA submits that the Court must consider whether it is foreseeable that such an order would result in the debt not being paid in full and creditors generally oppose these orders.<sup>16</sup> Applying for such orders also exposes parties to the legal costs of the third party creditor who must be joined to proceedings.<sup>17</sup>

WLSA is thus supportive of Proposal 3-13.

WLSA continues to endorse recommendations from WLSV *Small Claims, Large Battles* report in particular Recommendation 9 for the Family Law Courts work with relevant industry bodies to implement procedures to ensure that court powers to make orders to split, alter or transfer unsecured joint debts can be given practical effect, including in matters involving smaller claims and/or economic abuse.<sup>18</sup>

We also recommend the Australian Government considers steps to ensure that practical effect can be given to s90AE. Courts have the capacity to examine all the circumstances of the parties to determine whether the debt can be paid in full or not and WLSA recommends the Government works towards strengthening s90AE to ensure that Courts can play a greater role and exercise powers particularly for small claims.

WLSA is also supportive in principle of Proposal 3-14.

As discussed in the WLSV *Small Claims, Large Battles* report while creditors may argue against orders on this basis, the reality is that in many cases the parties don't have the capacity to fully repay the debt and the debt will not be paid in full even if the parties remain jointly and severally liable.<sup>19</sup>

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<sup>16</sup> S90AE(3)(b) *Family Law Act 1975* (Cth), see also WLSV *Small Claims, Large Battles* report (2018) accessed at <https://womenslegal.org.au/files/file/WLSV%20Small%20Claims%2C%20Large%20Battles%20Research%20Report%202018.pdf>

<sup>17</sup> S90AE(4)(d) *Family Law Act 1975* (Cth)

<sup>18</sup> Accessed at <https://womenslegal.org.au/files/file/WLSV%20Small%20Claims%2C%20Large%20Battles%20Research%20Report%202018.pdf>.

<sup>19</sup> Accessed at <https://womenslegal.org.au/files/file/WLSV%20Small%20Claims%2C%20Large%20Battles%20Research%20Report%202018.pdf> p 31

## Superannuation – information resources (Proposal 3-15)

**Proposal 3–15** The Australian Government should develop information resources for separating couples to assist them to understand superannuation, and how and why superannuation splitting might occur.

Superannuation is an important asset and may sometimes be the only asset for low income families. As the process to obtain orders to split superannuation is complex and poorly understood WLSA agrees that the Australian Government should develop information resources for separating couples to assist them to understand superannuation, and how and why superannuation splitting might occur.

While we support the development of such resources there must also be a coinciding process to simplify procedures including disclosure, processes and forms.

## Superannuation – standard splitting orders (Proposal 3-16)

**Proposal 3–16** The *Family Law Act 1975* (Cth) should require superannuation trustees to develop standard superannuation splitting orders on common scenarios. Procedural fairness should be deemed to be satisfied where parties develop orders based on these standard templates. The templates should be published on a central register.

There is a need to remove the procedural and legal complexities associated with superannuation splitting.

We continue to endorse Recommendation 7 of the WLSV *Small Claims, Large Battles* report that the Australian Government reduce the procedural and substantive complexity associated with superannuation splitting orders, by allowing unrepresented parties to complete a simplified form for superannuation splitting which is submitted to superannuation trustees and which can satisfy procedural fairness requirements.

WLSA is supportive of Proposal 3-16. Templates should be published on a central register readily accessible by people without requiring them to have legal representation.

Consultation with key family violence stakeholders is advisable to ensure that the ‘common scenarios’ include non-disclosure cases and where the perpetrator has controlled all of the finances and may be committing financial abuse.

## Creating tools to assist parties with super-splitting orders (Proposal 3-17)

**Proposal 3–17** The Australian Government should develop tools to assist parties to create superannuation splitting orders.

These could include:

- a tool to look up the legal name and contact details of superannuation funds;
- a tool, with appropriate safeguards, to identify the superannuation accounts held by a former partner from Australian Tax Office records, with necessary amendments to the taxation law to support this;
- tools to assist parties with process requirements, such as making

superannuation information requests, providing draft orders to superannuation trustees for comment where standard orders are not used, and providing final orders to trustees; and

- allowing auto-generation of standard form orders based on the standard orders provided by the superannuation trustee and user-entered data.

WLSA agrees in principle with Proposal 3-17. There is merit in developing tools to assist parties navigate this incredibly complex area.

WLSA members have long reported problems with parties failing to disclose superannuation resulting in delayed and unfair settlements and we continue to endorse Recommendation 5 of the WLSV *Small Claims, Large Battles* report for the Australian Government to provide an administrative mechanism for the release of information about the identity of a former partner's superannuation fund and its value.

In developing such tools consideration needs to be given to ensuring the tools can be accessed by people without access to technology or who lack technological literacy and for people who receive assistance from legal assistance services.

We also note that current fees from superannuation funds for processing information requests are often burdensome for clients. Fees for any future tools to be developed to assist with superannuation splitting orders should be minimal and represent cost recovery only.

We also recommend the proposed tools and processes in regards to splitting superannuation be embedded into the small property claims pathway that is discussed below under Proposals 6-3 to 6-6.

WLSA encourages further consultation with WLSV with respect to the development of tools referred to in this Proposal.

## Early Release of Superannuation

**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?

### Response

We refer to WLSA's earlier submission to the Australian Government Treasury Review of Early Release of Super Benefits under Compassionate and Financial Hardship Grounds and for Victims of Crime Compensation<sup>20</sup> where WLSA argued that any approach to early release of superannuation must balance the competing needs of financial recovery for family violence victim-survivors and addressing the superannuation gap for women and higher rates of poverty amongst women.<sup>21</sup>

<sup>20</sup> WLSA submission to the Australian Government Treasury Review of Early Release of Super Benefits under Compassionate and Financial Hardship Grounds and for Victims of Crime Compensation, 2018.

<sup>21</sup> In 2015–2016 the average superannuation account balance for men was \$111,853 while for women it was \$68,499 as reported by ASFA Research and Resource Centre, 'Superannuation Account Balances by Age and



WLSA supports the principle of preservation of superannuation and supports the early release of superannuation for family violence victim-survivors only in circumstances of last resort.

WLSA maintains the responsibility for supporting family violence victim-survivors lies with federal, state and territory governments through adequate funding of services to meet health, housing, justice, legal and other needs, and should not come from the victim-survivor's superannuation. Thus, any allowance of early access to superannuation must not allow federal, state or territory governments to escape their responsibilities to provide financial support and services to victim-survivors or reduce compensation payments.

WLSA recommends there is an objective assessment as to whether superannuation is released early to assist parties experience hardship including the following criteria:<sup>22</sup>

- the applicant has experienced family violence and is experiencing financial incapacity;
- all reasonable (including timely and effective) financial assistance avenues have been exhausted, at both the state and federal levels; and
- in the case of family violence, the release of funds will result in the victim-survivor receiving the necessary financial support to re-establish her (and her children's) lives following the violence.

WLSA calls for further consultation to decide on the appropriate evidence required for hardship to support an application for early release on superannuation.

WLSA also calls for limitations or safeguards to be put in place to prevent a victim-survivor's superannuation being accessed in situations of coercive control, for example where a perpetrator exercises control over the funds that a victim-survivor may receive, or where other family members, including adult children and extended family, place pressure on a victim-survivor to seek early access to her super in order to meet their own needs.

Staff that assess such early release applications would need to receive regular, ongoing and accredited training in family violence and cultural competency, including perpetrator behaviour to protect victims from early access as a result of coercion.

Finally, victim-survivors should not be disadvantaged through tax provisions and the Australian Government should provide tax relief in these circumstances. There should be tax exemptions for early release to ensure that victim-survivors are not subjected to additional penalties.

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Gender' (Report, Association of Superannuation Funds of Australia, October 2017) 8. See also Australian Council of Social Service, 'Poverty in Australia 2014' (Report, Australian Council of Social Service, 2014) 17–18.

<sup>22</sup> See WLSA submission to the Australian Government Treasury Review of Early Release of Super Benefits under Compassionate and Financial Hardship Grounds and for Victims of Crime Compensation (2018) accessed at [http://www.wlsa.org.au/uploads/submission-resources/Early Release of Super WLSA submission 14 Feb 2018.pdf](http://www.wlsa.org.au/uploads/submission-resources/Early%20Release%20of%20Super%20WLSA%20submission%2014%20Feb%202018.pdf) p3.

## Financial Agreements

**Question 3–3** Which, if any, of the following approaches should be adopted to reform provisions about financial agreements in the *Family Law Act 1975* (Cth):

- amendments to increase certainty about when financial agreements are binding;
- amendments to broaden the scope for setting aside an agreement where it is unjust to enforce the agreement, for example, because there has been family violence, or a change of circumstances that was unforeseen when the agreement was entered into;
- replacing existing provisions about financial agreements with an ability to make court-approved agreements; or
- removing the ability to make binding pre-nuptial financial agreements from family law legislation, and preserving the operation of any existing valid agreements?

### Response

#### Amendments to increase certainty about when financial agreements are binding

WLSA members report that in some circumstances financial agreements are used as tools of financial abuse by family violence perpetrators. In particular, we refer to Women's Legal Service Queensland's (WLSQ) submission on the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015.<sup>23</sup> The WLSQ submission noted that financial agreements can be used against CALD women who have limited or no English, little understanding of their legal rights and limited support.<sup>24</sup> WLSA is concerned that amendments to increase certainty about when financial agreements are binding would reduce the chance for family violence victim-survivors to escape such agreements.

In their submission WLSQ objected to the watering down of legal advice requirements proposed in the Bill saying that it would lessen the clarity around the nature of the legal advice and protection for vulnerable parties.<sup>25</sup> WLSA supports this position.

WLSA thus does not support amendments to the *Family Law Act 1975* (Cth) that would make it easier for a perpetrator of violence to use financial agreements as a tool of financial abuse. WLSA recommends the current law remains in force that requires legal advisers to advise about the effect of the agreement on the rights of that party, as well as the advantages and disadvantages, at the time the advice was provided, to that party of making the agreement.

WLSA further supports the recommendations of WLSQ in their submission on the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 including that in family violence situations:<sup>26</sup>

- legal advice should, as far as practicable, be provided in a face to face manner to allow for appropriate assessment of vulnerability, and
- that the legal advice be provided in writing and communicated in a way that is understandable to the client and that the party who is relying on the agreement

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<sup>23</sup> Accessed at

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Family\\_Law\\_Bill/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Family_Law_Bill/Submissions)

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.



provide a copy of the agreement to the other party within a specific time frame after formal request, and consideration be given to that party losing their ability to rely on the agreement, if this request is not met within a reasonable time frame.

Amendments to broaden the scope for setting aside an agreement where it is unjust to enforce the agreement (eg family violence, unforeseen change of circumstance)

WLSA supports amendments to broaden the scope for setting aside an agreement where there is family violence and it is unjust to enforce the agreement.

WLSQ in their submission to the Committee expressed their concern that the current provisions for setting aside financial agreements do not adequately protect a family violence victim-survivor who has entered into a financial agreement after 'years of conditioning and living with violence'. WLSQ said to the Committee:<sup>27</sup>

*...we have serious concerns that this provision will not achieve its policy objective and will, in fact, lead to injustice and be used against victims of violence. Again, 90 per cent of our clients who are victims of violence and are acting for themselves in court do not have paperwork of a high standard and can present badly because of fear and trauma.*

Australian Women Against Violence Alliance (AWAVA) said to the Committee:<sup>28</sup>

*I can speak more generally about the evidence that we now have about the cognitive, emotional and functional effects of being traumatised and how they permeate every aspect of a person's life, especially in cases where someone is trying to take steps to extricate themselves from a control and abuse situation*

*...recommendation from the Women's Legal Service Queensland (WLSQ) that 'a better balance be obtained in the legislation between contractual certainties on the one hand and upholding principles of justice, equity and the protection of the vulnerable on the other, particularly protecting victims of family violence from ongoing financial abuse and harm'.*

WLSA agrees with both these positions.

Replacing existing provisions about financial agreements with an ability to make Court-approved agreements

WLSA supports this proposal in principle and considers that the existing provisions about financial agreements should be replaced with an ability to make Court-approved agreements to ensure that only outcomes which are just and equitable, at least by reference to the known circumstances of the parties and the future scenarios provided for in the financial agreement itself.

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<sup>27</sup> Accessed at

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Family\\_Law\\_Bill/~media/Committees/legcon\\_ctte/Family\\_Law\\_Bill/d01.pdf](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Family_Law_Bill/~media/Committees/legcon_ctte/Family_Law_Bill/d01.pdf)

<sup>28</sup> Ibid.

### Removing ability to make binding pre-nuptial financial agreements

In many cases, the incentive for seeking a financial agreement prior to separation is because the wealthier party wishes to enter into an agreement which is more advantageous to them than what it would be should a Family Court make property settlement orders following separation. The financial agreement provides a back-door option for a property settlement which may otherwise not be regarded as just and equitable by a Court.

WLSA again supports this proposal in principle.

### Spousal Maintenance provisions in financial agreements

It has previously been suggested that the *Family Law Act 1975* (Cth) be amended to allow spousal maintenance to be included in a financial agreement. In particular:

- including the ability to have a 'nil' value for spousal maintenance included in an agreement;
- cessation of spousal maintenance on the death of the payer or when the payee re-marries or enters into a de facto relationship;
- allowing for claims to be made to recover over-payments of spousal maintenance if the payee has entered into a new relationship or remarried without the knowledge of the payer.

WLSQ argued that these proposed amendments did not properly take into account the dynamics of family violence or diminish the attractiveness of binding financial agreements for perpetrators to financially abuse victim-survivors.

AWAVA agreed with the WLSQ submission and added that the legislation assumes equal contracting parties but for a very large number of women their choices are interwoven with their need to limit the risk of harm to themselves and their children by appeasing their partner.

WLSA agrees with both these positions.

## **Dedicated spousal maintenance provisions (Proposal 3-18 to 3-19)**

**Proposal 3–18** The considerations that are applicable to spousal maintenance (presently located in s 75 of the *Family Law Act 1975* (Cth)) should be located in a separate section of family law legislation that is dedicated to spousal maintenance applications ('dedicated spousal maintenance considerations').

**Proposal 3–19** The dedicated spousal maintenance considerations should include a requirement that the court consider the impact of any family violence on the ability of the applicant to adequately support themselves.

WLSA supports Proposal 3-18.

WLSA agrees it would be easier for Court users to find this information if the spousal maintenance provisions were included in a separate part of the Act.

WLSA agrees in principle with Proposal 3-19.

We note that the effects of family violence in relation to what are currently s75(2) factors is wider than how it affects the income earning capacity of the applicant. It also includes future expenses, especially medical and counselling expenses and in the long term significant health issues and a shortened life span.

The compulsory consideration to consider the impact of family violence should not be limited to the applicant's income earning capacity.

### **Improving accessibility of spousal maintenance**

**Question 3–4** What options should be pursued to improve the accessibility of spousal maintenance to individuals in need of income support? Should consideration be given to:

- greater use of registrars to consider urgent applications for interim spousal maintenance;
- administrative assessment of spousal maintenance; or
- another option?

#### **Response**

WLSA supports in principle the consideration of greater use of registrars, as well as an administrative assessment of spousal maintenance so that spousal maintenance can be claimed without the need for legal advice and outside of a Court system, but there be recourse to review of decisions and to the Family Court making spousal maintenance orders if there are related proceedings on foot. This is similar to how child support is currently treated.

WLSA anticipates that more parties would claim spousal maintenance from their partners/former partners if they didn't need to apply to Court for orders for same. At present, it is often not economically feasible for parties who can afford a lawyer to incur thousands of dollars to seek a spousal maintenance order which will cost more money to enforce and may not be successful. In the legal assistance services sector, the time required to apply for spousal maintenance and the lack of funding generally, but particularly for family law financial matters, prohibits services assisting clients who can't afford legal advice from claiming spousal maintenance.

If more parties supported their former spouses, this would reduce the reliance on the government purse and also free up the resources of the Courts and legal services sector for the more complicated family law matters.

We note that international spousal maintenance orders can be registered with the Australian Child Support Agency and can then be enforced, for example, by garnisheeing wages<sup>29</sup> and we reiterate our recommendation from our earlier submission to the ALRC Issues Paper on the Review of the Family Law System for the

<sup>29</sup> S18A, *Child Support (Registration and Collection) 1988* (Cth).

consideration of a similar mechanism for the enforceability of Australian spousal maintenance agreements.<sup>30</sup>

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<sup>30</sup> Accessed at: [http://www.wlsa.org.au/uploads/submission-resources/WLSA\\_submission\\_to\\_ALRC\\_Review\\_of\\_the\\_Family\\_Law\\_System\\_%28fa%29.pdf](http://www.wlsa.org.au/uploads/submission-resources/WLSA_submission_to_ALRC_Review_of_the_Family_Law_System_%28fa%29.pdf), p 29.

## Chapter 4: Getting Advice and Support

### Family Hubs (Proposals 4-1, 4-3 to 4-4)

**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 4–4** Local service providers, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations, specialist family violence services and legal assistance services, including community legal services, should play a central role in the design of Families Hubs, to ensure that each hub is culturally safe and accessible, responsive to local needs, and builds on existing networks and relationships between local services.

While there is merit in the Families Hub idea, there are also significant concerns and practical issues which need to be taken into account.

WLSA recommends that consideration should be given to investing in, consolidating and expanding existing services, including legal assistance services, rather than creating a new service model that may not be adequately funded and which seems to be an expensive option which may have the effect of diverting funding away from pre-existing, safe and effective assistance services for vulnerable Australian families. Existing CLCs and FVPLS services are so under-resourced that staff are principally tied up in frontline service delivery, with little capacity to develop and sustain referral relationships and partnerships.

WLSA agree with NFPLS that proper funding is essential to develop and maintain more formalised referral pathways and relationships.

Such concerns include:

- Safety considerations - over half of family law matters involve family violence and it may be highly dangerous for both the victim-survivor and the perpetrator to seek help from the same location. It may also assist the perpetrator to locate the victim-survivor and her children. In the design of the Hubs, such safety considerations must be explored in consultation with victim-survivors, family violence experts, Aboriginal and Torres Strait Islander and CALD communities, LGBTIQ communities and those with disability.

- Duplication and Integration with state hubs – there are currently Hubs in some jurisdictions for family violence matters. There is significant overlap between family violence and family law. It may be confusing to some parties to have different Hubs for different purposes. The duplication of Hubs would be confusing as there would be multiple entry points for family law matters where there was family violence. The relationship between FRCs, Families Hubs and other Hubs needs to be clear to avoid a situation where parties fall through the gaps by the Hubs referring the parties to one another and no one Hub taking responsibility for assisting that party in their matter.
- Training to identify the need for legal advice – it is not clear what training the Hub workers would have to identify when a Hub user has a legal need and to make the appropriate referrals. This was an issue faced in Victoria with the Family Violence Support and Safety Hubs and one which resulted in the legal sector not being integrated into the Hubs. The training of the relevant professionals in the Hubs to be able to identify legal needs and make an appropriate referral is an issue.
- Role of legal advice - it is not clear what opportunity Hub users would have to receive legal advice. Hubs should include the provision of legal assistance, but this would require additional funding streams for legal assistance services, such as community legal centres, including specialist women's legal services and programs and specialist community controlled Aboriginal and Torres Strait Islander legal services which currently have no capacity to support this. In Victoria no separate legal funding assistance stream was made available to support safety Hub referrals which has been of concern as the Hubs refer to community legal centres who are required to apply current guidelines. We also note the Royal Commission into Family Violence recognised the importance of legal assistance being integrated into the family violence response but deferred to the (then in progress) review into access to justice by the Department of Justice and Regulation to make recommendations. The access to justice review recommended significant additional resources for legal assistance including investment in integrated service delivery and also specifically recommended that legal professionals be embedded in the support and safety Hubs to undertake legal triage, amongst other things.<sup>31</sup>
- Dual purpose of the Hubs – in the Victorian Safety and Support Hubs, there was a tendency to collocate within the Hubs the state child welfare (child protection) department. This was raised an issue by many groups including Aboriginal and Torres Strait Islander service providers who expressed concern that this may deter some community groups from seeking assistance for fear of children being removed.
- Unintended drain on existing workforce –WLSA agrees with the concern raised by NFVPLS that the workforce to service the Families Hubs does not currently exist, and implementing the recommendations will likely drain existing service provision.

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<sup>31</sup> Access to Justice Review, Department of Justice and Regulation, Victoria State Government (2016) accessed at <https://engage.vic.gov.au/accesstojustice>

These are similar to those concerns raised in the context of the Support and Safety Hubs in Victoria (now called the Orange Door) which were a recommendation of the Victorian Royal Commission into Family Violence.

WLSA agrees with the suggestion of NFPLS that the overlapping proposals may in fact make the family law system more rather than less complicated.

WLSA considers that the Australian Government should delay the establishment of any additional “Hubs” until a formal evaluation of the Orange Door experience in Victoria is complete.

WLSA also suggests the ALRC give further consideration to alternative ways to address case management and coordination of services (to ensure they are more ‘joined-up’), including:

- proper funding to develop and maintain more formalised referral pathways and relationships for existing services, especially specialist services like women’s services, family violence services and FVPLS;
- through the creation of family law system navigator roles (like in the Orange Door as recommended by the Victorian Royal Commission into Family Violence) whose role is to build relationships across the family law system and with specialist services including FVPLSs.

WLSA refers the ALRC to the submission of NVPLS in relation to specific proposals to meet the needs of Aboriginal and Torres Strait Islander families.

#### **Use of digital technologies to support the assessment of client needs (Proposal 4-2)**

**Proposal 4–2** The Australian Government should work with state and territory governments to explore the use of digital technologies to support the assessment of client needs, including their safety, support and advice needs, within the Families Hubs.

WLSA members note that many clients experience difficulty accessing or using technology, including:

- women in refuges;
- those who are technologically illiterate;
- those for whom English is not their first language;
- those who live remote areas and do not have telephone, computers or internet (some communities in Western Australia still do not have internet reception and rely on satellite phones);
- those for whom it is not safe to use the technology available (for example, where the perpetrator may be using the technology as surveillance on the victim-survivor or controls and monitors their access to technology).



There is certainly merit in exploring technological solutions as there will be family law court users who would benefit from the use of digital technologies.

However, it is important that such technology is not the only means by which client needs are assessed.

This is particularly important in family violence matters and for clients from some CALD or Aboriginal or Torres Strait Islander communities where non-verbal cues and body language may be critical to a proper assessment of risk and to increase the ability of the client to understand advice in a safe environment where they feel supported.

WLSA agrees strongly with NVPLS that while online resources are useful, they are not a panacea for access barriers and that such technological solutions are unlikely to meet the emotional (and safety) needs of family violence victim-survivors.

For example, NVPLS considers the success of FVPLSs' service model relies on engaging with Aboriginal and Torres Strait Islander women through face to face conversation at intake/assessment and beyond, hearing her story, validating her strength and providing tailored support for her specific needs. especially Aboriginal and Torres Strait Islander victim-survivors.

This view is shared by WLSA with respect to both FVPLSs and specialist women's services generally.

Technological solutions are no substitute for risk assessment particularly for traumatised clients who have experienced family violence.

Non-verbal cues including body language often do not translate well over technology and many cues may be missed by the assessor. It can also be difficult to check whether the technology being used is free from monitoring by the perpetrator.

### **Family Advocacy and Support Service (FASS) (Proposal 4-5 to 4-6)**

**Proposal 4–5** The Australian Government should, subject to positive evaluation, expand the Family Advocacy and Support Service (FASS) in each state and territory to include:

- an information and referral officer to conduct intake, risk and needs screening and triage, as well as providing information and resources;
- a family violence specialist legal service and a family violence specialist support service to assist clients who have experienced or are experiencing family violence; and
- an additional legal service and support service, to assist clients who are alleged to have used family violence and clients who are not affected by family violence but have other complex needs.

**Proposal 4–6** The FASS support services should be expanded to provide case management where a client has complex needs and cannot be linked with an appropriate support service providing ongoing case management.

WLSA supports Proposals 4-5 and 4-6 in principle subject to a final FASS evaluation.



Evaluation needs to be embedded into the roll out.

As noted in our earlier submission to the ALRC Issues Paper on the Review of the Family Law System FASS needs to be responsive to the needs of the local people and so if rolled out each registry needs to consult locally about what is needed and may provide the service differently.

Equity of access to legal and support services in regional, rural and remote communities is also important.

Increased awareness of the FASS program would also assist. For example, in Western Australia the service itself is not particularly well known and primarily consists of a duty lawyer service in Western Australia which of itself is not identified by court users or other service providers as being FASS. It is therefore hard to measure the benefit of FASS itself as opposed to additional resourcing for more duty lawyers at Family Court registries.

## Chapter 5: Dispute Resolution

**Proposal 5–1** The guidance as to assessment of suitability for family dispute resolution that is presently contained in reg 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) should be relocated to the *Family Law Act 1975* (Cth).

**Proposal 5–2** The new legislative provision proposed in Proposal 5–1 should provide that, in addition to the existing matters that a family dispute resolution provider must consider when determining whether family dispute resolution is appropriate, the family dispute resolution provider should consider the parties' respective levels of knowledge of the matters in dispute, including an imbalance in knowledge of relevant financial arrangements.

### Matters suitable for FDR

WLSA supports Proposal 5-1 and Proposal 5-2.

### Need for a safe model of dispute resolution for family violence

WLSA members have been instrumental in the development and implementation of safe models of family violence informed family dispute resolution.

Women's Legal Service Queensland was instrumental in developing the Co-ordinated Family Dispute Resolution model - a model specifically designed for parenting matters involving family violence. While the pilot was positively evaluated it did not receive further funding due to resource implications.

Further, several WLSA members, including Women's Legal Service NSW, Women's Legal Service Victoria, Women's Legal Service Queensland, North Queensland Women's Legal Service, Central Australian Women's Legal Service, Women's Law Centre of WA and Family Violence Prevention Legal Services provide representation in lawyer assisted family dispute resolution with particular expertise in matters relating to sexual and family violence and child abuse.

There are further FDR models that are specifically for family violence matters being explored, including at the University of Western Australia's Mediation Clinic<sup>32</sup> which is based on a therapeutic framework with a whole of family and child inclusive evidence-based approach.

Investing further into research and pilots for safe FDR for family violence victim-survivors would improve just outcomes for many women and assist to address the long term significant financial disadvantages women face following a relationship breakdown.

WLSA agrees with NFVPLS that there should be the further development of culturally

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<sup>32</sup> For more information about this see Howieson, J., & Priddis, L. (2012). Mentalising in mediation: Towards an understanding of the mediation shift. *Australasian Dispute Resolution Journal*, **23**, 52–60, accessed at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2304540](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304540)

appropriate and safe models of family dispute resolution for parenting and financial matters provided that specialist Aboriginal and Torres Strait Islander organisations must be the ones leading this work.

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

**Proposal 5–3** The *Family Law Act 1975* (Cth) should be amended to require parties to attempt family dispute resolution prior to lodging a court application for property and financial matters.

There should be a limited range of exceptions to this requirement, including:

- urgency, including where orders in relation to the ownership or disposal of assets are required or a party needs access to financial resources for day to day needs;
- the complexity of the asset pool, including circumstances involving third party interests (apart from superannuation trustees);
- where there is an imbalance of power, including as a result of family violence;
- where there are reasonable grounds to believe non-disclosure may be occurring;
- where one party has attempted to delay or frustrate the resolution of the matter; and
- where there are allegations of fraud.

WLSA supports Proposal 5.3 provided that appropriate exceptions and safeguards are in place.

We note our endorsement in our earlier submission to the ALRC Issues Paper on the Review of the Family Law System of Recommendation 11 of the WLSV *Small Claims, Large Battles* report for the Australian Government to fund an expansion of existing models of legally assisted FDR, to give greater access to vulnerable parties seeking property settlements.

Some safeguards for expanding FDR to property/financial matters to be considered include:

- there are adequate reforms to ensure full and frank financial disclosure;
- FDR is available for parties with limited resources;
- FDR practitioners are appropriately trained in property matters, sexual and family violence and child abuse, are culturally competent and disability aware; and
- legally assisted dispute resolution models.

WLSA agrees with the submission of WLSV that 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.<sup>33</sup>

<sup>33</sup> See WLSV Submission to this ALRC Discussion Paper.

Women's Legal Service NSW (WLS NSW) in a paper entitled *Sense and Sensitivity: Family Law, Family Violence and Confidentiality*<sup>34</sup> states that:

*In WLS NSW experience many victims of family violence instruct that they do not want to go directly to court and that with appropriate support they wish to attempt to reach an agreement about arrangements for their children in FDR. Such support could include each party having to work with both a support worker and a lawyer during the FDR process and the option to elect to proceed face to face or via a shuttle conference.*

*However, many victims are denied this opportunity as the FDRP assesses the matter as inappropriate for FDR because of the violence and presumably because there is not a family violence informed model of FDR available as an alternative. WLS NSW acknowledges that the presence of domestic and family violence raises safety and ethical issues and is aware that some mediators take the position that there is no place for negotiation where this is a power difference. However, victims of violence should have equal access to safe family violence informed FDR, as there can be child focused, safety, strategic and cost advantages in not going straight to court. There are also clear benefits to accessing the supportive services and referrals offered by FRCs as opposed to being forced to go directly to court, potentially without a lawyer or other assistance.*

*This issue is extensively considered in the AIFS Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases.*

*The AIFS evaluation acknowledges that this is a task of some significant difficulty involving complex and vulnerable clients and the challenges of interdisciplinary collaborative practice, but one with clear merit. WLS NSW encourages a genuine commitment from government to develop and resource a model of FDR that is appropriate for matters involving family violence, focused on safety, which assists the parties to identify their key concerns and achievable outcomes.*

*In advocating for a safe family violence informed approach to FDR WLS NSW acknowledges that the presence of risk, urgency and trauma will always necessitate some matters proceeding straight to court. There must be a nuanced safety and risk assessment on a case by case basis. It is also noted that participation in FDR may expose victims to greater invasions of privacy and increased risk if their matter subsequently ends up in court given the uncertainty about when FDR begins and ends....*

WLSA agrees with these comments.

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<sup>34</sup> Carolyn Jones (2016) *Sense and Sensitivity: Family Law, Family Violence and Confidentiality*, Sydney: Women's Legal Service NSW accessed at: <http://www.wlsnsw.org.au/wp-content/uploads/WLS-NSW-Sense-and-Sensitivity-web.pdf> p4-5

## **Evidence of DR and genuine effort to resolve dispute – Genuine Steps Statement and Certificate from FDR (Proposal 5-4 to 5-5)**

**Proposal 5–4** The *Family Law Act 1975* (Cth) should be amended to specify that a court must not hear an application for orders in relation to property and financial matters unless the parties have lodged a genuine steps statement at the time of filing the application. The relevant provision should indicate that if a court finds that a party has not made a genuine effort to resolve a matter in good faith, they may take this into account in determining how the costs of litigation should be apportioned.

**Proposal 5–5** The *Family Law Act 1975* (Cth) should include a requirement that family dispute resolution providers in property and financial matters should be required to provide a certificate to the parties where the issues in dispute have not been resolved.

The certificate should indicate that:

- the matter was assessed as not suitable for family dispute resolution;
- the person to whom the certificate was issued had attempted to initiate a family dispute resolution process but the other party has not responded;
- the parties had commenced family dispute resolution and the process had been terminated; or
- the matter had commenced and concluded with partial resolution of the issues in dispute.

WLSA supports Proposal 5-4.

WLSA also agrees in principle with Proposal 5-5.

Further to this WLSA suggests it would assist the parties and the Court to resolve disputes more efficiently and less expensively if the Certificate noted the issues which remain in dispute and those which had been agreed.

### **Alternative option – case study from Western Australia**

#### **Conferral Certificates and Statement of Issues Agreed and Issues in Dispute**

Consideration should be given to adapting a process similar to a practice which developed in Western Australia around five to six years ago in response to an increased backlog of Family Court of Western Australia matters arising from a suddenly reduced number of sitting judges.

WLSA members from Western Australia note that a practice developed whereby:

- to file an application seeking financial orders parties who were represented needed to file a Conferral Certificate (non-prescribed form) to prove that the lawyers had as a minimum attempted to settle or narrow the issues in dispute by telephone communication (by letter was not sufficient);
- the party would need to write to the court to request a relisting once they could prove they attended DR;

- at the first return date for a property matter, if the parties had not attended DR their matter would be adjourned until they had attended (except in urgent cases); and
- following their attendance at DR, the parties were required to hand up at the next return date a statement which outlined the Agreed Issues and Issues in Dispute to assist the court to manage the proceedings.

Feedback from WLSA members in Western Australia is that this practice worked well and is a tried and tested procedure which achieves the same outcomes as those proposed by the ALRC.

This practice should be considered as an alternative to the proposal because it has already been tried and tested and would be more cost effective than a new untested process. The requirement to hand up a statement which identified Agreed Issues and Issues in Dispute was of great assistance and highlighted the procedural orders required to progress the matter. This is similar to what parties are required to do in Papers for the Judge and it makes sense this process be undertaken at earlier stages of Family Court matters.

**Question 5–3** Is there a need to review the process for showing that the legal requirement to attempt family dispute resolution prior to lodging a court application for parenting orders has been satisfied? Should this process be aligned with the process proposed for property and financial matters?

#### **Response**

Yes. It would be more helpful if the Certificate received by the parties following FDR in parenting cases outlined the Agreed Issues and those in Dispute as discussed above.

This could then be filed and would greatly assist the parties, their lawyers and the Court to more cost effectively and efficiently program the dispute for determination.

**Question 5–1** Should the requirement in the *Family Law Act 1975* (Cth) that proceedings in property and financial matters must be instigated within twelve months of divorce or two years of separation from a de facto relationship be revised?

#### **Response**

In the experience of WLSA members it is sometimes unsafe or too traumatic for a victim-survivor of family violence to instigate property settlement proceedings within the 12 months following a divorce or 2 years post separation in de facto relationships.

For some victim-survivors, seeking a divorce is an important symbolic moment in their recovery as it can mark the end of that time in their lives and the start of a new chapter. This is why some parties choose to divorce despite it triggering the above deadline and pressure to commence property proceedings.

## Disclosure obligations (Proposal 5-6)

**Proposal 5–6** The *Family Law Act 1975* (Cth) should set out the duties of parties involved in family dispute resolution or court proceedings for property and financial matters to provide early, full and continuing disclosure of all information relevant to the case.

For parties involved in family dispute resolution or court proceedings, disclosure duties should apply to:

- earnings, including those paid or assigned to another party;
- vested or contingent interests in property, including that which is owned by a legal entity that is fully or partially owned or partially controlled by a party;
- income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;
- superannuation interests; and
- ⊖ liabilities and contingent liabilities.

WLSA agrees that the duties of disclosure should be more clearly identified and in the one place in the *Family Law Act 1975* (Cth) itself and not contained in different Rules which can be hard for parties to find.

There should also be guidance given in relation to how a party without legal representation is able to determine which issues are in dispute to then know what documents might be relevant and therefore should be disclosed in their matter.

Without legal advice most parties do not understand what is meant by ‘in their possession’ and may not realise that documents held by another professional may be deemed to be in their possession or if that party is an office holder the rights that party may then have in relation to accessing documents.

Guidance should be available in an easily understandable format.

A template list of disclosure should be available for download and use by parties on the Family Court website. The guidance material could be included as part of this template and include details of how people who do not have legal representation are able to find out if they are an office holder or have an interest in a corporate entity.

Consideration should also be given to requiring parties to file at certain stages in proceedings an updated list of disclosure.

## Consequences of non-disclosure (Proposal 5-7)

**Proposal 5–7** The provisions in the *Family Law Act 1975* (Cth) setting out disclosure duties should also specify that if a court finds that a party has intentionally failed to provide full, frank and timely disclosure it may:

- impose a consequence, including punishment for contempt of court;
- take the party’s non-disclosure into account when determining how costs are to be apportioned;
- stay or dismiss all or part of the party’s case; or



- take the party's non-disclosure into account when determining how the financial pool is to be divided.

If a party fails to make a full and frank disclosure the Court can already impose consequences, including staying or dismissing a non-compliant party's application or making costs orders against them.<sup>35</sup>

However, as discussed in the WLSV *Small Claims, Large Battles* report, the Court is unlikely to impose such penalties for small claims because to do so may reduce the available property pool and thus adopting a punitive approach to non-disclosure has not been effective for financially disadvantaged parties.<sup>36</sup> Furthermore, to seek costs itself costs time and money (which many clients don't have) and there is also the risk that a party themselves may be open to a cost application if the Court decides not to make an order as to costs.

WLSA therefore contends that in considering the consequences for non-disclosure there needs to be a differentiation in approach between financially disadvantaged and financially advantaged parties.

WLSA endorses the broader approach to strengthening financial disclosure as outlined in Recommendation 4 of the WLSV *Small Claims, Large Battles* report<sup>37</sup> - that is, for the Australian Government, in consultation with the Federal Circuit Court and Family Court of Australia, consider how best to strengthen mandatory financial disclosure that will enable family violence victims and decision makers to access the necessary financial information needed to resolve small claims matters efficiently and fairly, including consideration of:

- a. Broadening the role of registrars to increase interim case oversight to check compliance with disclosure and encourage greater use of registrar powers to make orders for disclosure;
- b. Encouraging banks and government agencies, such as land titles offices, to reduce fees associated with processing family law subpoenas or title searches consistent with existing fee reduction regimes in the family law courts;
- c. Providing a mechanism for family law courts to be provided with information by the Australian Taxation Office for the purposes of determining if full financial disclosure is being made;
- d. Amending the *Family Law Act 1975* (Cth) to enable courts to order forfeiture of assets by one party and redistribution to the other for failure to comply with financial disclosure obligations;
- e. Amending the *Family Law Act 1975* (Cth) to encourage greater exercise of courts' discretion to make adverse adjustments to property divisions for parties who do not make full and frank disclosure.

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<sup>35</sup>See WLSV *Small Claims, Large Battles* 2016 accessed at <https://womenslegal.org.au/files/file/WLSV%20Small%20Claims%2C%20Large%20Battles%20Research%20Report%202018.pdf>, p 24.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid, p 7.

In particular, WLSA considers that the Australian Tax Office (ATO) can play an important role in enabling access superannuation and financial information.

One of the key recommendations from the WLSV *Small Claims, Large Battles* report that the WLSV has been pursuing in 2018 is Recommendation 5:<sup>38</sup>

*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*

WLSA endorses WLSV submission for an administrative mechanism to be administered through the ATO for the release of information to be provided directly to the Family Law 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.

WLSA considers that one consequence for when a Court finds that a party has failed to provide full, frank and timely disclosure is that the non-disclosure should be taken into account in determining how the financial pool is to be divided. WLSA considers that this will assist to effect a just outcome.

**Question 5–2** Should the provisions in the *Family Law Act 1975* (Cth) setting out disclosure duties be supported by civil or criminal penalties for non-disclosure?

### **Response**

As noted above adopting a punitive approach to non-disclosure has not been effective for financially disadvantaged parties<sup>39</sup> and we recommend a broader approach to strengthening financial disclosure as discussed in the WLSV *Small Claims, Large Battles* report, particularly with the ATO playing a role in enabling access superannuation and financial information.

## **Obligations on legal advisors (Proposal 5-8)**

**Proposal 5–8** The *Family Law Act 1975* (Cth) should set out advisers' obligations in relation to providing advice to parties contemplating or undertaking family dispute resolution, negotiation or court proceedings about property and financial matters.

Advisers (defined as a legal practitioner or a family dispute resolution practitioner) must advise parties that:

- they have a duty of full, frank and continuing disclosure, and, in the case of family dispute resolution, that compliance with this duty is essential to the family dispute resolution process; and
- if the matter proceeds to court and a party fails to observe this duty, courts have the power to:

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid, p 24.

- (a) impose a consequence, including punishment for contempt of court;
- (b) take the party's non-disclosure into account when determining how costs are to be apportioned;
- (c) stay or dismiss all or part of the party's case; and
- (d) take the party's non-disclosure into account when determining how the financial pool is to be divided.

WLSA supports Proposal 5–8.

Amending the *Family Law Act 1975* (Cth) so that it more clearly outlines and has in the one place all of the relevant disclosure obligations for parties would assist lawyers to fulfil their obligations.

However, we note for this proposal to be effective it must be supported by the other reforms discussed above.

**Question 5–3** Is there a need to review the process for showing that the legal requirement to attempt family dispute resolution prior to lodging a court application for parenting orders has been satisfied? Should this process be aligned with the process proposed for property and financial matters?

**Response**

As discussed above, it would be more helpful if the Certificate received by the parties following FDR in parenting cases outlined the Agreed Issues and Those in Dispute. This could then be filed and would greatly assist the parties, their lawyers and the Court to more cost effectively and efficiently program the dispute for determination.

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

**Proposal 5–9** The Australian Government should work with providers of family dispute resolution services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to support the further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters.

This should include:

- examining 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;
- the further development of dispute resolution models for property and financial matters involving, where necessary, support by financial counsellors and the provision of legal advice by private practitioners and legal assistance services, such as legal aid commissions, community legal centres and the Legal Advice Line that is part of Family Relationships Advice Line; and
- amendments to existing funding agreements and practice agreements to support this work.

In principle WLSA supports Proposal 5-9.

It is important that specialised models of FDR are available to those with limited resources, including those who may appear to have assets but who may not have access to financial resources, for example where there is financial abuse in the relationship.

WLSA agrees with NFVPLS that there should be further development of culturally appropriate and safe models of family dispute resolution for parenting and financial matters provided specialist Aboriginal and Torres Strait Islander organisations must be the ones leading this work for models which will impact on Aboriginal and Torres Strait Islander people.

### **Legally assisted dispute resolution (LADR) for parenting and property matters (Proposal 5-10)**

**Proposal 5–10** The Australian Government should work with providers of family dispute resolution services, private legal services, financial services, legal assistance services, specialist family violence services and Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ and disability organisations to develop effective practice guidelines for the delivery of legally assisted dispute resolution (LADR) for parenting and property matters.

These Guidelines should include:

- guidance as to when LADR should not be applied in matters involving family violence and other risk related issues;
- 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;
- the respective roles and responsibilities of the professionals involved;
- the application of child-inclusive practice;
- the application of approaches to support cultural safety for Aboriginal and Torres Strait Islander people;
- the application of approaches to support cultural safety for families from culturally and linguistically diverse communities;
- the application of approaches to support effective participation for LGBTIQ families;
- the application of approaches that support effective participation for families where parents or children have disability;
- practices relating to referral to other services, including health services, specialist family violence services and men's behaviour change programs;
- practices relating to referrals from and to the family courts; and
- information sharing and collaboration with other services involved with the family.

**Proposal 5–11** These Guidelines should be regularly reviewed to support evidence-informed policy and practice in this area.

WLSA supports Proposal 5-10 and Proposal 5-11.

WLSA reiterates our comments above about the need for proper investment in developing a model of FDR that is safe and suitable for parties where there is family violence which

is supported by specialist family violence lawyers and family violence and trauma informed FDR practitioners.

As noted in our earlier submission to the ALRC Issues Paper on the Review of the Family Law System, WLSA recommends the development of LAFDR be preceded by a legal needs analysis to inform the Australian Government as to the scope of the service required to meet legal need.

In addition to the proposed guidelines in Proposal 5-10, there is a need for increased funding of the LAFDR model so that the grant for lawyers is sufficient to cover the cost for their time needed to:

- obtain proper and detailed instructions from the client to be able to properly discharge their legal obligations to advise the client about their matter; and
- build up the trust with their client needed to meaningfully safeguard their interests in the FDR itself. This is particularly important where there has been family violence or allegations of abuse.

WLSA acknowledges that the implementation of LAFDR programs differ from state to state depending on the organisation running the program and the funds received for same.

Feedback from a WLSA member is that their pilot LAFDR:

- only allows for 1 hour of paid time for the lawyer and their client to meet prior to the DR to obtain instructions and this is on the day of the DR itself; and
- this was insufficient for that lawyer to obtain proper instructions let alone to then advise the client on their options and discuss a strategy for advancing their interests in the DR.

This has led to a very low take up rate for lawyers offering this service in that state. Many CLCs including some WLSA members have decided only to provide this service for existing clients where they have already obtained the detailed client instructions and have already established a relationship of trust with the client (which is needed in order for the lawyer to properly and meaningfully safeguard their client's interests in the DR itself).

In other states, the experience was more positive. For example, WSLV has been advocating for the increased availability and funding of LAFDR for property matters because 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. They consider that in Victoria LAFDR provides effective FDR for family violence victims and should be more widely available to vulnerable parties with property disputes.<sup>40</sup>

If LAFDR is to be rolled out effectively across the system, the Australian Government needs to commit to an increase in funding to legal assistance services, such as

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<sup>40</sup> Accessed at <https://womenslegal.org.au/files/file/WLSV%20Small%20Claims%2C%20Large%20Battles%20Research%20Report%202018.pdf> p 37.

community legal centres, including specialist women's legal services and programs and specialist community controlled Aboriginal and Torres Strait Islander legal services, including Family Violence Prevention Legal Services and Aboriginal and Torres Strait Islander Legal Services to broaden the availability of funding for priority clients. Currently several WLSA members, including Women's Legal Service NSW, Women's Legal Service Victoria, Women's Legal Service Queensland, North Queensland Women's Legal Service, Central Australian Women's Legal Service and Family Violence Prevention Legal Services provide representation in lawyer assisted family dispute resolution with particular expertise in matters relating to family violence and child abuse with centres providing FDR services.

They are no specific government funding for this important work.

WLSA recommends specific and additional funding to legal assistance services and FDR providers for family violence informed LAFDR.

## Chapter 6: 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.

### Establishing a triage process (Proposals 6-1 to 6-2)

WLSA is supportive of a triage process. However, we consider the issue will be the level of expertise and training of the Court staff undertaking this process.

In Victoria, the triage process that is employed in the Moorabbin Specialist Family Violence Courts is a good example and involves:

- Applicant and Respondent support workers;
- Support workers undertake risk assessment and then provide that evidence to the Court together with recommendations for progressing the proceedings in terms of managing risk; and
- This is provided in a sensitive way so as not to disclose verbatim everything the victim-survivor disclosed but with sufficient detail to flag the level of risk to the Court without inflaming the conflict between the parties.

We note that the Aboriginal Family Law Service (WA) has previously advocated<sup>41</sup> for a:

*Triage system where membership of the group included court officers (including judiciary, Victim Support Service, Family Consultant etc), and child protection officer. Cases flagged (either internally or externally) for family and domestic violence or child abuse are presented to the group for decision making around report to child protection.*

*Referrals to family support services may be recognised here. A case coordination function may allow the court to defer decisions on child harm in cases where family supports are required to build protection particularly in cases of family and domestic violence. The family courts may consider a more structured and centralised approach to support services for families. For example, using the secondary service hub model implemented by CPFS (WA’s state’s child welfare department) the courts could consider creating a hub of services – either actual (i.e. based at the court) or virtual (i.e. central kiosk contact point with referral to suitable service).*

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<sup>41</sup>AFLS Submission accessed at

<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Aboriginal-Family-Law-Services-WA.pdf>



*This could be an extension to the Family Pathways Network where the strategic aspect of this project been achieved, with some more detailed coordination work to be completed.*

*The Kiosk would still act as a referral point.*

WLSA suggests that further consideration and consultation be given to implementing a triage system in the Family Law Court context having regard to existing relationships of each Family Court registry with its local service providers and state welfare and law enforcement organisations.

WLSA agrees with the submissions of WLSV that:<sup>42</sup>

*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. 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.*

WLSA reiterates our recommendation in our earlier submission to the ALRC Issues Paper on the Review of the Family Law System for embedding an early risk assessment into any triage process and that upon filing of any family law application, the following processes are undertaken as soon as practicable:<sup>43</sup>

- that in all cases involving dependent children, a family consultant with specified family violence training who is embedded within the court registry undertake a risk assessment with respect to child safety and provide recommendations in relation to interim care arrangements for children;
- where family violence is alleged or identified, that a referral of any adult affected family member be made to an embedded family violence support worker within the court registry;
- where the affected member is Aboriginal and/or Torres Strait Islander, a referral should be made to a specialised and culturally safe legal service such as a FVPLS; and
- that following receipt of such a referral, the family violence support worker undertakes a risk assessment in relation to the adult affected family member(s), assisting her in preparing a safety plan, and making further referrals as necessary.

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<sup>42</sup> See WLSV Submission to this ALRC Discussion Paper.

<sup>43</sup> Accessed at: [http://www.wlsa.org.au/uploads/submission-resources/WLSA\\_submission\\_to\\_ALRC\\_Review\\_of\\_the\\_Family\\_Law\\_System\\_%28fa%29.pdf](http://www.wlsa.org.au/uploads/submission-resources/WLSA_submission_to_ALRC_Review_of_the_Family_Law_System_%28fa%29.pdf), p 30.

Finally, we again emphasise the essential need for resourcing and specialist sexual and family violence and trauma informed practice training, cultural competency and disability awareness for Court staff undertaking such processes.

### **Specialist court pathway for small property claims process (Proposal 6-3 to 6-6)**

**Proposal 6–3** Specialist court pathways should include:

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

WLSA commends the ALRC for the proposal for a simplified small property claims process to promote the early resolution of small property disputes as recommended in the WLSV *Small Claims, Large Battles* report.<sup>44</sup>

As also recommended in the WLSV *Small Claims, Large Battles* report<sup>45</sup> the small property claims process should:

- incorporate simplified procedural and evidentiary requirements (for example, this could include having a Registrar meet with parties similar to a conciliation conference using a simplified form completed by the parties);
- establish eligibility with reference to the financial vulnerability of parties, the particular issues in dispute and the nature and value of assets. It is recommended that eligibility should be based on the applicant's projected share of property pool as opposed to the total size of the pool;
- be available to eligible parties who may have concurrent unresolved parenting matters (where the property pool is small, the influence of parenting arrangements on division of assets is likely to be minimal therefore the process should allow a property settlement to occur despite parenting issues remaining unresolved);
- have embedded within it the above discussed proposals in regards to:
  - improving financial disclosure;
  - superannuation splitting; and
  - dealing with joint debt.

### **Specialist court pathway for family violence matters (Proposal 6-3 and 6-7)**

**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;

<sup>44</sup> Accessed at

<https://womenslegal.org.au/files/file/WLSV%20Small%20Claims%2C%20Large%20Battles%20Research%20Report%202018.pdf> p 20-21.

<sup>45</sup> Ibid.

- 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.

In Victoria, the Royal Commission into Family Violence recommended the roll out of specialist family violence Magistrate's Courts, noting that the complex dynamics of family violence require a sophisticated understanding that can only be provided in a specialist context.

In a family law context it should then follow that family violence matters in family law should also be dealt with in a specialist context.

WLSA agrees that there should be a specialist pathway for family violence matters. However, the details of the pathway need to be further considered and be the subject of further consultation, guided by a committee, including of sexual and domestic and family violence and child abuse experts.

For example, the development of a specialist list that was resourced by appropriately experienced sexual and family violence and child abuse informed professionals may help foster a more specialist culture and practice within the family law context in relation to sexual and family violence and child abuse.

However, WLSA has concerns about the capacity of family violence "matters" to be dealt with by a single list noting the prevalence of family violence in many family law proceedings.

Members from remote and regional areas have expressed concern about the capacity of their registry to manage a list.

### **Issues arising from multiple lists**

It is also unclear how a family violence list may operate in the context of other proposals being considered by the DP, including the small property list and Indigenous list.

How would matters where there are eligibility for the matter to be placed in multiple lists be managed (e.g. an Aboriginal or Torres Strait Islander party seeking orders for a property settlement proceedings where there is family violence?) What role does party consent play in the lists (for a family violence list the agency of the victim-survivor is important). How would the proposed list fit in with other case management proposals, including improved triage and risk assessments?

Other proposals including improved triage and early risk assessment are important steps which hopefully will lead to family law matters being allocated the resources the matters require.

Feedback from some WLSA members is that their clients who have experienced family violence do not want their matters dealt with in such a way as they felt it labelled them and drew attention to their matter in Court. There is also concern from some WLSA members that some families experiencing family violence may be more reluctant to disclose family violence to avoid being singled out and treated in the family law system differently to other families.

Given the high number of matters in Court where there are family violence allegations responding to family violence must be core business for the Family Court. The whole system needs to change to better incorporate risk assessment and safety so that those matters that are not included in the specialist family violence list (limited to high risk matters) are responded to appropriately with the safety of the child and adult victim-survivor prioritised. Improved training of all professionals working within the family law system in sexual and family violence, child abuse and trauma informed practice, cultural competency and disability awareness is essential to ensure the whole system responds appropriately to family violence.

The need for the whole Court to be trauma informed and specialist in family law and sexual and family violence is discussed below.

### **Specialist court pathway for Indigenous list (Proposal 6-3)**

Any new pathway for a list for Aboriginal and Torres Strait Islander people must be developed and undertaken in consultation with, and led by, Aboriginal and Torres Strait Islander led organisations and communities to ensure that decisions about that pathway is best placed to meet the needs of Aboriginal and Torres Strait Islander people in local communities. This includes for decisions including the name of the list.

It has been reported by the National Association of Community Legal Centres Aboriginal and Torres Strait Islander Women's Legal Network that the current Indigenous list in the Court works well for some clients, with benefits including a more culturally sensitive and respectful environment and the support of Aboriginal and Torres Strait Islander liaison workers. However, the Network has noted that some Aboriginal and Torres Strait clients have reported they do not want to participate in the Indigenous List for confidentiality reasons and it is essential that any specialist Court pathway is on an opt in basis only for reasons of agency.

The Aboriginal and Torres Strait Islander Women's Legal Network has also indicated that it would be beneficial for some clients to have the option of having Aboriginal and Torres Strait Islander Elder participation in the Court and cultural advisers to the Court. Where there is Elder participation there is a need for the parties involved to know and respect the Elder involved in order for it to have impact. Again, these options would need to be provided on an opt in basis.

We also note that the Aboriginal Family Law Service (AFLS) in Western Australia has advocated for:

- the positioning of Family Court officers in Aboriginal organisations; and

- the development of specialist family violence FDR programs with services for Aboriginal families to be delivered by practitioners situated in Aboriginal and Torres Strait Islander organisations.

We refer to our comments in our submission in response to the ALRC Issues Paper regarding the implementation of the 2012 and 2016 Family Law Council recommendations regarding increasing the accessibility of the family law system for Aboriginal and Torres Strait Islander people.

WLSA encourages further consultation with Aboriginal and Torres Strait Islander communities and organisations in regards to these and other options.

Finally, as noted throughout our submission, it is essential for those working in the family law system to have compulsory, regular and accredited cultural competency training.

## Parenting management hearings

**Question 6–3** What changes to the design of the Parenting Management Hearings process are needed to strengthen its capacity to apply a problem-solving approach in children’s matters? Are other changes needed to this model?

### Response

WLSA refers to our submission to the Senate Legal and Constitutional Affairs Committee in response to the Family Law Amendment (Parenting Management Hearings) Bill 2017 below.<sup>46</sup>

WLSA continues to have grave concerns that the Parenting Management Hearings model is untested and has not been based on research and evidence or informed by family violence victim-survivors or experts.

We note that there are some protections in the process for matters relating to family violence and child abuse, but we remain concerned that these protections are not enough.

Panel members in Parent Management Hearings will be able to make binding determinations including in matters involving family violence and in some matters involving child abuse. In our members’ experience these matters are generally always complex. We are also concerned about the limitations on legal representation, particularly given that family violence and child abuse matters can be considered. Legal advice is vital to for victim-survivors to make informed decisions.

If the Parent Management Hearings go ahead WLSA continues to make the following recommendations as outlined in our submission to the Committee:

- That required assurances are obtained about the need for ongoing risk assessment and that the professional undertaking the risk assessment has the

<sup>46</sup> Accessed at

[https://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/ParentingManagement/Submissions](https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ParentingManagement/Submissions)

required experience and expertise in family violence, child abuse and trauma informed practice;

- Given the Parent Management Hearings can make binding determinations in matters relating to family violence and some forms of child abuse, including fully displacing the parental responsibility of one parent, it is essential and in the interest of the safety of victims-survivors of violence and their children that:
  - Parties are referred and able to access legal assistance before entering a Parent Management Hearing process.
  - When seeking leave for legal representation where any of the mandatory considerations in such an application are met, leave is granted.
  - Legal assistance and representation is funded, particularly in matters involving family violence and child abuse. This should include additional funding for family law and family violence duty services; specialist women's legal services and programs; and specialist Aboriginal and Torres Strait Islander controlled legal service providers (including both Family Violence Prevention Legal Services and Aboriginal and Torres Strait Islander Legal Services) (No funding has as yet been allocated for legal representation of parties).
- At least one Panel Member on each Panel should have extensive knowledge and experience in family violence, child abuse and trauma informed practice from a victim's-survivor's perspective (While the Principal (Panel) member is required to have expertise and experience in matters relating to family violence and family law they are not required to sit on each Panel. This means some Panels may be constituted without expertise in matters relating to family violence, for example, in circumstances where family violence is not identified at intake).
- All Panel members and staff associated with Parent Management Hearings should be culturally competent, disability aware and have ongoing training in cultural competency, disability awareness, sexual violence, family violence, child abuse and trauma informed practice; and working with vulnerable clients.
- There should be diversity in the composition of Panels.
- There should be development of guidelines about the use of sensitive records.
- The independent evaluation report should be published and made publicly available in a timely manner.

## Post-orders support for families (Proposal 6–9 and 6-10 to 6-11)

**Proposal 6–9** The Australian Government should develop a post-order parenting support service to assist parties to parenting orders to implement the orders and manage their co-parenting relationship by providing services including:

- education about child development and conflict management;
- dispute resolution; and
- decision making in relation to implementation of parenting orders.

**Proposal 6–10** The Australian Government should work with relevant stakeholders, including the Community Services and Health Industry Skills Council, the Australian Psychological Society, the Australian Association of Social Workers, the Mediator Standards Board, Family & Relationship Services Australia and specialist family violence services peak bodies, to develop intake assessment processes for the post-order parenting support service.

**Proposal 6–11** The proposed Family Law Commission (Proposal 12–1) should develop accreditation and training requirements for professionals working in the post order parenting support service.

WLSA agrees in principle with Proposal 6-9.

We also support in principle Proposal 6-10. The service also needs to be family violence and trauma informed and staff must be trained in cultural competency, disability awareness, sexual violence, family violence, child abuse and trauma informed practice; and working with vulnerable clients.

WLSA also recommends the service is not limited to just parents and should be a service available to any families who have gone through the Family Court and who have orders in relation to care arrangements for children.

There should be a culturally safe model developed in consultation with Aboriginal and Torres Strait Islander organisations and FVPLS to co-design the intake and support service for Aboriginal and Torres Strait Islander families.

We also suggest a support service be available at an earlier stage than post order as this may assist with agreements made in DR. For example, this could be where parties require assistance with caring for children, such as parenting courses which teach practical skills.

WLSA is supportive of Proposal 6-11.

WLSA also calls for the development of accreditation and training requirements for professionals working in the Family Court system in general to ensure they have appropriate training in sexual violence and family violence as well as family law. We note this function is proposed to be administered by the Family Law Commission.



## Suitability of Court premises for family violence matters (Proposal 6-12)

**Proposal 6–12** The Australian Government should ensure that all family court premises, including circuit locations and state and territory court buildings that are used for family law matters, are safe for attendees, including ensuring the availability and suitability of:

- waiting areas and rooms for co-located service providers, including the extent to which waiting areas can accommodate large family groups;
- safe waiting areas and rooms for court attendees who have concerns for their safety while they are at court;
  - private interview rooms;
  - multiple entrances and exits;
  - child-friendly spaces and waiting rooms;
  - security staffing and equipment;
  - multi-lingual and multi-format signage;
  - remote witness facilities for witnesses to give evidence off site and from court based interview rooms; and
  - facilities accessible for people with disability.

WLSA agrees with Proposal 6-12.

WLSA recommends there be an open consultation about Family Court premises conducted by the Australian Government to ensure that the relevant peak bodies can provide feedback about how the Court registries in their area could be improved to increase usability by their members and make it safer for everyone within the community to access the Family Law Courts.

Consideration should also be given to providing a crèche or child minding facility within or close to the Court for parties with children who can't afford the services of a private babysitter and who lack the support of family to baby-sit to allow them to attend Court. There is such a facility in the Family Court of Western Australia and in many womens' services around Australia to increase the participation of women in their legal matters.

We also reiterate the recommendations made in our earlier submission to the ALRC Issues Paper on the Review of the Family Law System including the need for:

- safe rooms and meeting rooms in all family court premises, including where shuttle mediation between separate rooms may be appropriate;
- safety planning regarding entering and leaving buildings;
- ensuring cultural safety in consultation with Aboriginal and Torres Strait Islander communities to try and ensure Aboriginal and Torres Strait Islander people feel welcome and safe; and
- ensuring accessibility for people with disability in consultation with court users with disability and their advocates.

## **Training and experience of family law professionals in family violence**

Continuous patterns of abusive behaviour in the context of an intimate relationship affects the physical, psychological and emotional wellbeing of women and their children. Although there is growing awareness of the lived reality of sexual and family violence and its impact on victim-survivors due to inquiries like the Royal Commission into Family Violence in Victoria, nuanced understandings about family violence are not yet embedded into our public institutions, such as the Courts.

Our members have provided feedback that female litigants displaying mental health issues are often disadvantaged by Family Court processes, which often fail to deal sensitively or effectively with these issues, due to a lack of sexual and family violence competency on the part of family law system professionals. There is also a lack of understanding or recognition within the current system about some types of emotional and financial abuse; for example: perpetrators initiating Court proceedings to re-assert power and control in their relationship and seeking access to children although they have not been positively involved in their care for a number of years.

WLSA considers that all professionals working within the entire family law system should have specialist sexual violence and family violence knowledge and experience. An issue is how this is measured when there is currently no specific accreditation for lawyers in family violence.

WLSA advocates for the Federal Government to implement Recommendation 28 of the Parliamentary Inquiry into a Better Family Law System to Support and Protect those Affected by Family Violence Final Report regarding the development of a national, ongoing, comprehensive, and mandatory family violence training program for family law professionals, including Court staff, family consultants, Independent Children's Lawyers, and FDR practitioner.<sup>47</sup> WLSA recommends this specialisation also include training in sexual violence.

WLSA further recommends that an accreditation program be established for lawyers in family violence, the curriculum and criteria for which is informed by specialist family violence services, family law and family violence Courts and is consistent with the training of judicial officers in both the specialist family violence Courts and family law.

This accreditation program could then form the basis of eligibility for lawyers on legal aid commission panels (Family Violence and Family Law panels) and lead the way in terms of setting the benchmark for the level of knowledge family lawyers and family report writers should have about family violence to ensure safe outcomes for women and children.

In terms of the content of the training, this should include:

- the nature and dynamics of family violence (e.g. power and control wheels etc);
- working with vulnerable clients;

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<sup>47</sup> Federal Government Parliamentary Inquiry into a Better Family Law System to Support and Protect those Affected by Family Violence Final Report (2017) accessed at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Social\\_Policy\\_and\\_Legal\\_Affairs/FVlawreform/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Report)

- risk assessment and screening;
- safety planning for parties and children;
- correctly identifying the predominant aggressor of violence;
- trauma informed and trauma based practice;
- intersection of family violence and related areas of law;
- cultural competency;
- disability awareness;
- the 'Safe and Together Model' for understanding the patterns of abuse and impact of family violence on children; and
- vicarious trauma and wellbeing for the professionals.

More detail and the need for trauma informed response is outlined, for example, in the Family Violence Chapter of the Western Australia Law Handbook 6<sup>th</sup> Ed.<sup>48</sup>

In addition to training, experience in working with those who have experiences sexual and family violence is also important.

There should also be a proper complaints procedure so that practitioners who don't engage in a safe way, including those who facilitate systems abuse by perpetrators, can be better held to account.

### **Training of family law judicial officers (Federal and State Courts)**

A specialist approach should be adopted for Courts proposing to exercise jurisdiction under the *Family Law Act 1975* (Cth).

WLSA supports Recommendation 27 of the Parliamentary Inquiry into a Better Family Law System to Support and Protect those Affected by Family Violence Final Report regarding the development a national and comprehensive professional development program for judicial officers from the Family Courts, and from State and Territory Courts that preside over matters involving family violence.<sup>49</sup>

Further training for state and territory judicial officers exercising power under the *Family Law Act 1975* (Cth) would:

- a) improve the quality of the orders made by State and Territory Courts under the *Family Law Act 1975* (Cth);

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<sup>48</sup> Accessed at <http://austlii.community/foswiki/WALawHbk/FamilyAndDomesticViolence>

<sup>49</sup> Accessed at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Social\\_Policy\\_and\\_Legal\\_Affairs/FVlawreform/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Report)

- b) reduce the volume of subsequent litigation in the Family Law Courts for orders that are made by State and Territory Courts which are found not to be in the best interests of children; and
- c) increase the confidence of litigants in the family law system.

Such training should be coordinated as between the State and Territory Courts and the Commonwealth Federal Courts once protocols are established as to the types of matters proposed be dealt with by the State and Territory Courts and to ensure consistency between the approaches to family law matters across all Courts exercising jurisdiction under the *Family Law Act 1975* (Cth).

WLSA agrees with Safe Steps that there is also a need for training to develop skills in correctly identifying the predominant aggressor of violence.<sup>50</sup>

### **Training of report writers**

WLSA supports accreditation and monitoring of family report writers and those producing expert reports, including competency:

- in sexual and family violence,
- child abuse and trauma-informed practice;
- understanding of child development; cultural competency; and
- disability awareness.

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<sup>50</sup> Accessed at <http://www.safesteps.org.au/wp-content/uploads/2018/03/submission-family-violence-other-matters-2017.pdf>.

## Chapter 7: Children in the Family Law System

WLSA recognises the need for children and young people to be recognised as the family law system's key stakeholders, and welcomes the importance of embedding a child-centred approach to the system's work in any redevelopment.

### Child-friendly information about family law system and support services (Proposal 7-1 to 7-2)

**Proposal 7–1** Information about family law processes and legal and support services should be available to children in a range of age-appropriate and culturally appropriate forms.

**Proposal 7–2** The proposed Families Hubs (Proposals 4–1 to 4–4) should include out-posted workers from specialised services for children and young people, such as counselling services and peer support programs.

WLSA supports Proposal 7–1.

There should be further consultation with peak bodies representing children and young people to inform and guide which information about family law processes and legal and support services should be available to children and the format of, and means by which, such information is accessed.

This material should be publicly available and in language that is developmentally appropriate for children of all ages and backgrounds.

Guidance material and community education generally for Aboriginal and Torres Strait Islander children and families should be led by Aboriginal and Torres Strait Islander controlled organisations who are best placed to know how to effectively communicate information in and to their communities.

WLSA supports Proposal 7–2.

### Mechanisms for children to express their views (to have a voice in proceedings concerning them) (Proposals 7-3 to 7-4, 7-11)

**Proposal 7–3** The *Family Law Act 1975* (Cth) should provide that, in proceedings concerning a child, an affected child must be given an opportunity (so far as practicable) to express their views.

**Proposal 7–4** The *Family Law Act 1975* (Cth) should provide that, in any family dispute resolution process concerning arrangements for a child, the affected child must be given an opportunity (so far as practicable) to express any views about those arrangements.

**Proposal 7–11** Children should be able to express their views in court proceedings and family dispute resolution processes in a range of ways, including through:

- a report prepared by the children's advocate;
- meeting with a decision maker, supported by a children's advocate; or
- directly appearing, supported by a children's advocate.

WLSA agrees in principle with Proposal 7–3 and Proposal 7–4.

WLSA supports in part Proposal 7–11, namely that children should be able to express their views in Court proceedings and FDR processes in a range of ways.

WLSA recognises the right of children to participate in proceedings that affect them. We further acknowledge there have been criticisms of some ICLs and children’s advocates have highlighted children and young people do not feel they are able to participate in family law matters that affect them.

It is not clear from the DP how this new role of a child advocate would work with the existing roles of the ICL and Family Consultants.

WLSA agrees there is merit in the idea of better supporting children involved in family law proceedings, especially with support from a social science professional with training and expertise in child development and working with children.

However, WLSA questions if the answer lies in the creation of a new role of a children’s advocate rather than considering enhancing and clarifying the role of family consultants and ICLs.

WLSA agrees with the comment by NFVPLS that increasing the number of professionals involved in a child’s life is not necessarily the answer to increasing children’s participation.

There should be further consultation with children and young people and peak bodies representing and working with children and young people.

WLSA encourages the ALRC to have regard to the specific recommendations by NFVPLS in their submission to this DP as to the circumstances in which they consider it would not be appropriate for children to participate directly.

### **Child-inclusive FDR (Proposal 7-5)**

**Proposal 7–5** The Attorney-General’s Department (Cth) should work with the family relationship services sector to develop best practice guidance on child-inclusive family dispute resolution, including in relation to participation support where child inclusive family dispute resolution is not appropriate.

WLSA supports Proposal 7-5 but notes further research and evaluation is required.

This proposal should not be limited to working with the family relationship services sector but include universities. For example, we note that the safe model of DR for family violence matters being developed by University of Western Australia Mediation Clinic (discussed earlier) is child-inclusive and being developed and tested with family law and legal assistance professionals.

## **Child Participation should be voluntary but meaningful (Proposal 7-7)**

**Proposal 7–7** Children should not be required to express any views in family law proceedings or family dispute resolution.

WLSA supports Proposal 7-7.

## **Risk Assessment of Children in family law proceedings (Proposal 7-6)**

**Proposal 7–6** There should be an initial and ongoing assessment of risk to the child of participating in family law proceedings or family dispute resolution, and processes put in place to manage any identified risk.

WLSA agrees with Proposal 7–6.

Risk assessment not only needs to be ongoing, but needs to be undertaken by appropriately qualified professionals trained in sexual and family violence, that is risk assessment requires a specialist response.

## **Funding and training of ICLs**

When appropriately trained and experienced, ICLs can safeguard the interests of the children they represent. In cases where family violence is a risk, the ICL can and should collect information, ensure the child's voice is heard and provide an independent view of any proposed order. The lack of funding for ICLs in all cases, and particularly if family violence is alleged, means the Court is not properly assisted in assessing the risk of family violence or protecting children from such risk as it is obliged to do under section 60CG of the *Family Law Act 1975* (Cth). That is particularly the case where both parties are self-represented.<sup>51</sup> Adequate funding of ICLs is required to ensure that appropriately qualified and experienced lawyers are attracted and can be retained to do this work.

ICLs should be required to meet with the children they are meant to be representing. They should be appropriately trained and experienced in working with children to be able to communicate with them in a developmentally appropriate, and where relevant, in a trauma informed way (and satisfy working with children checks).

## **Separate legal representative for children (Proposal 7–10)**

**Proposal 7–10** The *Family Law Act 1975* (Cth) should make provision for the appointment of a legal representative for children involved in family law proceedings (a 'separate legal representative') in appropriate circumstances, whose role is to:

- gather evidence that is relevant to an assessment of a child's safety and best interests; and
- assist in managing litigation, including acting as an 'honest broker' in litigation.

WLSA recommends consideration of how the role of ICL be enhanced to ensure children can more effectively participate in proceedings that affect them.

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<sup>51</sup> See <https://www.lawcouncil.asn.au/resources/submissions/inquiry-into-domestic-violence-in-australia>



We refer to our comments in our submission in response to the ALRC Issues Paper that the family law system provides an effective mechanism to enable the disclosure of and investigation into safety concerns for children.<sup>52</sup>

### **Family law professionals working with children (Proposal 7-12)**

**Proposal 7–12** Guidance should be developed to assist judicial officers where children seek to meet with them or otherwise participate in proceedings. This guidance should cover matters including how views expressed by children in any such meeting should be communicated to other parties to the proceeding.

**Proposal 7–13** There should be a Children and Young People’s Advisory Board for the family law system. The Advisory Board should provide advice about children’s experiences of the family law system to inform policy and practice development in the system.

WLSA agrees with Proposal 7-12.

To safely support increased engagement of children in the family law process, it is imperative that all professionals working in the system are properly trained and supported in working with children.

WLSA supports judicial officers receiving ongoing training about working with children and the development of written guidance as part of this support. The guidance material should be publicly available for transparency and to increase public confidence in the family law system and to ensure that children and parents are able to see how their children’s views will be dealt with.

WLSA supports Proposal 7–13.

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<sup>52</sup> WLSA submission in response to the ALRC Review of the Family Law System Issues Paper, May 2018, pages 37-38.

## Chapter 8: Reducing Harm

### Definition of family violence in *Family Law Act 1975* (Cth) (Proposals 8–1 to 8-3)

**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.

**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.

**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’.

WLSA supports Proposal 8–1 and 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).

WLSA members note, however, that it may be difficult in practice to provide evidence in support of this as it is often a contentious issue whether or not the family violence perpetrator’s family law application of itself is systems abuse and save for matters where an application is dismissed from being vexatious it can be very difficult to prove when a family violence perpetrator is using their legal right to commence proceedings as systems abuse.

There is also a need to consider whether this new subsection could be misused and if so how to prevent or limit misuse.

WLSA calls on the Federal Government to implement Recommendation 19 of the Family Law Council Final Report (Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems) regarding commissioning research on the intentional and unintentional misuse of legal processes in the family law context and how

such abuse of the system may be prevented.<sup>53</sup>

### **Amending the *Family Law Act 1975* (Cth) to take judicial notice of the National Family Violence Benchbook**

WLSA recommends that consideration should also be given to amending the *Family Law Act 1975* (Cth) to enable judicial officers to take judicial notice of the contents of the National Family Violence Benchbook.

This could enable relevant evidence in relation to the effects of family violence on women and children to be better taken into account in family law proceedings without the further cost to parties and the system in having parties in individual matters otherwise being required to file expert evidence in relation to same.

It would assist in helping to educate professionals in the family law system about family violence and start to change the culture within family law to make it more consistent with best practice principles of the family violence sector.

### **Further research and pilot projects are needed (Proposal 8–2)**

**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.

WLSA agrees in principle with Proposal 8–2.

However, WLSA considers the community groups should be expanded to specifically include the experience of older women noting the ageing population and the significant overlap between family violence and elder abuse<sup>54</sup> as well as people with disability, noting the high rates of family violence perpetrated against people with disability and particularly women with disability.

### **Provisions to dismiss unmeritorious proceedings (Proposal 8–4 to 8-5)**

**Proposal 8–4** The existing provisions in the *Family Law Act 1975* (Cth) concerning dismissal of proceedings that are frivolous, vexatious, an abuse of process or have no reasonable prospect of success ('unmeritorious proceedings') should be rationalised.

WLSA agrees in principle with Proposal 8-4 but there is a need to consider there is the potential for misuse and if so how to prevent or limit misuse. As discussed in our earlier

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<sup>53</sup> Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems Final Report* (2016) accessed at <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports.aspx>

<sup>54</sup> Women's Law Centre of WA submission to the Parliament of WA Inquiry into Elder Abuse accessed at [http://www.parliament.wa.gov.au/parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/E769A8A65308B45D482581ED001F2AA0/\\$file/el.eld.046.171127.sub.Womens+Law+Centre.pdf](http://www.parliament.wa.gov.au/parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/E769A8A65308B45D482581ED001F2AA0/$file/el.eld.046.171127.sub.Womens+Law+Centre.pdf)

submission to the ALRC Issues Paper on the Review of the Family Law System WLSA supports the Family Law Council Complex Needs report Recommendation 19 on the commissioning of research into what family law systems abuse occurs and how it can be prevented.

The ability of any proposed amendments regarding dismissal powers to achieve their policy objective is contingent on the expertise of judges, and their ability to discern the nuances of systems abuse.<sup>55</sup>

It is important that any such provisions are closely monitored and evaluated.

### **History of family violence (Proposal 8–5)**

**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.

WLSA agrees in principle with Proposal 8–5.

Again, it is critical that any decision maker assessing the merits of family law applications be appropriately trained and experienced in sexual and family violence to avoid the actions of an unrepresented and traumatised client being perceived as an applicant without merit.

It also highlights the importance of accreditation of family law system professionals to improve the quality of the evidence of the history of family violence.

### **Protected confidences treatment of counselling and other sensitive and confidential records (Proposal 8-6)**

**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).

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<sup>55</sup> See WLSA Submission to the Senate Legal and Constitutional Affairs Committee in response to the Family Law Amendment (Family Violence and Other Measures) Bill 2017 accessed at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/FamilyViolence/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/FamilyViolence/Submissions)

- 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.

In WLSA's submission to the ALRC Issues Paper on the Review of the Family Law System we referred to a paper produced by Women's Legal Services NSW *Sense and Sensitivity: Family Law, Family Violence and Confidentiality*. 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.

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'. 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.

The WLS NSW paper recommends a presumption "that there is always potential for a detrimental impact on the therapeutic relationship when sensitive records are accessed, particularly in a litigation context".<sup>56</sup>

There should be further support provided to counselling and other therapeutic services on how to respond to subpoenas, how to make an objection or raise their concerns when they are served with a subpoena to produce protected confidences.

The paramount consideration should be the safety and best interests of the child and also of their primary carers.

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<sup>56</sup> WLS NSW *Sense and Sensitivity: Family Law, Family Violence, and Confidentiality* (2016) accessed at <http://www.wlsnsw.org.au/law-reform/sense-and-sensitivity-2016/> p 42.

## Guidelines for treatment of sensitive records (Proposal 8–7)

**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.

We support Proposal 8.7 that the Attorney-General's Department (Cth) convene a working group made up of a range of relevant professionals, including the Family Courts, legal representatives including WLSA, FDR practitioners, medical and specialist family violence services peak and bodies to develop the guidelines.

We further recommend the inclusion of specialist sexual assault services.

There is great value in a multi-disciplinary working group – so the different professionals can understand each other's point of view.

## Chapter 9: Additional Legislative Issues

### Supported decision making framework for people with disability (Proposals 9-1 to 9-2, 9-7)

**Proposal 9–1** The *Family Law Act 1975* (Cth) should include a supported decision making framework for people with disability to recognise they have the right to make choices for themselves.

The provisions should be in a form consistent with the following recommendations of the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*:

- Recommendations 3–1 to 3–4 on National Decision Making Principles and Guidelines; and
- Recommendations 4–3 to 4–5 on the appointment, recognition, functions and duties of a ‘supporter’.

**Proposal 9–2** The Australian Government should ensure that people who require decision making support in family law matters, and their supporters, are provided with information and guidance to enable them to understand their functions and duties.

**Proposal 9–7** The Australian Government should ensure that the family law system has specialist professionals and services to support people with disability to engage with the family law system.

It is widely acknowledged that women with disability are disproportionately affected by family violence.<sup>57</sup> Research indicates that women with disability are approximately 40% more at risk of family violence than women without disability, while more than 70% of women with disability have been victims of sexual violence.<sup>58</sup>

WLSA members have noted that women with disability face several systemic and structural barriers in accessing the family law system, including:

- discrimination on the basis of disability;
- lack of necessary supports, adjustments and aids when disability is identified;
- physical inaccessibility to police stations and courts;
- negative attitudes towards people with disability; and
- erroneous assessments on the credibility or legal competence of people with disability.

As noted in WLSA’s submission to the ALRC Issues Paper on the Review of the Family Law System women with disability who have been subjected to family violence and their

<sup>57</sup> Second Action Plan of the National Plan to Reduce Violence against Women and their Children 2010-2022.

<sup>58</sup> *Fact Sheet: Violence against Women with Disabilities, Women with Disabilities Australia*, Australian Civil Society Delegation to the 53<sup>rd</sup> Session of the Committee against Torture, November 2014.



advocates have expressed concern to WLSA that often a woman's 'disability is on trial' in family law matters when the focus should be on recognising the perpetration of family violence, the impact of the perpetration of such violence and the best interests of the child.<sup>59</sup>

WLSA is supportive of measures to improve both access to and the experience of the family law system for women with disability. We support embedding specialist professionals and services within the family law system to support people with disability to engage in the system.

We are supportive in principle of the inclusion within the *Family Law Act 1975* (Cth) of a decision making framework for people with disability in a form consistent with recommendations from the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*. However, we emphasise the need for such measures to be developed and undertaken in further consultation with a network of disability victim-survivors and disability advocacy organisations.

Consultation with disability victim-survivors, advocacy organisations and advisers, must address in particular how disability is defined. Definitions of disability vary and some forms of disability, particularly mental health conditions, are often undiagnosed. We recommend the consideration of a wide social model of disability such as that defined in the United Nations Convention on the Rights of Persons with Disabilities that 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.<sup>60</sup>

It is essential for people who require decision making support in family law matters, and their supports to be provided with information and guidance to enable them to understand their functions and duties. Again, this information provided must be developed in consultation with disability victim-survivors and disability advocacy organisations and of course provided in different formats, such as Easy English, Auslan, braille and audio.

## **CEDAW 2018 Report**

WLSA encourages the ALRC to have regard to the recommendations, considerations and concerns in the Australian NGO Coalition Shadow Report on Australia's Compliance with the Convention on the Elimination of All Forms of Discrimination Against Women<sup>61</sup>

### **Extract from CEDAW Shadow 2018 report**

#### **Forced sterilisation and medical interventions**

A 2013 parliamentary inquiry found that women with disability and people with intersex variations are subjected to involuntary and coerced sterilisation.<sup>63</sup>

<sup>59</sup> Accessed at: [http://www.wlsa.org.au/uploads/submission-resources/WLSA\\_submission\\_to\\_ALRC\\_Review\\_of\\_the\\_Family\\_Law\\_System\\_%28fa%29.pdf](http://www.wlsa.org.au/uploads/submission-resources/WLSA_submission_to_ALRC_Review_of_the_Family_Law_System_%28fa%29.pdf) p17.

<sup>60</sup> United Nations Convention on the Rights of Persons with Disabilities, Art 1.

<sup>61</sup> Australian NGO Coalition Shadow Report on Australia's Compliance with the Convention on the Elimination of All Forms of Discrimination Against Women accessed at <http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/CEDAW%20Shadow%20report%20-%20Final%2014.6.18.pdf>

Women and girls with disability continue to be subject to forced sterilisation procedures.<sup>64</sup> Australia has not legislated against forced medical intervention on the bodies of people with intersex variations. These medical practices persist on the basis of inadequate medical evidence and without independent oversight. <sup>65</sup>

Australia should:

- Enact national uniform legislation prohibiting
- Forced sterilization of women and girls with disability; and
- Non-medically necessary sterilisation, including surgical and hormonal interventions on people with intersex variations without personal consent.

Footnotes referred to in extract:

63 Senate Community Affairs References Committee, Parliament of Australia, Involuntary or Coerced Sterilisation of Intersex People in Australia (2013); Senate Community Affairs References Committee, Parliament of Australia, Involuntary or Coerced Sterilisation of People with Disabilities in Australia (2013).

64 Senate Community Affairs References Committee, Parliament of Australia, Involuntary or Coerced Sterilisation of People with Disabilities in Australia (2013) 15.

65 Re Carla (Medical procedure) [2016] FamCA 7. See also: Morgan Carpenter, The Family Court Case Re: Carla (Medical procedure) [2016] FamCA 7 (8 December 2016) Intersex Human Rights Australia <https://ihra.org.au/31036/re-carla-family-court/>

Specifically, with respect to the proposals for medical procedures for children and young people with intersex variations, WLSA encourages the ALRC to have regard to the recommendations, considerations and concerns referred to in the submission<sup>62</sup> of Intersex Human Rights Australia (formerly OII Australia) to the UN Committee on the Rights of Persons with Disabilities.

### **Litigation representatives (Proposals 9-3 to 9-5)**

**Proposal 9–3** The *Family Law Act 1975* (Cth) should include provisions for the appointment of a litigation representative where a person with disability, who is involved in family law proceedings, is unable to be supported to make their own decisions. The Act should set out the circumstances for a person to have a litigation representative and the functions of the litigation representative. These provisions should be in a form consistent with recommendations 7–3 to 7–4 recommendations of ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*.

**Proposal 9–4** Family courts should develop practice notes explaining the duties that litigation representatives have to the person they represent and to the court.

**Proposal 9–5** The Australian Government should work with state and territory governments to facilitate the appointment of statutory authorities as litigation

<sup>62</sup> Submission of Intersex Human Rights Australia (formerly OII Australia) to the UN Committee on the Rights of Persons with Disabilities available at <https://oii.org.au/31467/submission-crpd-2017/>

representatives in family law proceedings.

WLSA is supportive in principle of the proposal for the appointment of a litigation representative where a person with disability involved in family law proceedings is unable to be supported to make their own decisions. As noted in the proposals the *Family Law Act 1975* (Cth) would need to set out the specific circumstances for when a person has a litigation representative and the functions of the litigation representative, as these provisions should be in a form consistent with recommendations from the ALRC Report 124, *Equality, Capacity and Disability in Commonwealth Laws*.

We again note the need for such measures to be developed and undertaken in further consultation with a network of disability victim-survivors and disability advocacy organisations.

We note one issue currently faced by litigation representatives which is the uncertainty about the extent to which professionals acting as a legal representative can seek costs from the other party.

In many cases, a vulnerable person in need of a legal representative may not have anyone in their life who is willing to act as a legal representative particularly if it then opens up that person to be liable for costs incurred in their matter and requires them to be involved with the members of that family in the family law dispute. There is thus a need for adequate funding so that a professional legal representative can step into the shoes of a vulnerable person when there is no one else to act in that capacity.

There needs to be safeguards against issues that arise with assessing capacity particularly in light of the ageing population and elder abuse. For example, there is potential for misuse in blended families where adult children from previous marriages may misuse family law mechanisms to perpetrate financial abuse. As noted above there needs to be greater awareness of discrimination against parents with disabilities in the family law system with assumptions made about disability impacting on parenting capacity. Supports to assist people with disability in their parenting must be considered in consultation with the person with disability.

Disability awareness training is also essential.

### **National Disability Insurance Agency (NDIA) (Proposal 9-6)**

**Proposal 9–6** The Australian Government should work with the National Disability Insurance Agency (NDIA) to consider how referrals can be made to the NDIA by family law professionals, and how the National Disability Insurance Scheme (NDIS) could be used to fund appropriate supports for eligible people with disability to:

- build parenting abilities;
- access early intervention parenting supports;
- carry out their parenting responsibilities;
- access family support services and alternative dispute resolution processes; and
- navigate the family law system.

WLSA agrees that opportunities as to how the NDIA scheme could be used to provide support to women with disabilities in their family law proceedings should be explored. The support should be extended to advocates who assist the person with a disability to

receive legal assistance including attending at Court (in a non-legal support role).

**Question 9-1** Should authorisation by a court, tribunal, or other regulatory body be required for procedures such as sterilisation of children with disability or intersex medical procedures? What body would be most appropriate to undertake this function?

In what circumstances should it be possible for this body to authorize sterilisation procedures or intersex medical procedures before a child is legally able to personally make these decisions?

What additional legislative, procedural or other safeguards, if any, should be put in place to ensure that the human rights of children are protected in these cases?

### **Response**

WLSA considers that reforms which merely amend the current approach are inadequate. WLSA supports the position of People with Disabilities Australia that such action should be prohibited to give meaningful effects to the human rights of children.

The only judicial intervention should be to assess the genuineness of claims of medical necessity.

WLSA does not consider that the family law courts are the most appropriate forum.

PWDA consider that the family law and state and territory tribunals have not proven to be effective safeguards for preventing medically unnecessary sterilizations and medical interventions on children with disability and children and young people with intersex variations.

There should be further consultation with peak advocacy bodies representing children, people with disabilities and human rights organisations to investigate which judicial forum is best suited for such judicial assessment.

WLSA agrees with PWDA that additional legislative, procedural safeguards should only be used once prohibition is enacted and even then the safeguards should only consider the genuineness of claims that procedures are medically necessary and compliant with human rights. Safeguard mechanisms should be independent with representation of human rights experts (including human rights focused clinicians) and peer-led intersex and disability organisations.

WLSA encourages the ALRC to review Australia's NGO Coalition report Review of Australia Fifth Periodic Report under the International Covenant on Economic, Social and Cultural Rights<sup>63</sup>, May 2017 which WLSA endorsed. See particularly pages 90-94 (from paragraph 286 to recommendations at the end of that section).

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<sup>63</sup>Australia's NGO Coalition report Review of Australia Fifth Periodic Report under the International Covenant on Economic, Social and Cultural Rights available at [http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/ICESCR%20Final%20Report%20May17\\_0.pdf](http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/ICESCR%20Final%20Report%20May17_0.pdf)



## Chapter 10: A Skilled and Supported Workforce

### Workplace Capability Plan (Proposals 10-1 to 10-6)

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

**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.

**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.

**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.

**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.

**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.

As discussed above, WLSA has long advocated for all family law professionals to receive ongoing, regular and accredited training in sexual and family violence including the recognition of dynamics of sexual and family violence and unconscious bias, cultural competency, working with victims of trauma, family law (for state and territory judges) and child protection.

We therefore welcome Proposals 10-1 and 10-2.

WLSA cautions against reforms which may have the unintended effect of siloing specialist expertise, for example, family violence awareness on the one hand, cultural awareness on the other.

When identifying the professional groups working in the family law system we note the need to encompass all workers in the family law system, and not just staff that appear in the courtroom itself, such as lawyers, judicial officers and report writers. For example, WLSA members have reported women leaving Court before their proceeding commence as a result of negative experiences with registry or security staff who are not trauma aware.

While WLSA supports the Workplace Capability Plan proposals in principle, we emphasise that for such a plan to have any real impact training must be:

- adequately funded;
- regular and on-going (for example, a one-off session on cultural competency or family violence is unlikely to have any real impact on behavior of participants);
- accredited and overseen by an independent body (such as the Family Law Commission as in Proposal 10-4);
- delivered by specialist training providers; and
- developed in consultation with relevant community groups and service providers, including Aboriginal and Torres Strait Islander communities, those from CALD communities and those with disability.

We support Proposal 10-3 and propose additional key core competencies below at Question 10-1.

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

**Response**

WLSA recommends a separate, additional competency for 'understanding of sexual violence'. Sexual violence remains largely concealed, there are low levels of reporting and there is the tendency for sexual violence to fall through the gaps by both legal and non-legal services. Frontline service workers often do not have the skills to ask or communicate with clients about sexual violence. As with other core competencies a sexual violence competency would need to be developed in consultation with victim-survivors and sexual violence service providers.

We also recommend inclusion of competency in understanding child development.

More detail is also required for the core competency of 'an understanding of family violence'. At a minimum training must specifically address:

- early and ongoing risk assessment and screening;
- the forms, dynamics and nuances of family violence, including identification of



- predominant aggressor;
- effects of family violence on victim-survivors;
- the impact of gender on family violence and conscious and unconscious discrimination against women; and
- the intersections of family violence with different cultural and language backgrounds and/or disability. Family violence and trauma is often experienced differently by different groups within our community, including Aboriginal and Torres Strait Islander families, those from culturally and linguistically diverse (CALD) communities, people with disability and LGBTIQ communities.

WLSA encourages the ALRC to have regard to the specific recommendations that NVPLS makes in its submission to this DP in relation to cultural competency core competency.

### **Family violence training (Proposal 10-6)**

WLSA considers that one unit of family violence training to be insufficient noting the significantly high proportion of family law matters involving family violence. Further, given family violence is relevant beyond family law matters it should be compulsory for all legal practitioners.

The benefit of compulsory training is to increase the prospects that family lawyers and those professionals in the family violence sector are consistent with the advice provided to those affected by family violence. Consistency and holistic service delivery are paramount and required to promote safety for women and children. However, to achieve this, the compulsory family violence training needs to be with a specialist family violence training provider, including specialist sexual and family violence services and specialist women's legal services.

For example, WLSV runs Safer Families training, a professional development program that supports community legal centre lawyers to provide high quality, effective advice and representation to clients experiencing family violence. Women's Legal Service NSW in partnership with the state peak body, Community Legal Centres NSW, has provided whole day training seminars focused on domestic violence, the most recent day focused on family law and family violence primarily for community legal centre staff.

As outlined in the WLS NSW submission to the ALRC DP, WLS NSW has also 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.

Without such a requirement, there is no means to ensure that the sexual and family violence training attended by family law professionals is the accepted best practice or up

to date in the sexual and family violence sector.

### **Accreditation of children's contact services (Proposal 10-7)**

**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.

We support this Proposal.

The resources available to provide these important services are inadequate. This in turn leads to a significant number of cases where there is simply no contact service available, or where that availability is subject either to severe time restrictions, or inordinate wait times.

Those issues can lead to increased interaction between the perpetrator and victim-survivor of family violence, as the perpetrator seeks to make arrangements to spend time with the children, and to increased demands on Legal Aid and the courts.

The Services should be appropriately resourced to ensure that waiting times for both contact changeover services and supervised contact are minimised. The families, and particularly children, who require the assistance of contact services are often the most vulnerable of all families who access the family law system.

As already noted, without appropriately funded contact services, the outcome for these families is usually the adoption of contact arrangements that do not provide suitable levels of safety for children (and parents), or the cessation of all contact between a child and a parent. Neither outcome meets the objects and principles of the *Family Law Act 1975* (Cth) to promote the best interests of children.<sup>64</sup>

### **Judicial officers exercising family law jurisdiction (Proposals 10-8)**

**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.

WLSA supports Proposal 10-8 and adds the need to also have experience and aptitude in relation to sexual violence.

Legislative protection of sexual and family violence specialisation is fundamental for the safe resolution of the large number of family law matters involving sexual and family violence that proceed through the Courts.

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

**Question 10–5** What, if any, changes should be made to the process for appointment

<sup>64</sup> See

<https://www.lawcouncil.asn.au/resources/submissions/inquiry-into-domestic-violence-in-australia>

of federal judicial officers exercising family law jurisdiction?

## Response

The process for the appointment of future federal judicial officers must:

- be based on merit;
- be open and transparent; and
- encourage diversity.

WLSA notes the need for diversity for all appointments in the family law system and this is especially true of judicial officers. In particular, the Aboriginal and Torres Strait Islander Women's Legal Network recommends identified positions for judicial officers and other Court staff for Aboriginal and Torres Strait Islander people.

As noted in the Improving the Family Law System for Aboriginal and Torres Strait Islander Clients report by the Family Law Council strategies to develop workforce capacity need to be implemented.<sup>65</sup> Strategies include funding and opportunities for Aboriginal and Torres Strait Islander people to undertake study to enable more judicial appointments, family consultants and Aboriginal and Torres Strait Islander workers in the family law system.

As recommended in our earlier submission to the ALRC Issues Paper on the Review of the Family Law System, WLSA also supports the improvement of complaint mechanisms to investigate the behaviour of judicial officers.<sup>66</sup>

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

**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.

**Proposal 10–10** The Family Law Commission (Proposal 12–1) should maintain a publicly available list of accredited private family report writers with information about their qualifications and experience as part of the Accreditation Register

**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.

**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.

<sup>65</sup> Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients Report*, (2012) accessed at <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports.aspx> p 67.

<sup>66</sup> Accessed at: [http://www.wlsa.org.au/uploads/submission-resources/WLSA\\_submission\\_to\\_ALRC\\_Review\\_of\\_the\\_Family\\_Law\\_System\\_%28fa%29.pdf](http://www.wlsa.org.au/uploads/submission-resources/WLSA_submission_to_ALRC_Review_of_the_Family_Law_System_%28fa%29.pdf) p 46.

In our submission to the ALRC Issues Paper on the Review of the Family Law System WLSA noted the problems members have faced with family report writers and recommended the establishment of a national accreditation and an enforceable monitoring scheme.<sup>67</sup> We have had concerns with an over-reliance by the Court on family reports and a lack of depth of understanding of family violence by family report writers.

WLSA thus supports Proposal 10-9 and Proposal 10-10.

WLSA considers such a list will not only increase knowledge of those using the system but increase public confidence in the family law system as a whole.

As noted in our submission to the ALRC Issues Paper on the Review of the Family Law System there needs to be greater clarity and transparency with family report writers about why the family report is being sought and the issues identified that should be reported on.<sup>68</sup> WLSA is therefore also supportive of Proposal 10-11.

WLSA also supports Proposal 10-12.

As noted in our submission to the ALRC Issues Paper on the Review of the Family Law System there needs to be greater transparency about whether there are experts available for particular issues including sexual and family violence, cultural issues, mental health issues and substance abuse etc.<sup>69</sup>

WLSA members remain concerned about the cost of expert reports which can be prohibitive and we caution that the above measures will need to be adequately funded to avoid further increasing costs. As recommended in our submission to the ALRC Issues Paper on the Review of the Family Law System there should be increased resourcing to allow for affordable or free Court based report writing services.<sup>70</sup>

Finally, as discussed above mandatory training in sexual and family violence, child abuse and trauma informed practice, child development, cultural competency and disability awareness remains essential for family court workers, including family report writers.

### **Provision of Reports (Proposal 10-13)**

**Proposal 10–13** The Family Law Act 1975 (Cth) should provide that, where concerns are raised about the parenting ability of a person with disability in proceedings for parenting orders, a report writer with requisite skills should:

- prepare a report for the court about the person’s parenting ability, including what supports could be provided to improve their parenting; and
- make recommendations about how that person’s disability may, or may not, affect their parenting

<sup>67</sup> Accessed at: [http://www.wlsa.org.au/uploads/submission-resources/WLSA\\_submission\\_to\\_ALRC\\_Review\\_of\\_the\\_Family\\_Law\\_System\\_%28fa%29.pdf](http://www.wlsa.org.au/uploads/submission-resources/WLSA_submission_to_ALRC_Review_of_the_Family_Law_System_%28fa%29.pdf) p20.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

WLSA has significant concerns about Proposal 10-13.

Reports, like other aspects of the justice system, could be influenced by discriminatory views toward people, particularly mothers, with disability. The overrepresentation in child protection matters is but one example.

While proposed training and review will assist, it is not enough to override an ableist system and culture.

Advocacy, legal representation and support (legal and non-legal) must be available.

WLSA recommends there be further more in depth consultation with peak advocacy bodies representing people with disabilities in relation to this proposal. WLSA refers the ALRC to the submission of PWDA.

### **Wellbeing programs for family law system staff (Proposal 10-15)**

**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.

WLSA acknowledges the challenging nature of working within the family law system, especially for staff working with families affected by family violence and trauma.

We support Proposal 10-15.

We note that the chronic under-funding of the family law system as discussed above causes additional pressures and stress for staff and again seek for this to be remedied.

## Chapter 11: Information Sharing

### Information sharing between state and territory child protection and family violence with the family law system (Proposals 11-1 to 11-12)

**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.

**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.

We support Proposal 11-2 and recommend a national information sharing framework focus on agency and the safety of the victim-survivor.

There is a need to be clear about the purpose of any information sharing scheme, who is involved and how a family law information sharing scheme fits in with existing schemes. As noted in our submission to the ALRC Issues Paper on the Review of the Family Law System it is important that information sharing is not seen as the panacea and it will not solve systemic problems such as delays or inexperience in responding to family violence. WLSA considers that safeguards for any information sharing scheme must be put in place to protect against unintended consequences.

While WLSA acknowledges the benefits of, and supports in principle, restricted information sharing in regards to family law, family violence and child protection we make some general comments to highlight some of the potential risks that may arise from an information sharing system, as well as potential safeguards that may help protect against these risk.

Potential risks arising from information sharing schemes include:

- There is risk of harm to victim-survivors if information is wrongly shared with a perpetrator, particularly where parties are self-represented.
- There is a danger that the impact of incorrect or poor information is magnified in an information sharing system. For example, the risks arising from the use of an expert report later found to be flawed increase with the number of times the report is used. Furthermore, given that workers may categorise clients under pressure

without sufficient information or sufficient training it is common for the primary offender to be misidentified. The risk of harm from this misidentification again increases each time this identification is used in different systems. This could result in inaccurate and untested information being admitted as evidence into other jurisdictions, such as family law, which may then place children in greater danger if they are ordered to spend time with the actual primary aggressor.

- There is a risk of victim-survivors losing their agency in controlling their own information if there is not an emphasis on informed consent.

WLSA is supportive of the need for consent for victim-survivors to release of their information in any information sharing scheme.

- There is a risk that agencies may not act on risk if they assume another agency with access to the information sharing system will now be responsible.
- There are particular risks for Aboriginal and Torres Strait Islander and CALD victim-survivors and victim-survivors with disability given the widespread lack of appropriate cultural competency and lack of awareness and understanding of disability awareness.
- There is a risk of disengagement from support services if a victim-survivor feels the service is not confidential. For example, if the victim-survivor has not provided consent to sharing of information or has not understood what that consent involves. Victims may also be dissuaded from reporting to police or contacting other services out of fear that their confidential information may be shared and ultimately obtained by the perpetrator.

WLSA thus recommends that the proposals for an information sharing scheme be made the subject of a separate review which goes into detail about the proposal and how it would fit in with each state and territory's existing information sharing scheme and allow proper time for consultation.

In particular, WLSA calls for further research into potential safeguards to identify and minimise the risks involved with information sharing. These safeguards should include:

- Identifying the purpose and framing the information sharing system as a safety focused and a risk management tool which is based on sexual and family violence and trauma informed principles and aims to be consistent, minimally intrusive, proportionate, culturally appropriate and respectful of agency
- Testing the information sharing system amongst a small group of participants first before roll out to a larger population.
- Placing emphasis on agency, privacy and informed consent for all participants. There should be measures to explain the information sharing system and the meaning of consent to all participants. There should be further consultation and research into the appropriateness and utility of mechanisms to allow for participants to share information with some organisations and not others, and mechanisms to allow participants to share some information but not other information.



- Consider the particular needs of Aboriginal and Torres Strait Islander communities, CALD communities, people with disability, LGBTIQ communities and people living in regional, rural and remote areas, to be developed in consultation with each of these groups.
- Extensive, regular and ongoing training in sexual and family violence for all staff putting information into the shared system, including the recognition of dynamics of sexual and family violence and unconscious bias, working with victims of trauma and cultural competence. Training in response-based practice<sup>71</sup> such as not concealing or mutualising family violence, holding perpetrators to account and not blaming or pathologising victims-survivors and in appropriate note-taking is essential. Staff must have the appropriate skills to analyse the information regarding family violence and be able to correctly identify the primary victim and predominant aggressor.
- Training on interpreting the types of reports and information prepared in each jurisdiction (for example, training on types of orders in each jurisdiction and the basis for such orders) that are put into the information system and how such reports and information are used to inform decision-making about safety and best interests.
- Clear protocols around who is able to access information.
- Clear protocols around roles and responsibilities of different agencies.
- If there is to be a database that each of the Courts can access, issues of timeliness and currency of data should be considered. For example, it would need to be made clear to users that it should not be assumed that a lack of relevant information on a database necessarily reflected the latest circumstances.

**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?
- The Family Law Act 1975 (Cth) give family law professionals discretion to notify police if they fear for a person's safety and should such professionals be provided with immunity against actions against them, including defamation, if they make such a notification?

<sup>71</sup> For information about response-based practice see <https://www.responsebasedpractice.com/>

## Response

### Gun Licenses

WLSA agrees that state and territory police should be required to enquire about whether a person is currently involved in family law proceedings before they issue or renew a gun licence.

WLSA further supports police being required to inform the Family Courts if a person makes an application for a gun licence when they are involved in family law proceedings.

To enable the persons whose safety may be impacted to take steps to manage the risks, WLSA recommends this information be available through the Commonwealth Courts Portal.

### Notifying police of family violence allegations in family law proceedings

In some jurisdictions, such as NSW, there are different ways to seek domestic violence protection orders, for example, through police application or private application. Those who fear reporting to the police can access protection orders through a private application which does not require a report to police. This is an important reason why WLSA does not support family courts being required to notify police of family violence allegations.

There are also resource implications for police if requiring the family courts to report allegations of family violence to the police.

**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.

We support Proposal 11-3.

WLSA agrees with the need for information and guidance around the above points and suggests additional guidance about:

- who information is shared with; and

- what constitutes informed consent.

WLSA recommends that consideration of an information sharing scheme in a family law context be very cautiously considered noting the different information sharing schemes in various states and territories which already exist and which would need to be consistent with any federal family law information sharing scheme. This includes the mandatory reporting scheme in Northern Territory and the Victorian family violence and child safety and wellbeing information sharing schemes.

WLSA also recommends that there be further consultation which is informed by the formal evaluations undertaken of other information sharing schemes.

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

### **Response**

WLSA does not support the inclusion of health records in a family law information sharing framework.

There is a danger for misdiagnoses to have negative effects in Family Court matters. An example discussed in Women's Legal Service NSW report *Sense and Sensitivity: Family Law, Family Violence and Confidentiality* is that a victim-survivor of family violence suffering from PTSD may not make full disclosures about her experiences of violence due to fear that her privacy will be breached and her safety compromised.<sup>72</sup> She may then be misdiagnosed as having another type of mental illness and the incorrect diagnosis may be used to assess her parenting capacity. Similarly, substance abuse by victims of violence may be given undue weight in proceedings if the context of family violence is not disclosed to health service providers during treatment.<sup>73</sup>

**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?

### **Response**

WLSA does not support the sharing of records with family relationship services, such as FDR services, Children's Contact Services and parenting order program services.

WLSA believes that information should also not be shared with program services including support services, counsellors, psychologists and psychiatrists. We refer to research discussed in the Women's Legal Service NSW report *Sense and Sensitivity: Family Law, Family Violence and Confidentiality* noting that records by

<sup>72</sup> WLS NSW (2016) *Sense and Sensitivity: Family Law, Family Violence and Confidentiality* accessed at <http://www.wlsnsw.org.au/law-reform/sense-and-sensitivity-2016/> p 31.

<sup>73</sup> Ibid.

these services are not intended to be read by third parties, and are highly vulnerable to misinterpretation.<sup>74</sup> Furthermore, it is not the role of the counsellor or service provider to uncover facts or verify the truth or accuracy of what the victim-survivor is telling them, nor does the victim-survivor have the chance to read over notes and verify their truth.<sup>75</sup> Without a guarantee of confidentiality, victim-survivors may decide not to seek therapeutic care or may limit their disclosures or discontinue treatment should information be shared.<sup>76</sup>

**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 issued under state and territory child protection legislation.

**Proposal 11–5** State and territory governments should consider providing access for family courts and appropriate bodies and agencies in the family law system to relevant inter-jurisdictional and intra-jurisdictional child protection and family violence information sharing platforms.

**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.

WLSA supports Proposal 11-4.

However, we note that increased investment in technology to support the Scheme being available to access all orders in real time is needed.

WLSA supports in principle Proposal 11-5 and Proposal 11–6.

**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 11–8** The Australian Government and state and territory governments should work together to facilitate relevant entities, including courts and agencies in the family law, family violence and child protection systems, entering into information sharing agreements for the sharing of relevant information about families and children.

**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.

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<sup>74</sup> Ibid 28.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid 30.

**Proposal 11–10** The Australian Government should develop and implement an information sharing scheme to guide the sharing of relevant information about families and children between courts, bodies, agencies and services within the family law system.

**Proposal 11–11** The Family Law Act 1975 (Cth) should support the sharing of relevant information between entities within the family law system. The information sharing scheme should include such matters as:

- what information should be shared;
- why information should be shared;
- circumstances when information should be shared;
- mechanisms for information sharing;
- how information that is shared can be used;
- who is able to share information; and
- roles and responsibilities of professionals in the system in relation to information sharing.

WLSA supports Proposal 11–7. However, increased information sharing between the federal family law jurisdiction and the state welfare and family violence jurisdictions could arguably provide some of the benefit that the child protection workers currently co-located at federal family law registries provide.

WLSA supports Proposals 11-8, 11-9 and Proposal 11–10.

WLSA supports Proposal 11–11. However again we suggest the additional need for information about:

- who information is shared with; and
- what constitutes informed consent.

**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?

### **Response**

WLSA supports 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*

This includes 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.

Consistent with this WLSA recommends the child protection agency provides 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

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.

**Question 11–5** What information should be shared between the Families Hubs (Proposals 4–1 to 4–4) and the family courts, and what safeguards should be put in place to protect privacy? For example:

- Should all the information about services within the Families Hubs that were accessed by parties be able to be shared freely with the family courts?
- What information should the Family Courts receive (ie services accessed, number of times accessed, or more detailed information about treatment plans etc)?
- Should client consent be needed to share this information?
- Who would have access to the information at the Family Courts?
- Would the other party get access to any information provided by the Families Hubs services to the family courts?
- Should there be capacity for services provided through the Families Hubs to provide written or verbal evidence to the Family Courts?

### Response

WLSA has raised questions about the establishing of Families Hubs. We have also expressed concerns about information sharing without the victim's-survivor's informed consent. Any information-sharing framework should be developed with a focus on agency and safety of the victim-survivor.

**Proposal 11–12** The Australian Government should work with states and territories to ensure that the family relationships services they fund are captured by, and comply with, the information sharing scheme.

In regards to Proposal 11–12, WLSA raises the same concerns as expressed above in regards to information sharing with proposed Families Hubs.

## Chapter 12: System Oversight and Reform Evaluation

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

**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.

#### **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.

WLSA supports Proposal 12-1.

WLSA supports Proposal 12-2. We believe the Family Law Council plays a very important role and its work should continue through the Family Law Commission.

### Cultural Safety Framework (Proposals 12-8 to 12-10)

**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.

**Proposal 12–10** Family law service providers should be required to provide services that are compliant with relevant parts of the cultural safety framework.

WLSA supports Proposal 12-8.

WLSA considers that the development of cultural safety framework for Aboriginal and Torres Strait Islander families be led by Aboriginal and Torres Strait Islander controlled organisations including FVPLSs. WLSA agrees with NFVPLS that Aboriginal and Torres Strait Islander people and organisations should have oversight of the cultural safety framework for all reforms directly impacting Aboriginal and Torres Strait Islander people.

### **Privacy provisions in s121 *Family Law Act 1975* (Cth) (Proposal 12-11)**

**Proposal 12–11** Privacy provisions that restrict publication of family law proceedings to the public, currently contained in s 121 of the Family Law Act 1975 (Cth) should be maintained, with the following amendments:

- s 121 should be redrafted to make the obligations it imposes easier to understand;
- an explicit exemption to the restriction on publication or dissemination of accounts of proceedings should be provided for providing accounts of family law proceedings to professional regulators, and for use of accounts by professional regulators in connection with their regulatory functions;
- an avoidance of doubt provision should be inserted to clarify that government agencies, family law services, service providers for children, and family violence service providers are not parts of the 'public' for the purposes of the provision;
- the offence of publication or dissemination of accounts of proceedings should only apply to public communications, and legislative provisions should clarify that the offence does not apply to private communications; and
- to ensure public confidence in family law decision making, an obligation should be placed on any courts exercising family law jurisdiction, other than courts of summary jurisdiction, to publish anonymised reports of reasons for decision for final orders.

WLSA agrees that there should be an explicit exemption to the restriction on publication or dissemination of accounts of proceedings should be provided for providing accounts

of family law proceedings to professional regulators.

## Acknowledgments

We acknowledge the family violence victim survivors for whom we work, and in particular the family violence survivors who have shared their stories in this submission in the hope for positive change.

Thank you to everyone who assisted in the drafting of this submission.

## Further Resources and Information

If you have any queries or would like any further information in relation to this submission, please contact WLSA National Policy Coordinators, Sarah Bright and Allison Munro at [wlsa@wlcwa.org.au](mailto:wlsa@wlcwa.org.au).