

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

A better family law system to support and protect those affected by family violence

*Recommendations for an accessible, equitable and responsive
family law system which better prioritises safety of those
affected by family violence*

House of Representatives Standing Committee on Social Policy and Legal
Affairs

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CANBERRA

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Executive Summary

Many families across Australia access the federal family law system for assistance and support to resolve the legal issues which arise following family breakdown. Many of these families may have had an experience with family violence. It is imperative that adequate support and management is provided to these families to ensure their ongoing safety and wellbeing. However, evidence suggests that the family law system is not adequately supporting or protecting families which have experienced family violence.

In March 2017, the Attorney-General, Senator the Hon. George Brandis QC, requested that the House of Representatives Standing Committee on Social Policy and Legal Affairs inquire into how Australia's family law system can better support and protect those affected by family violence.

This report presents the findings of the Committee's inquiry, and recommendations to improve the family law system's response to families impacted by family violence. The report advocates for an accessible, equitable and responsive family law system which better prioritises the safety of families.

The first and second chapters of this report provide an overview of the inquiry process, past inquiries and reports of a similar nature, and the family law system's current approach to family law matters involving family violence.

Chapter 3 discusses the key concerns identified in evidence regarding the current family law system's approach to family violence. These include:

- the difficulties posed by an adversarial family law system;
- the existence of inappropriate responses to reports of family violence;
- that legal fees and complex court procedures which reduce the accessibility of the family law system; and
- the complexity in navigating state, territory, and federal jurisdictions.

The Committee expresses concern that the current design of the family law system can fail to support and protect families affected by family violence, and proposes the exploration of reform for the current family law system.

Responding to these concerns, Chapter 4 presents various ways in which the family law system can be improved. The chapter recommends a nationally developed risk assessment tool for use across the family law system and by all professions working within and adjacent to the family law system. It then examines family dispute resolution and calls for a stronger, more uniform approach to identifying and responding to family violence in family dispute resolution using the new nationally-consistent risk assessment tool. The chapter also proposes greater use of legally-assisted family dispute resolution for families affected by family violence, thereby reducing the number of cases which proceed to court, which frequently leads to lengthy delays in resolving disputes and prohibitive costs.

Once a matter reaches court, the Committee recommends reform to ensure that the determination of family violence occurs earlier in proceedings, which must be supported by a stronger initial assessment of risk. The Committee also makes recommendations for improved case management of family law matters involving family violence, including the adoption of a single point of entry to the federal family courts so that cases may be appropriately triaged and actively case managed. The Committee also recommends the implementation of more uniform rules and procedures to reduce complexity as well as stronger referral pathways and penalties for abuse of process, perjury and non-compliance with court orders. The Committee also calls for legislative amendments to require the Court to determine family violence allegations at the earliest practicable opportunity, so that the Court can make informed decisions regarding parenting and property matters. In addition, the Committee comments on the importance of information sharing regarding protection orders, the exercise of family law jurisdiction by state and territory magistrates, and the need to support one or more trials in state and territory courts so that all matters concerning family violence can be determined by the one court. The chapter also notes the early signs of success of the Australian Government's new Family Advocacy and Support Services program and recommends the extension of this program, subject to a positive evaluation, including into regional Australia.

Obtaining an equitable property settlement after the breakdown of a relationship which has involved family violence can be very difficult. Chapter 5 presents evidence that property settlements can provide abusive partners with a new avenue for abuse and leave families impacted by family violence in significant

financial hardship. It discusses options for safer, fairer and swifter property settlements, including simplifying the process for superannuation splitting orders.

The Committee believes that property division must be equitable and timely in order to effectively support families impacted by family violence. The Committee makes recommendations that the impact of family violence be expressly considered in all aspects of property division, suggests that an early resolution process for small claim property matters be adopted, and promotes consideration of amendments to the Family Law Act in relation to property and joint debt division. The Committee also makes recommendations for administrative and legislative changes to assist parties to identify and access their former partner's superannuation details for the purpose of property settlement.

Chapter 6 explores matters involving children including the impact of family violence on children, and the need to prioritise children's safety. The chapter discusses the legislative presumption of equal shared parental responsibility and the intended current exemption for cases involving family violence. The Committee expresses concern that this presumption is being improperly relied upon such that the safety of children is not being appropriately prioritised in many family law matters. The Committee recommends the simplification of Part VII of the Family Law Act, and that consideration be given to the removal of the presumption of equal shared parental responsibility. Further, the Committee suggests that, to ensure the safety of children in courts, a child safety service be incorporated into the courts to provide supervision and safety and facilitate appropriate communication between state, territory and federal child protection agencies. This could be an extension of the existing Family Advocacy and Support Services. In addition, the Committee makes recommendations for the extension of the Magellan program and for the adoption of multi-disciplinary panels in child abuse investigations.

Chapter 6 also examines the role of family reports in parenting orders, including the process of preparing reports, the cost of reports and the relative roles of private and court based family consultants. The Committee expresses concern about the quality and cost of family reports and makes recommendations to abolish private family consultants, and establish agreed fees for family reports. Further, the Committee believes that it is critical for children's perspectives to be provided to courts and considers further exploration of this issue by the Australian Law Reform Commission's review of the family law system is necessary.

Some families experiencing family violence can face additional barriers when accessing the family law system. Chapter 7 examines these additional difficulties for families from a number of different backgrounds including Aboriginal and

Torres Strait Islander families, culturally and linguistically diverse families, and people with disability. The Committee acknowledges that the family law system can be particularly difficult for some groups to access. The Committee recognises the significant work that the Family Law Council has completed in relation to the family law system as it related to Aboriginal and Torres Strait Islander families and culturally and linguistically diverse families, and suggests that previous recommendations from the Family Law Council are implemented. The Committee also recommends that the Family and Advocacy Support Service be expanded to support families with additional needs and that one of the trial courts in which all family violence matters are determined be ideally located in an area of high Indigenous population.

Chapter 8 examines the capacity of family law professionals to respond to family violence. The chapter explores evidence regarding the skills and expertise of judicial officers, registrars and court staff, family consultants, Independent Children's Lawyers, and family dispute resolution practitioners. The chapter also discusses resourcing of the family law system and the contribution that under-resourcing makes to delays within the family law system.

The Committee recognises that there are gaps in the capacity of some family law professionals, and expresses concern that such inconsistencies in capacity may be placing families at risk of further harm. The Committee responds to the evidence that many of these gaps in capacity are due to a lack of training, and makes suggestions for improvements to training for all family law professionals. The Committee expresses particular concern regarding the lack of accreditation of family consultants and the inability to make complaints when family consultants do not meet professional standards and makes recommendations to address this.

This chapter also examines resourcing of the family law system. The Committee discusses concerns about the current backlog of cases in the federal family courts and recommends that additional resources are provided to address this backlog.

Even after family law matters are resolved families which have experienced family violence may still experience some level of risk. Chapter 9 explores the ongoing support services available to families after a family law matter is resolved. The chapter examines court-based and external support services including housing, financial services and behaviour change programs for perpetrators.

The Committee believes that ongoing support services can provide families with security and safety after a family law matter has been resolved. The Committee expresses support for specialist domestic violence courts to employ wrap-around models of court-based support. The Committee also recognises the importance of evidence-based, evaluated, and best practice behaviour change programs in the

ongoing safety of families which have experienced family violence and makes recommendations for the incorporation and expansion of programs within existing services.

Foreword

In every suburb, in every town and in every city, family violence is a scourge across Australia. It affects families and individuals in horrendous and insidious ways. Leaving a violent relationship is an overwhelmingly difficult process which may involve significant risk to those affected including children, financial pressures, relocation and emotional turmoil. Some people, of course, are unable to leave a violent relationship and that can lead to tragic consequences.

Whether it be in relation to parenting orders, property division or the protection and safety of children, many people affected by family violence turn to or are required to enter the family law system. However, rather than providing safety and resolution to these families, the journey through the family law system can be a very difficult one and result in increased risk, trauma, prohibitive costs, a lack of justice and unacceptable delays in resolving the issues in dispute. Abuse of the legal system, itself, can also be used to inflict family violence.

The inadequacy of the family law system's response to family violence has been exposed in a number of recent inquiries, reviews and a state-based royal commission. Recognising that the family law system is no longer adequately meeting the needs of Australian families, the Attorney-General in September this year commissioned the Australian Law Reform Commission to undertake a comprehensive review of the family law system. It is hoped that this review will lead to a broader overhaul of the family law system.

This report adds evidence to the existing body of work in this area, and continues the call for swift and, in some cases, urgent improvements to the family law system. It provides suggestions to restructure the family law system so that it may provide support, timely resolution and safety to families experiencing family violence.

This inquiry provoked considerable interest, and the body of evidence received offers considerable insight into the experiences of families navigating the family law system. It is incredibly disturbing that the costs of private legal representation are so prohibitive, running into hundreds of thousands of dollars for a single matter. This is simply not affordable for the majority of Australians, and pushes already distressed families into debt and poverty. It may also force those affected by family violence to represent themselves in court which may give rise to unjust outcomes including the trauma of being cross-examined by the perpetrator of the violence. The family law system should protect families affected by family violence. It is therefore alarming to learn that the system provides opportunities for perpetrators of family violence to continue the abuse of their families. Perpetrators may use delaying tactics, repeated applications and failure to comply with court orders in order to continue to control their families and coerce them into unsafe consent agreements. It is unacceptable that there are not stronger deterrents or consequences for abuse of the legal process.

Children may be impacted by family violence, directly or indirectly, and it is paramount that their safety is prioritised during and after the resolution of family law matters. Sadly, the family law system too often appears to be failing to protect our young and vulnerable.

The Committee received considerable evidence that the presumption in the *Family Law Act 1975* (Cth) of equal shared parental responsibility is leading to unjust outcomes and compromising the safety of children. The recommendation to remove this presumption represents a substantial departure from current law. However, this recommendation must be considered in tandem with the recommendations that allegations of family violence be determined at the earliest available opportunity in legal proceedings. Not only is this critical to deliver justice to those impacted by family violence, it is similarly of vital importance to people against whom false or spurious allegations of family violence are made.

A large number of parenting orders are heavily influenced by evidence provided in family reports prepared by family consultants. It is extremely concerning that families are often paying thousands of dollars for these reports, which may be written by practitioners who have no formal training or understanding of family violence or its impact on children. It is critical that the quality and reliability of family reports improves.

It has been uplifting to receive evidence that some recent initiatives by the Australian Government, such as the Family Advocacy and Support Services, have provided some much needed improvements in the family law system. The continuation and expansion of such services to a greater number of locations is

required to ensure improved support for all families accessing the family law system.

More broadly, I commend the Australian Government for the significant number of family law reforms it has announced and is in the process of implementing including:

- broadening the jurisdiction of state and territory magistrates courts to determine matters under the Family Law Act, including on property matters;
- creating a new criminal offence for breaching a personal protection injunctions;
- strengthening the powers of the family law courts to dismiss unmeritorious matters at the earliest possible opportunity; and
- preventing parties from cross examining each other in family law matters where allegations of family violence are made.

This report provides a vision for a reformed system which better supports and protects families affected by family violence. Such a system is accessible, equitable, and responsive, and prioritises the safety of families. This report makes 33 recommendations which the Committee believes, if implemented, will provide immediate improvements to a system which too often has failed families affected by family violence.

This inquiry was underpinned by the strong message that ‘your voice matters.’ In undertaking this inquiry, it was imperative that the Parliament hear the personal accounts of families which have navigated the family law system. Our committee received 126 submissions and a very significant 5,490 people submitted an anonymous questionnaire telling their story. I thank the committee secretariat for its hard work in collating this evidence and helping to produce this report.

Revisiting experiences of family violence can be very distressing. The Committee sincerely thanks all participants for their very important contributions to this inquiry. We have sought to give these people a voice in this report and in the vision we have for a new family law system to better support and protect families affected by family violence.

Ms Sarah Henderson MP

Chair

Contents

Executive Summary.....	iii
Foreword.....	ix
Abbreviations.....	xxi
Members.....	xxiii
Terms of Reference.....	xxv
List of Recommendations.....	xxix

The Report

1 Introduction.....	1
Recent reviews and amendments.....	3
Overview of the reports to date.....	3
Recent proposed family law amendments.....	8
Australian Law Reform Commission – Review of the Family Law System.....	9
Principles for a reformed family law system.....	11
A triaged, actionable pathway for reform.....	11
The inquiry process.....	12
Referral of the inquiry.....	12
Conduct of the inquiry.....	13
Community engagement strategy.....	14
Questionnaire.....	14
Community statement sessions.....	16

Confidential correspondence	16
Structure of the report	17
A note on terminology	18
Definition of family violence	18
2 Overview of the family law system.....	21
State and territory courts exercising jurisdiction under family violence legislation ..	22
Federal family law	24
Structure of courts	24
Property division.....	25
Parenting matters	26
Injunctions for personal protection under the Family Law Act	28
Procedures	31
Exercise of family law jurisdiction by state and territory courts.....	39
Interaction of family law and state/territory family violence legislation	40
Interaction of family law system and child protection systems	42
The system in practice.....	45
Different pathways.....	45
3 Challenges of current system.....	47
Introduction.....	47
Adversarial system	48
Unresponsive to reports of family violence	51
Legal strategy of not raising family violence	52
Dismissing reports of family violence.....	54
Delays.....	55
Family law system is inaccessible	59
Costs	59
Overly complex processes.....	62
Abuse of process	64
Coercion and consent orders.....	68

Perjury and false allegations	72
Fragmentation of jurisdictions	75
Committee comment	79
4 A new family law system	83
A new risk assessment tool across the entire family law system	84
Out of court processes	89
Family dispute resolution	89
Parenting management hearings	99
Design and delivery of court processes	102
Introduction	102
Risk assessment upon filing	103
Case management, triage and referral	106
Information sharing across jurisdictions	110
Early determination of family violence allegations	113
Court scrutiny of consent orders	116
Role of state and territory magistrates courts	117
Specialist courts, divisions and lists	122
Legal representation in family law matters	125
Access to legal representation	125
Self-represented litigants	129
Direct cross-examination	132
Administration and enforcement of court orders	138
A national approach	138
Breaches and enforcement of family law orders	141
A recent initiative: Family Advocacy and Support Services	143
Committee comment	148
A new, nationally consistent risk assessment tool	149
Legally-assisted family dispute resolution	151
Case management and triage	152

	Improved information sharing.....	155
	Early determination of family violence allegations.....	155
	Role of state and territory magistrates courts	156
	Direct crossexamination	158
5	Property division and financial recovery	159
	Introduction.....	159
	Existing options and challenges for property settlement	161
	Considering family violence in property division.....	164
	A new small property claims process.....	168
	Division of superannuation.....	171
	Treatment of joint debt and liabilities.....	173
	Procedural changes to support reform	174
	Greater use of state courts' powers to determine property settlements	174
	Extension of safeguard procedures to property matters.....	176
	Committee comment.....	176
	Family violence in property division	177
	Small claim property matters	178
	Division of superannuation	179
	Treatment of unsecured joint debt and shared liability	180
	Procedural changes to support reform.....	181
6	Matters involving children	183
	Recognising the impact of family violence on children.....	185
	Prioritising children's safety	187
	Equal shared parental responsibility.....	190
	Improving the information available to the courts.....	196
	Integration of child protection agencies' investigations.....	197
	Family reports.....	205
	Incorporating children's perspectives in court.....	216
	The role of independent children's lawyers.....	217

	Alternative mechanisms	220
	Committee comment	221
	Prioritising children’s safety	221
	A new child safety service attached to the Court	223
	Improving the information available to the Court	224
	Incorporating children’s perspectives in court	228
7	Families with additional needs	229
	Aboriginal and Torres Strait Islander families	230
	Barriers to the family law system.....	231
	Recommendations for reform.....	236
	Culturally and Linguistically Diverse families	241
	Barriers to the family law system.....	242
	Recommendations for reform.....	245
	Families with parents or children with disabilities	248
	Barriers to the family law system.....	250
	Recommended reform	251
	Other groups with particular needs.....	252
	Committee comment	253
	Aboriginal and Torres Strait Islander families	254
	Culturally and Linguistically Diverse families	256
8	Strengthening the capacity of family law professionals.....	259
	Improving skills and expertise across the system.....	259
	Skills and expertise in specific professions	263
	Judicial officers	263
	Registrars and other court staff	269
	Family consultants	270
	Independent children’s lawyers.....	277
	Family dispute resolution practitioners.....	279
	Resourcing	280

The Courts	281
Family consultants and Independent Children’s Lawyers	283
Committee comment	284
Skills and capacity	284
Accreditation system for family consultants	287
Resourcing	288
9 Ongoing support services	291
Court-based support services	292
Housing and homelessness after family violence	294
Economic support	295
Behaviour change programs	296
Committee comment	301
Court-based support and referrals	301
Appendix A. Recommendations from other reports	303
Appendix B. Australian Law Reform Commission - Review of the family law system	329
Appendix C. List of submissions	333
Appendix D. List of exhibits and additional documents	339
Appendix E. List of public hearings	343
Appendix F. Questionnaire findings	349
Additional Comments by Labor Members	369

List of Tables

Table 6.1	Parental responsibility outcomes by allegation of violence or child abuse, judicially determined and consent after proceedings cases, post-1 July 2006	191
Table 6.2	Children in shared parental responsibility arrangements, by whether there were allegations of family violence and/or child abuse, pre- and post-2012 reforms.....	192

List of Textboxes

Box 3.1	Adversarial system	50
Box 3.2	Legal strategy of not raising family violence.....	53
Box 3.3	Dismissing reports of family violence	55
Box 3.4	Court delays.....	57
Box 3.5	Costs of accessing the family law system.....	60
Box 3.6	Abuse of process	65
Box 3.7	Coercion and consent orders.....	69
Box 3.8	Perjury and false allegations	73
Box 3.9	Fragmentation of jurisdictions	77
Box 4.1	Family Dispute Resolution	93
Box 4.2	Access to legal representation.....	127
Box 4.3	Self-represented litigants	130
Box 4.4	Cross-examination	133
Box 4.5	Personal Protection Orders.....	143
Box 4.6	Case study – Consent orders and Family Advocacy and Support Service.....	145
Box 5.1	Property Settlement	163
Box 6.1	Prioritising children’s safety.....	189
Box 6.2	Independent children’s lawyers	219
Box 8.1	Improving skills and expertise across the system.....	260
Box 8.2	Family consultants	271
Box 8.3	Monitoring of family consultants	276
Box 8.4	Resourcing.....	280
Box 9.1	Support services	291

Abbreviations

AASW	Australian Association of Social Workers
ABS	Australian Bureau of Statistics
AIFS	Australian Institute of Family Studies
ALRC	Australian Law Reform Commission
ANROWS	Australian National Research Organisation for Women’s Safety
AVERT	Addressing Violence: Education, resources and training
BCP	Behaviour change program
CALD	Culturally and linguistically diverse
Castan Centre for Human Rights Law	Monash University – Castan Centre for Human Rights Law
CFDR	Coordinated Family Dispute Resolution
COAG	Council of Australian Governments
CPSU	Community and Public Sector Union
CRAF	Common Risk Assessment Framework
DOORS	Detection of Overall Risk Screen

DVSAT	Domestic Violence Safety Assessment Tool
FASS	Family Advocacy and Support Services
FDR	Family Dispute Resolution
FECCA	Federation of Ethnic Communities Councils of Australia
FLC	Family Law Council
FRSA	Family and Relationships Service Australia
ICL	Independent children’s lawyer
InTouch	InTouch Multicultural Centre Against Family Violence
LGBTIQ	Lesbian, gay, bisexual, transsexual, intersex and queer
NFVPLSF	National Family Violence Prevention Legal Services Forum
No To Violence	No To Violence – Men’s Referral Service
NSWLRC	NSW Law Reform Commission
PHAA	Public Health Association of Australia
PMH	Parent Management Hearings
PSS	Personal Safety Survey
RANZCP	Royal Australian and New Zealand College of Psychiatrists
Royal Commission	Victorian Royal Commission into Family Violence
Safe Steps	Safe Steps Family Violence Response Centre
The Deli Centre	The Deli Women and Children’s Centre
VLA	Victoria Legal Aid
VOCAL	Victims of Crime Assistance League Inc.
WLSA	Women’s Legal Services Australia

Members

Chair

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Deputy Chair

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Terms of Reference

Terms of reference

The Committee will inquire into and report on how the federal family law system should be improved to better protect people affected by family violence. The inquiry will consider:

- 1 how the family law system can more quickly and effectively ensure the safety of people who are or may be affected by family violence, including by:
 - a. facilitating the early identification of and response to family violence; and
 - b. considering the legal and non-legal support services required to support the early identification of and response to family violence;
- 2 the making of consent orders where there are allegations or findings of family violence, having regard to the legislative and regulatory frameworks, and whether these frameworks can be improved to better support the safety of family members, as well as other arrangements which may be put in place as alternative or complementary measures;
- 3 the effectiveness of arrangements which are in place in the family courts, and the family law system more broadly, to support families before the courts where one or more party is self-represented, and where there are allegations or findings of family violence;

- 4 how the family law system can better support people who have been subjected to family violence recover financially, including the extent to which family violence should be taken into account in the making of property division orders;
- 5 how the capacity of all family law professionals—including judges, lawyers, registrars, family dispute resolution practitioners and family report writers—can be strengthened in relation to matters concerning family violence; and
- 6 the potential for a national approach for the administration and enforcement of intervention orders for personal protection, however described.

Principles for the conduct of the inquiry

The Committee adopted the following principles for the conduct of the inquiry.

These principles aim to ensure that inquiry processes enable all sections of the community to participate in the inquiry, particularly those that may otherwise have difficulty engaging with the inquiry. The principles also aim to limit the extent to which the inquiry duplicates existing reports to government.

The inquiry will have particular regard to:

- the administration of family violence matters in comparable overseas jurisdictions, as they relate to the inquiry's terms of reference;
- the particular needs of, and supports required for, Aboriginal and Torres Strait Islander families, and disadvantaged and high risk groups, which need to access the family law system; and
- ensuring that the inquiry processes are such that people who have been affected by family violence and who wish to contribute to the Committee can do so:
 - in a manner which does not re-traumatise people who have been affected by family violence; from a safe and secure location, where necessary;
 - confidentially; and
 - in a manner which will not prejudice or compromise current or future family law or other civil or criminal proceedings.

The inquiry will seek to avoid duplicating the work underpinning existing reports to government, and other recent reports into improving how the family law system deals with family violence.*

The inquiry will also have regard to the initiatives currently being progressed by the Australian Government to implement recommendations of the Family Law Council's interim and final reports on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems, including:

- the publicly agreed review of the *Family Law Act 1975*, including the provisions in Part VII (provisions governing parenting arrangements), to ensure that the Act supports a family law system that meets the contemporary needs of families today and into the future, and effectively and appropriately addresses family violence and child protection issues;
- the exposure draft of proposed amendments to the Family Law Act, released 9 December 2016, that would strengthen the powers of the courts to protect victims of family violence, and facilitate the resolution of family law matters by state and territory courts in appropriate cases;
- the establishment of Family Advocacy and Support Services in family courts across Australia, to assist families moving between the federal family law system and the state family violence and child protection systems;
- work being undertaken by the Attorney-General's Department with stakeholders to progress measures to support vulnerable witnesses, and to assist the family law courts to manage the cross-examination of victims of family violence;
- new funding to pilot legally-assisted family dispute resolution, which will be targeted at providing assistance to Indigenous or culturally and linguistically diverse families; and
- the development of a National Domestic and Family Violence Bench Book for judicial officers, and a new government-funded training package for judicial officers on the nature and dynamics of family violence.

**Relevant recent reports*

Recent reports include, but are not limited to:

- the Family Law Council's interim and final reports on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems (2015 and 2016);

- the report of the Victorian Royal Commission into Family Violence (2016);
- the report of the Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever* (2015);
- the Victorian Coroner's Court Finding – Inquest into the Death of Luke Geoffrey Batty (2015);
- the Women's Legal Services Australia Safety First in Family Law – A Five-Step Plan (2016), which has been supported by Rosie Batty;
- the Australasian Institute of Family Studies Evaluation of the 2006 Family Law Reforms (2006) and Evaluation of the 2012 Family Violence Amendments (2015);
- the Australian Law Reform Commission's report – Family Violence – A National Legal Response (ALRC Report 114) (2010); and
- Bravehearts' Abbey's Project paper on the family law system (2016).

List of Recommendations

Recommendation 1

4.226 The Committee recommends that the Australian Government considers extending the Family Advocacy and Support Services program, subject to a positive evaluation, to a greater number of locations including in rural and regional Australia.

Recommendation 2

4.232 The Committee recommends that the Australian Government progresses, through the Council of Australian Governments, the development of a national family violence risk assessment tool. The tool must be nationally consistent, multi-method, multi-informant and culturally sensitive and be adopted to operate across sectors, between jurisdictions and among all professionals working within the family law system.

Recommendation 3

4.240 The Committee recommends that the Australian Government introduces to the Parliament amendments to the *Family Law Act 1975* (Cth) to require a risk assessment for family violence be undertaken upon a matter being filed at a registry of the Family Court of Australia or the Federal Circuit Court of Australia, using the national family violence risk assessment tool. The risk assessment should utilise the national family violence risk assessment tool and be undertaken by an appropriately trained family violence specialist provider.

Recommendation 4

4.246 The Committee recommends, subject to a positive evaluation of the recently announced legally-assisted family dispute resolution pilot, the Australian Government seeks ways to encourage more legally-assisted family dispute resolution, which may include extending the pilot program.

Recommendation 5

4.254 The Committee recommends that the Attorney-General considers how the Family Court of Australia and the Federal Circuit Court of Australia can improve case management of family law matters involving family violence issues, including:

- the adoption of a single point of entry to the federal family law courts so that applications, depending on the type of application and its complexity, are appropriately triaged, and actively case managed to their resolution in an expedited time-frame;
- the greater use of mediation or alternative dispute resolution by the federal family courts during proceedings to encourage earlier resolution of matters;
- the implementation of more uniform rules and procedures in the two federal family courts to reduce unnecessary complexity and confusion for families;
- the establishment of formal and expedited referral pathways between state and territory magistrates courts and the federal family courts; and
- the development of a stronger regime of penalties including cost orders to respond to abuse of process, perjury and non-compliance with court orders.

Recommendation 6

4.258 The Committee recommends that the Attorney-General progresses through the Council of Australian Governments an expanded information sharing platform as part of the National Domestic Violence Order Scheme to include orders issued under the *Family Law Act 1975* (Cth) and orders issued under state and territory child protection legislation.

Recommendation 7

4.261 The Committee recommends the Australian Government introduces to the Parliament amendments to the *Family Law Act 1975* (Cth) to require a relevant court to determine family violence allegations at the earliest practicable opportunity after filing proceedings, such as by way of an urgent preliminary hearing and, where appropriate, refer to findings made, and evidence presented, in other courts.

Recommendation 8

4.262 The Committee recommends that abuse of process in the context of family law proceedings be identified in the list of example behaviours as set out in section 4AB(2) of the *Family Law Act 1975* (Cth).

Recommendation 9

4.264 The Committee recommends that the Attorney-General develops stronger restrictions in relation to access by other parties to medical records in family law proceedings.

Recommendation 10

4.270 The Committee recommends that the Attorney-General works with state and territory counterparts through the Council of Australian Governments to reach agreements (such as in relation to resources, education and court infrastructure) to encourage state and territory magistrates to exercise family law jurisdiction, particularly in specialist family violence courts and courts which deal with a high number of family violence matters.

Recommendation 11

4.272 The Committee recommends that the Attorney-General works with state and territory counterparts through the Council of Australian Governments to establish a trial in one or more specialist state or territory family violence courts (including reaching agreement in relation to resources, education and court infrastructure) enabling family law issues in family violence cases to be determined by the one court, including expedited pathways for breach and enforcement proceedings. One of the trial courts should ideally be located in an area of high Indigenous population.

Recommendation 12

4.275 The Committee recommends the Attorney-General introduces the Family Law Amendment (Family Violence and Cross-examination of the Parties) Bill 2017 into the Parliament for its urgent consideration such that perpetrators of family violence will be prohibited from cross examining the other party including in relation to the qualifications and funding of those appointed to undertake such cross examination.

Recommendation 13

5.67 The Committee recommends that the Australian Government introduces to the Parliament amendments to the *Family Law Act 1975* (Cth) to enable:

- the impact of family violence to be taken into account in the Court's consideration of both parties' contributions; and
- the impact of family violence to be specifically taken into account in the Court's consideration of a party's future needs.

Recommendation 14

5.71 The Committee recommends that the Australian Government introduces to the Parliament amendments to the *Family Law Act 1975* (Cth) to include a requirement for an early resolution process for small claim property matters. This process should involve a case management process upon application to the Court for a property settlement, rather than a pre-filing requirement, which will provide greater certainty and more expeditious resolution.

Recommendation 15

5.74 The Committee recommends that the Attorney General:

- develops an administrative mechanism to enable swift identification of superannuation assets by parties to family law proceedings, leveraging information held by the Australian Taxation Office; and
- amends the *Family Law Act 1975* (Cth) and relevant regulations to reduce the procedural and substantive complexity associated with superannuation splitting orders, including by simplifying forms required to be submitted to superannuation funds.

Recommendation 16

5.80 The Committee recommends that the Attorney-General's Department considers options for legislative amendment to the *Family Law Act 1975* (Cth) to enable the federal family courts to make greater use of court orders for the split or transfer of unsecured joint debt and shared liabilities following the separation of families, particularly those affected by family violence.

Recommendation 17

5.83 The Committee recommends that the jurisdictional limit on state and territory magistrates' courts hearing family law property disputes be increased and that the Attorney-General introduces to the Parliament the Family Law Amendment (Family Violence and Other Measures Bill 2017) to give effect to the increase.

Recommendation 18

5.86 The Committee recommends that the *Family Law Act 1975* (Cth) be amended to extend sections 69ZN and 69ZX, which requires the Court to conduct proceedings in a way which safeguards the parties against family violence in parenting matters, to apply in property division matters.

Recommendation 19

6.130 The Committee recommends that the Australian Law Reform Commission, as part of its current review of the family law system, develops proposed amendments to Part VII of the *Family Law Act 1975* (Cth), and specifically, that it consider removing the presumption of equal shared parental responsibility.

Recommendation 20

6.136 The Committee recommends that the Attorney-General extends the Family Advocacy and Support Services pilot, subject to positive evaluation, to include a child safety service attached to the Family Court of Australia and the Federal Circuit Court of Australia, modelled on the United Kingdom's Children and Family Court Advisory and Support Service. The expanded service, which may require additional infrastructure, should:

- provide ongoing supervision of the safety of children following orders made by a court;

- bring applications to the Court where the risk of a child's safety is of concern and where an exercise of judicial power is required to ensure the child's ongoing safety; and
- refer matters to state and territory child protection agencies, where required.

Recommendation 21

6.148 The Committee recommends the Attorney-General, through the Council of Australian Governments where necessary, works to improve the information available to courts exercising family law jurisdiction at the earliest possible point in proceedings by:

- implementing the Family Law Council's recommendations in its 2015 *Families with complex needs and the intersection of the family law and child protection systems – Interim Report* for information sharing protocols between the federal family courts and state and territory child protection departments;
- establishing a child safety service attached to the Court that operates as a liaison between the federal family courts and child protection departments to ensure all relevant information is available to the Court at the earliest possible stage; and
- consider the adoption of multi-disciplinary panels by state and territory governments for child abuse investigations which would assist the family law courts to determine whether family violence has occurred; and

works with the Family Court of Australia to extend the Magellan program to all parenting matters where there are allegations of family violence.

Recommendation 22

6.156 The Committee recommends the Attorney-General pursues legislation and policy reform to abolish private family consultants, with family consultants to be only engaged and administered by the Court itself. Further, the Committee recommends the development of an agreed fee schedule to regulate the costs of family reports and other expert witnesses.

Recommendation 23

6.159 The Committee concludes that the Court must be better informed of children's views, concerns and matters affecting their welfare, and recommends that the Australian Law Reform Commission in its ongoing review of the family law system, examines and propose alternative mechanisms that would ensure children's perspectives are heard in court.

Recommendation 24

7.96 The Committee recommends that, as a matter of urgency, the Australian Government implements the Family Law Council recommendations from both the 2012 *Improving the family law system for Aboriginal and Torres Strait Islander clients* report, and the 2016 *Families with complex needs and the intersection of the family law and child protection systems – Final Report*, as they relate to Aboriginal and Torres Strait Islander families, including those recommendations addressing:

- community education;
- cultural competency;
- service collaboration;
- culturally diverse workforce;
- early assistance and outreach;
- legal and non-legal services;
- interpreters;
- cultural reports;
- family group conferences;
- participation of elders or respected persons in court hearings; and
- consulting with Aboriginal and Torres Strait Islander representatives in the development of any reforms.

Recommendation 25

7.101 The Committee recommends that, as a matter of urgency, the Australian Government implements recommendations from both the 2012 *Improving the family law system for clients from culturally and linguistically diverse backgrounds* report, and the 2016 *Families with complex needs and the intersection of the family law and child protection systems – Final Report*, as they relate to culturally and linguistically diverse families, including those recommendations addressing:

- community education;
- cultural competency;
- service integration;
- culturally diverse workforce;
- consultation with culturally and linguistically diverse communities in service evaluation;
- interpreters;
- cultural connection for children; and
- family group conferences.

Recommendation 26

7.103 The Committee recommends the Attorney-General extends the Family Advocacy and Support Service pilot to include collaboration and referral pathways to specialist support services for families with additional challenges, using the Children and Family Court Advisory and Support Service model.

Recommendation 27

8.82 The Committee recommends that the Australian Government develops a national and comprehensive professional development program for judicial officers from the family courts and from states and territory courts that preside over matters involving family violence. The Committee recommends that this program includes content on:

- the nature and dynamics of family violence;
- working with vulnerable clients;
- cultural competency;
- trauma informed practice;
- family law; and
- ‘The Safe and Together Model’ for understanding the patterns of abuse and impact of family violence on children.

Recommendation 28

8.83 The Committee recommends that the Australian Government develops a national, ongoing, comprehensive, and mandatory family violence training program for family law professionals, including court staff, family consultants, Independent Children’s Lawyers, and family dispute resolution practitioners. The Committee recommends that this program includes content on:

- the nature and dynamics of family violence;
- working with vulnerable clients;
- cultural competency;
- trauma informed practice;
- the intersection of family law, child protection and family violence; and
- ‘The Safe and Together Model’ for understanding the patterns of abuse and impact of family violence on children.

Recommendation 29

8.84 The Committee recommends the Australian Government undertakes an evaluation of the Addressing Violence: Education, resources and training (AVERT) family violence training program, with consideration of its content, format, uptake, reach and effectiveness.

Recommendation 30

8.87 The Committee recommends that the Australian Government develops a national accreditation system with minimum standards and ongoing professional development for family consultants modelled on the existing accreditation system for family dispute resolution practitioners. This system should include a complaints mechanism for parties when family consultants do not meet the required professional standards.

Recommendation 31

8.92 The Committee recommends that the Australian Government considers the current backlog in the federal family courts and allocates additional resources to address this situation as a matter of priority.

Recommendation 32

9.40 The Committee recommends the Attorney-General works to introduce 'wrap-around' services co-located in the federal family courts, modelled on the provision of these legal and non-legal support services in the specialist family violence courts of the states and territories.

Recommendation 33

9.44 The Committee recommends the Attorney-General works to establish a systematic court referral mechanism to evidence-based, evaluated, best practice behaviour change programs, through an expanded Family Advocacy and Support Services program, which includes systematic reporting from behaviour change program providers to advise the Court on ongoing risks to families' safety. Further, the Committee recommends that the Attorney-General work with state and territory counterparts to ensure adequate funding of evidence-based, evaluated, best practice behaviour change programs to support the mechanism.

1. Introduction

- 1.1 On 7 March 2017, the Attorney-General, Senator the Hon. George Brandis QC, asked the House of Representatives Standing Committee on Social Policy and Legal Affairs (the Committee) to inquire into how Australia's federal family law system can better support and protect people affected by family violence.
- 1.2 Family violence is widespread in Australia, affecting people regardless of sex, age, race, sexuality, disability, gender identity, socio-economic status or lifestyle. In Australia, one woman per week is murdered by a current or former partner in a family violence related murder.¹ Thirty family violence incidents are reported to the police every hour, equating to 723 incidents every day. A vast number more go unreported, hidden behind the front doors of everyday households.
- 1.3 Research indicates that one in four Australian women have experienced at least one incident of violence from an intimate partner since the age of 15,² and one in 19 Australian men have experienced physical or sexual violence by a current or former partner.³ Pregnant women are 230 per cent more

¹ Australia's National Research Organisation for Women's Safety (ANROWS), *Violence against Women: key statistics*, <<https://anrows.org.au/sites/default/files/Violence-Against-Australian-Women-Key-Statistics.pdf>>, viewed 27 September 2017; see also ANROWS, *Violence against women in Australia: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012*, October 2015; see also Dr Roslyn Baxter, Group Manager, Families Group, Department of Social Services, *Proof Committee Hansard*, Canberra, 17 October 2017, p. 13.

² ANROWS, *Violence against women in Australia: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012*, October 2015.

³ ABS, *Personal Safety Survey 2012*, <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4906.0Chapter1002012>>, viewed 11 September 2017; see also, ANROWS, *Submission 73.1*, p. 3.

likely than non-pregnant women to experience family violence.⁴ In Victoria, the violence of an intimate partner was found to be the main contributor to death and disability of women aged 15 to 44.⁵ According to 2006 statistics, children were reported to be present in 49 per cent of cases of violence by a current partner.⁶

- 1.4 The decision to leave a violent relationship can involve a total relocation away from family and friends, changes in education and employment arrangements, and significant financial and emotional hardship. It is a decision that families affected by violence would not enter into lightly. Notwithstanding, for many people affected by family violence, it is broadly recognised that it is often not possible to leave a violent relationship. The lack of alternate housing, financial resources, threats of further family violence and increased risk to the partner and any children are some of the reasons that people stay in the home.
- 1.5 The federal family law system responds to families in crisis and change, and one of its key responsibilities, is to ensure the ongoing safety and wellbeing of families. However, evidence to this inquiry, and numerous recent reports, indicate that the family law system is not adequately protecting and supporting families experiencing family violence.
- 1.6 In light of the statistics, it is perhaps unsurprising that 50 per cent of matters before the Family Court of Australia (the Family Court), 70 per cent of matters before the Federal Circuit Court of Australia (the Federal Circuit Court) and 65 per cent of matters before the Family Court of Western Australia, involve allegations of family violence.⁷ As a result, responding to family violence has been described as ‘core business of the federal family courts’.⁸
- 1.7 The Family Court advised that in 2016-17:

⁴ Department of Social Services, *Submission 116*, p. 5; see also Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Domestic Violence Trends and Issues in New South Wales*, Report No 46, 2012.

⁵ Women’s Legal Service Queensland, *Submission 81*, p. 3.

⁶ Australian Bureau of Statistics 2006, Personal Safety Survey 2005, Cat. 4906.0. Commonwealth of Australia, Canberra; see also Australia Institute of Family Studies (AIFS), *Submission 1*, p. 4.

⁷ Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms*, 2009, p. 314; see also Monash University – Castan Centre for Human Rights Law (Castan Centre for Human Rights), *Submission 57*, p. 2.

⁸ Ms Gayathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 26.

- 2,748 final orders applications were filed;
- 2,742 final orders applications were finalised; and
- 14,182 applications for consent orders.⁹

1.8 The Family Court further advised that in the same financial year, 653 Notices of Child Abuse, Family Violence or Risk of Family Violence were filed. However, the Court also commented that the ‘proportion of matters in which a Notice of Child Abuse, Family Violence or Risk of Family Violence has been filed does not reflect all the cases in which family violence is raised or is an issue’. The Court stated, ‘allegations of abuse or risk of abuse and family violence or risk of family violence are also raised by parties in affidavits filed in the proceedings and ... by the filing of a Family Violence Order’.¹⁰

1.9 In its Annual Report, the Federal Circuit Court reported that in 2016-17:

- 17,791 family law final orders applications were filed; and
- 17,239 family final orders applications were finalised.¹¹

Recent reviews and amendments

Overview of the reports to date

1.10 In referring the inquiry, the Attorney-General requested the Committee have regard to a number of recent reviews. The family law system’s response to family violence has been the subject of multiple inquiries, reviews and a royal commission in Victoria over the past decade, making it clear that the current system is not adequately responding to instances of family violence. Some of these inquiries and reviews include:

- Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Interim and Final Reports* (2015 and 2016);
- Victorian Royal Commission into Family Violence, *Report and Recommendations to the Victorian Government*, (2016);
- Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever Report*, (2015);

⁹ Family Court of Australia, *Submission 44.1*, p. 2.

¹⁰ Family Court of Australia, *Submission 44.1*, p. 2.

¹¹ Federal Circuit Court of Australia, *Annual Report 2016/17*, p. 6.

- Victorian Coroner’s Court, *Finding – Inquest into the Death of Luke Geoffrey Batty* (2015);
- Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2006) and *Evaluation of the 2012 Family Violence Amendments* (2015); and
- Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, (2010).

1.11 Collectively, the reports written to date run to several thousand pages, with many hundreds of recommendations to state and territory and federal governments. Some of these reports have focussed on the intersection of the federal family law system with other state-based systems—such as the child protection system—whilst others have proposed reforms that fall within the jurisdictions of state and territory governments.

1.12 Although the focus of these reports differs, many come to similar findings or make similar recommendations for reform. Key and repeating themes in many of these reports include:

- Legislative reform to the *Family Law Act 1975*
 - a common interpretive framework across federal and state/territory law for what constitutes family violence¹²
 - clarifying the jurisdiction of state and territory courts to make orders under the *Family Law Act 1975*¹³
 - strengthening the administration and enforcement of intervention orders
- Integration and cross-jurisdictional collaboration
 - improving inter-jurisdictional collaboration and information sharing (between and within governments, courts of different jurisdictions, and police)
 - specialist family and domestic violence courts and court services
 - incorporating the expertise of specialist family violence services into the family law system

¹² Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114/NSWLRC Report 128, 2010, Recommendation 5-1, p. 17.

¹³ See for example: Family Law Council, *Families with complex needs and the intersection of family law and child protection systems*—Interim Report, 2015, Recommendation 1, pp. 103-104; Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114/NSWLRC Report 128, 2010, Recommendations 16-5 and 17-4, pp. 28-29.

- development of an integrated case management system
- Risk assessment and early identification
 - development of a trauma-informed risk assessment identification protocol and guidelines to support family law practitioners to ensure risks are managed and a strategy for implementation
 - integration of a whole-of-family risk assessment process that is admissible in court
- Improving the safety of children and promotion of children’s voices
- Removing access barriers to justice
 - developing culturally appropriate support services for Aboriginal and Torres Strait Islander families and culturally and linguistically diverse families
 - improving support to self-represented litigants
- Capacity, training and resourcing for family law practitioners (including judicial officers, court staff, family report writers and legal professionals) to better identify and develop appropriate responses to families experiencing family violence; and
- Perpetrator interventions and accountability.

1.13 The reports are briefly summarised below with relevant recommendations from each appearing in Appendix A. These reports have been pivotal in Australia’s understanding of family violence—its prevalence, challenges and pathways for reform. These reports have not only informed the present inquiry, but they have also framed the Committee’s own recommendations to the Australian Government, and will be referenced throughout the report.

Family Law Council – Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems –Interim and Final Reports (2015 and 2016)

1.14 The Attorney-General tasked the Family Law Council to consider opportunities to improve the intersections between the family law and child protection systems.

1.15 The Interim Report (2015) identified the potential of a streamlined, coherent and integrated approach to the family law, child protection and family violence jurisdictions, which would improve the safety of families and children.¹⁴ The Final Report (2016) made recommendations that sought to

¹⁴ Family Law Council, *Families with complex needs and the intersection of family law and child protection systems* – Interim Report, 2015.

enhance collaboration and information sharing within and between the family law system, the child protection systems and other support services.¹⁵

Victorian Royal Commission into Family Violence (2016)

- 1.16 In February 2015, the Victorian Government established the Royal Commission into Family Violence (Royal Commission). The Royal Commission was tasked with finding effective ways to prevent family violence, better support victim survivors, and make perpetrators accountable.
- 1.17 The Royal Commission's final report included 227 recommendations for improvements to the way Victoria responds to family violence. The recommendations included endorsements of, and ways to improve, existing strategies to address family violence. All recommendations were directed at the Victorian Government, some of which were for progressing reform at the federal level. Following the release of the report, the Victorian Government accepted all 227 recommendations of the Royal Commission's report.

Special Taskforce on Domestic and Family Violence in Queensland – Not Now, Not Ever Report (2015)

- 1.18 The Queensland Special Taskforce into Domestic and Family Violence (the Taskforce) was announced by the Premier of Queensland on 10 August 2014. The Taskforce was led by former Governor-General, The Hon. Quentin Bryce AD CVO. The final report was provided to the Premier on 28 February 2015.
- 1.19 The report contained 140 recommendations along three themes: culture and attitude, police response, and the justice system. Of particular relevance to the present inquiry, the Taskforce recommended the establishment of a specialist family violence court,¹⁶ and the implementation of the National Domestic Violence Order Scheme.¹⁷

¹⁵ Family Law Council, *Families with complex needs and the intersection of family law and child protection systems*—Final Report, 2016.

¹⁶ Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland*, 2015, Recommendations 96-97, p. 36.

¹⁷ Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland*, 2015, Recommendations 90, p. 35.

- 1.20 The Queensland Government accepted all recommendations directed at government, and supported the recommendations directed at non-government bodies.¹⁸

Australian Institute of Family Studies – Evaluation of the 2006 Family Law Reforms (2006) and Evaluation of the 2012 Family Violence Amendments (2015).

- 1.21 In 2015, the Australian Institute of Family Studies (AIFS) released a report of the evaluation of the 2012 amendments made to *Family Law Act 1975* (Cth) (the Family Law Act).¹⁹ As will be discussed later in this report, the 2012 amendments sought to remove disincentives for families to disclose family violence to the courts and prioritise the safety of children in family violence situations.
- 1.22 The AIFS report indicated that the amendments were a positive step towards improving the response to family violence. However, data also suggested that only minor improvements in screening for family violence had occurred since the reforms; that families reported feeling that the issues of family violence and child abuse were still not dealt with effectively; and that there has been minimal impact on parenting arrangement outcomes.

Australian Law Reform Commission and New South Wales Law Reform Commission – Family Violence – A National Legal Response (2010)

- 1.23 In 2009 the Attorney-General referred the Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSWLRC) to conduct a wide-ranging review of family violence laws and legal frameworks.
- 1.24 The ALRC/NSWLRC report presented 186 recommendations aimed at making the legal framework seamless for those engaging with it; creating better access to legal and non-legal services for victims of family violence; ensuring legal responses are fair, safe, and just; and providing effective support for victims of family violence.

¹⁸ Queensland Government, 'Government Response to Special Taskforce on Domestic and Family Violence in Queensland', 21 June 2017, <<https://www.communities.qld.gov.au/gateway/end-domestic-family-violence/about/queensland-government-response>> last accessed 6 December 2017.

¹⁹ Australian Institute of Family Studies, *Evaluation of the 2012 family violence amendments: responding to family violence*, 2015.

- 1.25 The Australian Government considered 56 of the recommendations to be appropriate for the Commonwealth to respond to, with the remaining directed towards state and territory jurisdictions.²⁰

Recent proposed family law amendments

- 1.26 In recent months, the Australian Government has presented two exposure drafts of proposed amendments to the Family Law Act that seek to better support and protect families affected by family violence.

Exposure draft – Family Law Amendment (Family Violence and Other Measures) Bill 2017

- 1.27 Released in December 2016, the exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017 proposes to amend the Family Law Act to increase the number of state and territory courts that may exercise jurisdiction under that Act as well as expand the jurisdiction to a wider range of matters. Specifically, the amendments would:

- expressly enable state and territory children’s courts to exercise jurisdiction under the Family Law Act; and
- enable state and territory courts to hear more family law property matters by increasing the monetary limit on the total property pool to be assessed by the court. The limit would instead be prescribed in regulations, at a higher amount than currently provided for (\$20,000), to increase the jurisdiction of these courts and enable them to hear more matters.²¹

- 1.28 The Australian Government, in an accompanying consultation paper, argued that ‘these changes are intended to reduce the need for some families to navigate both the state/territory and federal court systems in order to resolve their disputes’.²²

²⁰ Attorney-General’s Department, *Government Response to the Australian and NSW Law Reform Commissions Report*, June 2013, <<https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Documents/AusGovernmentResponsetotheAusandNSWLRCReportFamilyViolence-anationallegalresponse.PDF>> viewed 3 November 2017.

²¹ Attorney-General’s Department, *Consultation paper – amendments to the Family Law Act 1975 to respond to family violence*, December 2016, p. 4.

²² Attorney-General’s Department, *Consultation paper – amendments to the Family Law Act 1975 to respond to family violence*, December 2016, p. 4.

- 1.29 The exposure draft of the Bill also proposes to amend the Family Law Act to create a new criminal offence for breaching a personal protection injunction issued under the Act.
- 1.30 It also proposes to extend the operation of family law orders varied by a state or territory judge, removing the 21 day limit on a state or territory court's variation of a family law order. Instead, the amendment proposes to enable a court's variation to continue to have effect until a time specified in the order, or a further order is made.²³
- 1.31 The amendment also seeks to strengthen the family law courts powers to dismiss unmeritorious matters 'at the earliest opportunity'.²⁴
- 1.32 At the time of writing, the Bill has not been introduced into the Parliament.

Exposure draft – Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017

- 1.33 Released in July 2017, the exposure draft of the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 proposes to amend the Family Law Act to prevent parties from cross-examining each other in specific circumstances, and would allow the court to have discretion to apply the legislative ban in other cases where allegations of family violence are made.
- 1.34 Rather, the proposed amendments would see a court-appointed person asking questions on behalf of a party for the purposes of cross-examining the other party. The court-appointed person will not be a legal representative for a party and they will not provide any legal advice to a party.²⁵
- 1.35 At the time of writing, the Bill has not been introduced into the Parliament.

Australian Law Reform Commission – Review of the Family Law System

- 1.36 On 27 September 2017, the Attorney-General released terms of reference for a new ALRC review into the family law system. The *Review of the Family Law*

²³ Attorney-General's Department, *Consultation paper – amendments to the Family Law Act 1975 to respond to family violence*, December 2016, p. 5.

²⁴ Attorney-General's Department, *Consultation paper – amendments to the Family Law Act 1975 to respond to family violence*, December 2016, p. 5.

²⁵ Attorney-General's Department, *Consultation paper – Addressing direct cross-examination of parties in family law proceedings involving family violence*, July 2017, p. 6.

System is the ‘first comprehensive review ... since the commencement of the [Family Law Act] in 1976’.²⁶ The ALRC’s review will be completed by 31 March 2019. The terms of reference for the ALRC’s review are included in Appendix B.

1.37 The ALRC’s review will focus on:

- the appropriate, early and cost-effective resolution of all family law disputes and whether the adversarial court system offers the best way to support the safety of families;
- the protection of the best interests of children and their safety, and how to best determine those interests and incorporate the views of children;
- family law services, including (but not limited to) dispute resolution services;
- family violence and child abuse, including protection for vulnerable witnesses;
- collaboration, coordination, and integration between the family law system and other Commonwealth, state and territory systems, including family support services and the family violence and child protection systems;
- mechanisms for reviewing and appealing decisions;
- families with complex needs, including where there is family violence, drug or alcohol addiction or serious mental illness; and
- the skills, including but not limited to legal, required of professionals in the family law system.²⁷

1.38 As is noted throughout this report, evidence to the present inquiry suggests that the family law system is in need of major reform. The ALRC’s current inquiry will provide a wholesale review of the family law system—a review that is broader than the terms of reference this Committee received.

1.39 In focussing on how the family law system can better support and protect families from violence, the Committee’s report sets out a set of principles for

²⁶ Attorney-General, Senator the Hon. George Brandis QC, *Media Release*, ‘First Comprehensive Review of the Family Law Act’, 27 September 2017, <<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/ThirdQuarter/First-comprehensive-review-of-the-family-law-act-27-September-2017.aspx>>, viewed 27 September 2017.

²⁷ Australian Law Reform Commission, *Review of the family law system – terms of reference*, <<https://www.alrc.gov.au/inquiries/family-law-system/terms-reference>> last accessed 6 December 2017.

a reformed family law system, and a triaged and actionable approach to achieving much needed reform for families affected by family violence.

Principles for a reformed family law system

- 1.40 Successive reviews and reports have demonstrated that in responding to family violence, the family law system must be accessible, equitable and responsive, and prioritise the safety of families.²⁸
- 1.41 A legal framework should be seamless from the point of view of those families which engage with it, and integrated with other legal systems and support services from the moment of first contact.
- 1.42 The system must also be accessible in regards to costs, complexity and culturally appropriate, so to ensure that the system is fair and just, holding those who use family violence accountable for their actions and providing protection to the targets of that violence.
- 1.43 The system must also be effective in facilitating early interventions and ongoing support in circumstances of family violence, be responsive to the risk of harm, and prioritise safety of families.
- 1.44 Evidence received during the inquiry indicates that the current system achieves some of these outcomes haphazardly at best. In developing its recommendations, the Committee has drawn upon these principles to develop a triaged pathway for reform.

A triaged, actionable pathway for reform

- 1.45 As noted above, various inquiries on family violence have been conducted in the last ten years, but a sizeable majority of recommendations have not been implemented.²⁹ Drawing upon the consistent findings and recommendations of the reviews done to date, the Committee's report presents an actionable, triaged pathway forward.

²⁸ In 2010, the joint review undertaken by the Australian Law Reform Commission and the New South Wales Law Reform Commission recommended that the family law system should be guided by four specific principles: seamlessness, accessibility, fairness, and effectiveness. The Committee has adopted these principles developed by the ALRC/NSWLRC and expanded upon them.

See also Australian Law Reform Commission, *Submission 31*, p. 1.

²⁹ Professor Patrick Parkinson AM, *Submission 64*, p. 2.

- 1.46 The triaged pathway provides long-term recommendations to restructure Australia's adversarial approach to family law disputes. This will also be a focus of the ALRC's *Review of the Family Law System* as announced by the Attorney-General.
- 1.47 However there is a chronic and critical need for reform immediately, to improve the protection and support to families experiencing violence. The Committee is of the view that these short-term and immediate reforms can be achieved swiftly and promptly, and are likely to receive broad support within the stakeholders engaged in this inquiry.
- 1.48 Indeed, the Committee's short-term and immediate recommendations for reform are designed to improve the protection and support that these families require now. The Committee is not of the view that these proposals are alone sufficient to respond to the scale and level of risk experienced by too many Australian families. Nonetheless, the Committee hopes that until lasting, structural reforms can be developed and implemented, these reforms will go some way to addressing the critical need for greater protection and support.

The inquiry process

Referral of the inquiry

- 1.49 On 7 March 2017, the Attorney-General tasked the Committee to inquire into how Australia's federal family law system can better support and protect people affected by family violence. The Committee agreed to adopt the terms of reference for the inquiry, as referred by the Attorney-General, on 16 March 2017.
- 1.50 The terms of reference directed the Committee to consider:
- 1 how the family law system can more quickly and effectively ensure the safety of people who are or may be affected by family violence, including by:
 - a. facilitating the early identification of and response to family violence; and
 - b. considering the legal and non-legal support services required to support the early identification of and response to family violence;
 - 2 the making of consent orders where there are allegations or findings of family violence, having regard to the legislative and regulatory frameworks, and whether these frameworks can be improved to better

support the safety of family members, as well as other arrangements which may be put in place as alternative or complementary measures;

- 3 the effectiveness of arrangements which are in place in the family courts, and the family law system more broadly, to support families before the courts where one or more party is self-represented, and where there are allegations or findings of family violence;
- 4 how the family law system can better support people who have been subjected to family violence recover financially, including the extent to which family violence should be taken into account in the making of property division orders;
- 5 how the capacity of all family law professionals—including judges, lawyers, registrars, family dispute resolution practitioners and family report writers—can be strengthened in relation to matters concerning family violence; and
- 6 the potential for a national approach for the administration and enforcement of intervention orders for personal protection, however described.

1.51 The inquiry was referred to the Committee in the context of numerous existing and recent reports to government into improving how the family law system responds to family violence. To avoid duplicating the work of these existing reports and reviews, and given the sensitive nature of the inquiry, the Committee adopted the following principles for its inquiry:

The inquiry will have particular regard to:

- the administration of family violence matters in comparable overseas jurisdictions, as they relate to the inquiry's terms of reference;
- the particular needs of, and supports required for high risk groups; and
- ensuring that the inquiry processes are such that people who have been affected by family violence and who wish to contribute to the Committee can do so:
 - in a manner which does not re-traumatise them;
 - from a safe and secure location, where necessary;
 - confidentially; and
 - in a manner which will not prejudice or compromise current or future family law or other civil or criminal proceedings.

Conduct of the inquiry

- 1.52 The inquiry was advertised on the Committee’s website, and a call for submissions was made in March 2017. The Committee received 126 submissions and 19 supplementary submissions, which are listed at Appendix C, and were published on the Committee’s website.³⁰ The Committee received 21 exhibits and 3 additional documents, which are listed at Appendix D.
- 1.53 The Committee held 10 hearings in Canberra, Melbourne, Sydney and Alice Springs, and conducted a number of site inspections in Melbourne and Alice Springs. These activities are listed at Appendix E.
- 1.54 One public hearing was postponed in which the Committee was to hear from the Chief Justice of the Family Court and the Chief Judge of the Federal Circuit Court in order to seek advice from the Attorney-General on the appropriateness of the heads of federal and state jurisdictions appearing for questioning by Members of Parliament.
- 1.55 Following advice received from the Attorney-General, the Committee did not proceed with the hearing with the Family Court and the Federal Circuit Court. The Committee did, however, put questions in writing to the Family Court to which responses were received (and taken as supplementary submission 44.1).

Community engagement strategy

- 1.56 The inquiry focused on issues that have had a profound impact on many Australian families. It was therefore important to the Committee to provide opportunity for Australians who have had experience with family violence and the family law system to share their experiences with the Committee in a safe and confidential way.
- 1.57 In addition to standard committee practice of accepting submissions and holding public hearings, the Committee developed a questionnaire, held two community statement sessions, and received correspondence from members of the public sharing their personal experiences and recommendations. Through these avenues, the Committee estimates that over 5,600 individuals contributed to the inquiry.

Questionnaire

³⁰ <www.aph.gov.au/spla>

- 1.58 The Committee created a questionnaire to provide individuals with the opportunity to share their insights and experiences of the family law system's response to family violence. The questionnaire was anonymous, which enabled people to speak freely about their own experiences without the need to be concerned about their, or their family's privacy.
- 1.59 The questionnaire was launched in March 2017 and closed at the end of September 2017. During those six months, the Committee received 5,490 responses to the questionnaire. The questionnaire asked about respondent's experiences of family violence, and the different pathways through the family law system, using a series of multiple-choice questions and open-text boxes. It took approximately 45 minutes to complete.
- 1.60 Over the course of the inquiry the Committee published key findings from the questionnaire on the following themes:
- navigating the family law system;
 - accessibility and affordability of the family law system;
 - dispute resolution for family law matters involving family violence; and
 - areas for improvement in the family law system.
- 1.61 The information shared by the individuals who completed the questionnaire provided the Committee with important insights into their experiences, and highlighted components of the family law system's response to family violence which need the most improvement.
- 1.62 The questionnaire was not designed to produce scientifically rigorous statistical information, and so the Committee has not attempted to rely on the questionnaire as a source of empirical evidence. Rather, the questionnaire provided valuable insights into the lived experiences of those interacting with the family law system when responding to family violence. In asking people impacted by family violence to complete the questionnaire, the Committee was concerned to send a strong message that 'your voice matters'.

Who completed the questionnaire?

- 1.63 Questionnaire respondents provided the following demographic information:
- 78 per cent were women and 22 per cent were men;
 - 17 per cent were under 35 years of age, 65 per cent were aged 35 to 54 years of age, and 18 per cent were over 54 years of age;
 - four per cent identified as Aboriginal or Torres Strait Islander; and

- five per cent identified that English was not their first language.

1.64 Key findings and quotes from the questionnaire are thematically incorporated throughout this report. Consolidated results from the survey are included in Appendix F.

Community statement sessions

1.65 In order to provide another avenue for individuals' voices to be heard, the Committee held two community statement sessions. In these sessions members of the public were given the opportunity to provide oral statements to the Committee about their experiences in the family law system and family violence.

1.66 The Committee was aware of the very high levels of public interest in the inquiry, and expected that large numbers of people would wish to participate in these sessions. As such, the Committee asked for expressions of interest from members of the public who wished to take part, aware that it would not be possible to offer a place to all individuals.

1.67 More than 300 expressions of interest were received, with interest from every state and territory. The Committee issued invitations to a geographically diverse cross-section of the Australian public, including individuals from a range of metropolitan, outer-metropolitan, regional and remote locations.

1.68 The Committee held two in camera community statement sessions in which they heard from ten individuals. The issues raised in these sessions were highly emotional, confronting and, for some participants, difficult to discuss. The participants in these sessions provided valuable real-life examples of how family violence and the family law system can impact families.

Confidential correspondence

1.69 The Committee also received a large volume of confidential correspondence, much of which provided detailed personal accounts of family violence and experiences of the family law system. While the Committee chose not to publish these accounts for reasons of privacy and protection of correspondents and because of possible legal restrictions that may apply to that information, the material has formed part of the evidence base for the inquiry and the Committee's report.

1.70 The Committee thanks all correspondents, questionnaire respondents and community statement session participants for taking the time to share their personal stories with the Committee. Though these contributions would

have been difficult and traumatic, your contributions have been invaluable to the Committee's inquiry.

Structure of the report

- 1.71 This report consists of nine chapters. Chapter 2 provides an overview of the family law system as it relates to matters involving family violence, as well as its intersection with state and territory family violence legislation and child protection systems.
- 1.72 Chapter 3 discusses the well-recognised challenges of the current system, including that the existing family law system is inappropriate for resolving family law disputes and that it does not appropriately respond to reports of family violence.
- 1.73 Chapter 4 establishes a new family system in accordance with the principles as set out above. In order for the family law system to respond appropriately to family violence to support and protect affected families, improvements are required to identifying the risk to families at first instance as well as changing risk dynamics. Processes both out-of-court and once a matter reaches court, also require reform to ensure that matters are appropriately triaged and holistically addressed within fragmented jurisdictions.
- 1.74 Chapter 5 discusses reform to property division following family violence to better support the financial recovery of families affected by violence. Equitable division of financial assets is critical to preventing poverty and homelessness following relationship breakdown and, for matters involving family violence, is particularly important for a family's independence and autonomy from violent perpetrators.
- 1.75 Chapter 6 focuses on how the safety of children must be prioritised, recommending legislative amendments and program reform to ensure their protection. The Chapter also examines the significant concerns about family consultants, making recommendations for change to respond to those concerns.
- 1.76 Chapter 7 addresses the additional needs that some families at high risk of family violence require, including Aboriginal and Torres Strait Islander families, culturally and linguistically diverse families, and families with parents or children with disability.
- 1.77 Chapter 8 examines the importance of improving the capacity of family law professionals right across the family law system, as a reformed family law system can only be as effective as the calibre of professionals upon which it

relies. The chapter has a particular focus on the skills and expertise of judges, court staff, family consultants, independent children's lawyers, and family dispute resolution practitioners.

- 1.78 Chapter 9 discusses the role of support services throughout a family's navigation of the family law system when responding to family violence, highlighting the importance of wrap-around services.

A note on terminology

- 1.79 Many different terms are used to describe violence in close relationships including 'family violence', 'domestic violence' and 'intimate partner violence'. Part of the complexity is in arriving at a term that adequately encapsulates diverse and dynamic relationships.
- 1.80 To adequately respond to the terms of reference and for the purposes of this report however, the Committee has elected to use the broader term of 'family violence'.

Definition of family violence

- 1.81 Defining what is, and what is not, family violence can also be complex. Further, as individual families and relationships are dynamic and unique, care is required when any system of classification is required.³¹
- 1.82 There is no uniform definition of family violence across the federal and state and territory jurisdictions. For the purposes of this report, the Committee has adopted the definition of family violence as included in the Family Law Act that provides:
- Family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family... or causes the family member to be fearful.³²
- 1.83 Behaviour that may constitute family violence under this definition includes, but is not limited to:
- an assault; or
 - a sexual assault or other sexually abusive behaviour; or

³¹ Family Court of Australia/Federal Circuit Court of Australia, *Family Violence Best Practice Principles*, 4th Edition, December 2016, p. 8; see also, Australian Institute of Family Studies, *Submission to the Family Violence Committee of the Family Court and the Federal Circuit Court*, May 2011.

³² *Family Law Act 1975* (Cth), s 4AB.

- stalking; or
- repeated derogatory taunts; or
- intentionally damaging or destroying property; or
- intentionally causing death or injury to an animal; or
- unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
- unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
- preventing the family member from making or keeping connections with his or her family, friends or culture; or
- unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.³³

1.84 This definition came into effect in 2012 and is 'significantly broader' than the definition that formerly appeared in the Family Law Act.³⁴ Unlike the earlier definition, there is no requirement that any fear experienced by the victim of the violence is reasonable.

1.85 Importantly, the Family Law Act also provides that a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

³³ *Family Law Act 1975 (Cth)*, s 4AB(2).

³⁴ Family Court of Australia/Federal Circuit Court of Australia, *Family Violence Best Practice Principles*, 4th Edition, December 2016, p. 6.

2. Overview of the family law system

- 2.1 Families living with family violence often experience complex, confusing and traumatic interactions with multiple court systems. This can aggravate the safety risks these families experience, particularly given the silos in which these court systems operate.¹
- 2.2 This chapter provides an overview of the federal family law system and parallel state and territory family violence and child protection legislation, and how matters involving family violence are considered by those systems. It does not provide a comprehensive description of these systems, but rather highlights aspects that are most relevant to the jurisdictional aspects covered during the present inquiry.
- 2.3 A number jurisdictions deal with families at a time of crisis and change, but in different ways. Protection orders made under state and territory family violence legislation are aimed at providing immediate and future personal protection from family violence. Whereas family law resolves separation disputes, including parental responsibility and property division and also safety.
- 2.4 It is important to note that neither the Commonwealth nor the states and territories have exclusive legislative competence in the area of family law, which has resulted in ‘an especially fragmented system with respect to children’.² With the exception of Western Australia, all states referred state

¹ Magistrates’ Court of Victoria, *Submission 56*, p. 1; see also Law Council of Australia, *Submission 85*, p. 9.

² Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 52.

powers with the effect that the federal parliament has jurisdiction over marriage, divorce, parenting and family property on separation. All states and territories retain jurisdiction over adoption and child welfare.

- 2.5 Rather than referring its powers to the Commonwealth, Western Australia established a state family court, the Family Court of Western Australia, which exercises both federal and state jurisdiction.³
- 2.6 This chapter does not seek to substantively engage with the significant challenges and criticisms that have been raised in evidence to the Committee. These will be addressed in later chapters of this report. Rather, this chapter presents an overview of the two jurisdictions and how they intersect.
- 2.7 First, the chapter will explain key aspects of state and territory family violence legislation. Second, the chapter will outline the powers and procedures of the *Family Law Act 1975* (Cth) (the Family Law Act). Third, the chapter will examine how the systems interact and how they may create a gap in protection for families experiencing family violence. The chapter will conclude by noting that not all matters proceed through multiple court systems in a logical or sequential way, and many families navigate matters concurrently through these different courts.

State and territory courts exercising jurisdiction under family violence legislation

- 2.8 The focus of state and territory courts exercising jurisdiction under family violence legislation is the prevention of family violence and the protection of persons who experience, or who are at risk of, family violence.⁴ The primary ways in which state and territory courts achieve this is by making protection orders.
- 2.9 The purpose of family violence protection orders is to protect people from future family violence. This is usually done by prohibiting a person who has used, or threatened to use, family violence from engaging in certain conduct.

³ *Family Court Act 1997* (WA); see also, Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 127.

⁴ *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 9(1); *Family Violence Protection Act 2008* (Vic), s 1; *Domestic and Family Violence Protection Act 2012* (Qld), s 3A(1); *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s 5; *Family Violence Act 2004* (Tas), s 3; *Family Violence Act 2016* (ACT) s 6; *Domestic and Family Violence Act 2007* (NT), s 3(1).

- 2.10 Family violence legislation generally allows courts to impose any restriction on a person who has used or threatened to use family violence that it thinks necessary or desirable for the protection of the person at risk.⁵ For example, a protection order may prohibit a person from:
- behaving in an intimidating, offensive or abusive manner towards a protected person;
 - communicating with the protected person; or
 - approaching or entering particular premises where the protect person lives or works.⁶
- 2.11 Family violence legislation in each state and territory confers power to make protection orders on courts of summary jurisdiction in the relevant jurisdiction—that is, local or magistrates courts (hereafter magistrates courts). As noted below, magistrates courts also have limited jurisdiction under the Family Law Act.
- 2.12 Some kinds of protection orders may be made by authorities other than judicial officers. For example, in some jurisdictions, registrars of the Court may make interim protection orders,⁷ and police officers can make temporary protection orders for the immediate protection of a victim of family violence.⁸
- 2.13 Breach of a protection order under state or territory family violence legislation is a criminal offence, attracting a police response and invoking the criminal justice system.⁹

⁵ *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 35(1); *Family Violence Protection Act 2008* (Vic), s 81(1); *Domestic and Family Violence Protection Act 2012* (Qld), s 28; *Restraining Orders Act 1997* (WA), s 13(1); *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s 12; *Family Violence Act 2004* (Tas), s 16(2); *Family Violence Act 2016* (ACT), s 38; *Domestic and Family Violence Act 2007* (NT), s 21(1)(a).

⁶ For example: *Crimes (Domestic and Personal Violence) Act 2007* (NSW), ss 35–36; *Family Violence Protection Act 2008* (Vic), s 81(2); *Restraining Orders Act 1997* (WA), s 13(2); *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s 12; *Family Violence Act 2004* (Tas), s 16(3); *Family Violence Act 2016* (ACT), s 38(2); *Domestic and Family Violence Act 2007* (NT), ss 22, 23.

⁷ For example, in NSW a registrar may make interim orders by consent: *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 23.

⁸ *Family Violence Protection Act 2008* (Vic), s 24; *Restraining Orders Act 1997* (WA), s 30A; *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s 18; *Family Violence Act 2004* (Tas), s 14; *Domestic and Family Violence Act 2007* (NT), s 41.

⁹ *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 14; *Family Violence Protection Act 2008* (Vic), s 123; *Domestic and Family Violence Protection Act 1989* (Qld), s 80; *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s 31; *Restraining Orders Act 1997* (WA), s 61; *Family Violence*

- 2.14 Though not entirely within the scope of the federal family law system, although highly relevant to it, the Committee has been tasked to examine how the national administration and enforcement of intervention orders can be improved to better protect those families experiencing, or at risk of, family violence. This is discussed in Chapter 4 of this report.

Federal family law

- 2.15 Family law deals with disputes about parenting arrangements for children and the division of property, and past and continuing family violence has an effect on all these matters.
- 2.16 The *Australian Constitution* gives the Commonwealth the power to make laws with respect to ‘marriage’, and ‘divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants’.¹⁰ It also has the power to legislate with respect to ‘matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States’.¹¹
- 2.17 Between 1986 and 2008, all states and territories (with the exception of Western Australia) referred state powers to the Commonwealth with respect to ex-nuptial children and non-married or de facto couples.
- 2.18 The effect of these referrals, and the original powers established under the *Australian Constitution*, is that the federal parliament has jurisdiction over marriage, divorce, parenting and family property upon separation. The state and territory governments retain legislative jurisdiction over adoption, child welfare and same-sex couples.¹²

Structure of courts

- 2.19 Two federal courts deal with matters under the Family Law Act—the Family Court of Australia (the Family Court) and the Federal Circuit Court of Australia (the Federal Circuit Court). The protocol for the division of work between the two courts provides that where there are serious allegations of

Act 2004 (Tas), s 35; *Family Violence Act 2016* (ACT), s 43; *Domestic and Family Violence Act 2007* (NT), s 120.

¹⁰ *Australian Constitution*, ss 51(xxi) and 51(xxii).

¹¹ *Australian Constitution*, s 51(xxxvii).

¹² Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report 114/NSWLRC Report 128), 2010, p. 126.

child sexual or physical abuse or ‘serious controlling family violence’, proceedings should be filed in the Family Court, rather than the Federal Circuit Court.¹³

- 2.20 Some state and territory courts are granted jurisdiction under the Family Law Act to hear and make orders under that Act. This is discussed later in this chapter.

Property division

- 2.21 Part VIII of the Family Law Act deals with disputes about property and spousal maintenance for formerly married couples, providing a mechanism to alter property rights that would otherwise apply under common law and equity. Part VIIIAB provides separating de facto couples in all jurisdictions other than Western Australia ‘virtually the same’ property relief as married couples.¹⁴
- 2.22 Property settlement can be reached by informal agreement, written agreement (including a Binding Financial Agreement) or court order (either by consent or as determined by a Judge). The Court can make two types of orders:
- a declaration of the title or rights that either party has with respect to property;¹⁵ and
 - an order altering property rights to effect a just and equitable distribution between the parties, after considering the contributions of each party and their future needs.¹⁶
- 2.23 The current provisions give the Court ‘a very broad discretion’ to determine the property disputes of separated families, but ‘provide little guidance’ as to how that discretion is to be exercised.¹⁷

¹³ Family Court of Australia, ‘Protocol for the division of work between the Family Court of Australia and the Federal Circuit Court’, 12 April 2013, at <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/protocol-for-division-of-work-fcoa-fcc>>, last accessed 11 September 2017.

¹⁴ Attorney-General’s Department, *Submission 89*, p. 9.

¹⁵ *Family Law Act 1975* (Cth), s 78 (for married couples), s 90SL (for de facto couples).

¹⁶ *Family Law Act 1975* (Cth), s 79 (for married couples), s 90SM (for de facto couples).

¹⁷ Attorney-General’s Department, *Submission 89*, p. 9.

- 2.24 The Family Law Act makes no mention of family violence in the context of property settlements.¹⁸ However, in the case of *Kennon v Kennon*, the Full Court of the Family Court held that family violence, in some limited circumstances, may be a relevant factor in determining property disputes.¹⁹ In order to satisfy the *Kennon* criteria, a party must prove on the balance of probabilities that they were subject to a violence ‘course of conduct’ which,
- had a ‘significant adverse impact’ upon their contributions; or
 - made those contributions ‘significantly more arduous’.²⁰
- 2.25 At present, the Family Law Act does not penalise the perpetrator for their actions by considering the impact of family violence as a negative financial contribution or the future needs of parties.²¹ Further, there ‘is no clear guidance as to the level of adjustments to be made where it is found that a party’s contributions should be given greater weight due to the actions of the other party’. This is entirely a matter for judicial discretion.²²

Parenting matters

- 2.26 Part VII of the Family Law Act provides for the resolution of parenting disputes between separating parents. A parenting order can deal with any aspect of parental responsibility for a child. Parenting orders may be made in favour of a parent or another person, such as a grandparent or other relative of the child.²³ Such orders may specify who has parental responsibility for a child, with whom a child lives, the time a child spends with their parents or other persons, and other aspects of the child’s care, welfare or development.²⁴
- 2.27 The paramount consideration when making a parenting order is the ‘best interests of the child’.²⁵ In determining a child’s best interests, the Court must give primary consideration to:

¹⁸ Queensland Law Society, *Submission 38*, p. 5.

¹⁹ *Kennon v Kennon*, (1997) FLC 92-757.

²⁰ *Kennon v Kennon*, (1997) FLC 92-757.

²¹ Family Law Court of Australia, *Submission 44*, p. 11.

²² Attorney-General’s Department, *Submission 89*, p. 9.

²³ *Family Law Act 1975* (Cth), s 64C.

²⁴ *Family Law Act 1975* (Cth), s 64B(2).

²⁵ *Family Law Act 1975* (Cth), ss 60CA and 65AA.

- the benefit to the child of having a meaningful relationship with both of the child's parents; and
- the need to protect the child from physical or psychological harm from being subject to, or exposed to, abuse, neglect or family violence.²⁶

2.28 The Court may consider a number of additional matters including:

- the views of the child;
- the child's relationship with each parent and other persons (including grandparents or relatives);
- the extent to which each parent has engaged with the child and their wellbeing;
- the impact of the parental separation on the child;
- if the child is an Aboriginal or Torres Strait Islander child, their right to enjoy their culture and the impact of the parenting order on that cultural right; and
- any family violence involving the child or a member of the child's family.²⁷

2.29 When making a parenting order, the Court is required to apply a presumption that it is in the best interests of the child for the child's parents to have 'equal shared parental responsibility for the child'.²⁸

2.30 The Family Law Act clarifies that 'equal shared parental responsibility' does not 'provide for a presumption about the amount of time the child spends with each parent'.²⁹ Rather, the Family Law Act provides that 'equal shared parental responsibility' refers to 'making a decision about a major long term issue' about the child.³⁰

2.31 Despite this, the Committee heard substantial evidence that the distinction between 'responsibility' and 'time' is not well understood, influencing both the culture within the judiciary and the assumptions of separating parents when agreeing to consent orders. This is discussed further in Chapter 6.

2.32 When making a parenting order, the Court must ensure that the order does not expose a child to an unacceptable risk of family violence and is consistent with any protection order made under state and territory family

²⁶ *Family Law Act 1975* (Cth), s 60CC.

²⁷ *Family Law Act 1975* (Cth), s 60CC.

²⁸ *Family Law Act 1975* (Cth), s 61DA.

²⁹ *Family Law Act 1975* (Cth), s 61DA.

³⁰ *Family Law Act 1975* (Cth), s 65DAC.

violence legislation.³¹ Further, the Family Law Act provides that the presumption of equal shared parental responsibility does not apply if the Court believes, on reasonable grounds, that a parent has engaged in child abuse or family violence.³² The Family Law Act also provides that protection orders made under state and territory family violence legislation are relevant to parenting orders.³³

- 2.33 The presumption for equal shared parental responsibility may also be nullified by evidence that it would not be in the best interests of the child (as defined at paras 2.24 and 2.25) for the parents to have equal shared parental responsibility.³⁴
- 2.34 The Family Court and the Federal Circuit Court has developed the *Family Violence Best Practice Principles* (Best Practice Principles) to give guidance to judicial officers of that court on how to approach parenting proceedings where there are allegations of family violence or child abuse.
- 2.35 Significantly, the Family Law Act does not empower courts to make orders placing children in the care of a person who is not a party to the proceedings, and there is no general ‘child protection’ power in the Act. These powers are within the jurisdiction of the state and territory children’s courts.

Injunctions for personal protection under the Family Law Act

- 2.36 In addition to the protection orders issued under state and territory family violence legislation by magistrates’ courts, the Family Law Act also provides for injunctions for personal protection. However, these injunctions protect a limited range of families.
- 2.37 As noted in Chapter 1, in December 2016 the Australian Government released proposed amendments to create a new criminal offence for breach of a personal protection injunction issued under the Family Law Act.
- 2.38 Due to the constitutional foundation of the Family Law Act, injunctions under that Act are not available to protect unmarried couples without children, same-sex couples without children, siblings or other family

³¹ *Family Law Act 1975* (Cth), s 60CG.

³² *Family Law Act 1975* (Cth), s 61DA(2).

³³ *Family Law Act 1975* (Cth), s 60CC.

³⁴ *Family Law Act 1975* (Cth), s 61DA(4).

members.³⁵ The Family Law Act provides that courts may grant an injunction for personal protection under the child welfare provisions or the matrimonial clauses only. Both are addressed below.

Injunctions to protect the welfare of the child

- 2.39 The Court may order an injunction for the personal protection of the child, the child's parent, a person with a parenting order in respect of the child or a person who has parental responsibility for a child.³⁶ The injunction may also restrain a person from entering or remaining in the child's place of residence, employment or education or that of their parent.³⁷
- 2.40 Where there are allegations of family violence made during an application under Part VII of the Family Law Act, the Court must consider whether an injunction should be granted.³⁸

Injunctions to protect a party to a marriage

- 2.41 The Family Law Act permits a court to grant an injunction in circumstances arising out of a marriage:
- for the personal protection of a party to the marriage;
 - to restrain a party to the marriage from entering or remaining in the matrimonial home or the other party's residence or place of work;
 - for the protection of the marital relationship;
 - in relation to the property of a party to the marriage; or
 - in relation to the use or occupancy of the matrimonial home.³⁹
- 2.42 'Personal protection' is not defined under the Family Law Act, but courts have interpreted the term to include protection from physical harm as well as protection of a person's wellbeing and freedom from interference and

³⁵ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 798.

³⁶ *Family Law Act 1975* (Cth), s 68B(1)(a)-(b).

³⁷ *Family Law Act 1975* (Cth), s 68B(1)(c)-(d).

³⁸ *Family Law Act 1975* (Cth), s 67ZBB.

³⁹ *Family Law Act 1975* (Cth), s 114.

harassment.⁴⁰ A victim of family violence may also seek an order to exclude a person from particular places.⁴¹

Enforcement

- 2.43 If a Family Law Act injunction is breached, the person protected by the injunction must file an application to seek an order from the Court regarding the contravention. The application must be accompanied by an affidavit establishing the facts of the contravention and a filing fee paid.⁴²
- 2.44 A person in breach of an injunction may be arrested under the Family Law Act.⁴³ A police officer may arrest a person if the officer believes on reasonable grounds that the person has breached the injunction by causing, or threatening to cause, bodily harm to the person protected by the injunction, or has harassed, molested or stalked that person.⁴⁴ Both members of the Australian Federal Police and state and territory police forces are empowered to conduct arrests.⁴⁵ There is no power of arrest in relation to injunctions for matters other than personal protection.

Relationship with protection order under state and territory family violence legislation

- 2.45 Injunctions granted under the Family Law Act may operate in parallel with protection orders made under state and territory family violence legislation.
- 2.46 If a person has sought, or is seeking, a protection order under state or territory family violence legislation, an additional injunction cannot be sought under the Family Law Act unless the proceeding under state or territory legislation has lapsed, been dismissed or those orders have been set aside or expired.⁴⁶ There is no bar to a person who has obtained an

⁴⁰ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 797; see also *In the Marriage of Kemsley* (1984) 10 Fam LR 125, 130.

⁴¹ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 797.

⁴² *Family Law Rules 2004* (Cth).

⁴³ *Family Law Act 1975* (Cth), ss 68C and 114AA.

⁴⁴ *Family Law Act 1975* (Cth), ss 68C(1) and 114AA(1).

⁴⁵ *Family Law Act 1975* (Cth), ss 4(1), 68C(1) and 114AA(1).

⁴⁶ *Family Law Act 1975* (Cth), s 114AB.

injunction under the Family Law Act to apply for a protection order under state or territory family violence legislation.

- 2.47 If an injunction made under the Family Law Act for either the protection of a child's welfare, or for the protection of a party to a marriage, is capable of operating concurrently with a protection order made under state and territory family violence legislation, both orders can operate together. However, where the two orders are inconsistent, the injunction made under the Family Law Act prevails.⁴⁷
- 2.48 However, a state or territory court with the requisite jurisdiction may revive, vary, discharge or suspend an order made under the Family Law Act either for the protection of a child's welfare or for a party to a marriage, to the extent it expressly or impliedly requires or authorises a person to spend time with a child.⁴⁸ A court may only do so if it also makes or varies a protection order under state or territory family violence legislation and there is material before the Court that was not before the Court that made that original Family Law Act injunction.⁴⁹ Where a state or territory court is making or varying an interim order, it may not discharge the original family law injunction.⁵⁰ An order by a state or territory court that revives, varies, discharges or suspends a family law order is subject to a 21 day time limit, and parties must return to the federal family law courts for a review of the original order.⁵¹
- 2.49 As noted in Chapter 1, in December 2016 the Australian Government released proposed amendments to remove the 21 day limit on state or territory court's variation of a family law order. This will be further discussed in Chapter 4.

Procedures

- 2.50 The *Family Law Rules 2004* (Cth) set out the procedures that apply in the Family Court. Proceedings in the Federal Circuit Court are governed by the

⁴⁷ *Family Law Act 1975* (Cth), s 68Q(1).

⁴⁸ *Family Law Act 1975* (Cth), s 68R(1)(c).

Courts with requisite jurisdiction include, the Family Law Court of Australia, the Federal Circuit Court of Australia, and subject to some conditions, the courts of summary jurisdiction of each state and territory (*Family Law Act 1975* (Cth), ss 69H and 69J).

⁴⁹ *Family Law Act 1975* (Cth), s 68R(3).

⁵⁰ *Family Law Act 1975* (Cth), s 68R(4).

⁵¹ *Family Law Act 1975* (Cth), s 68T; see also, Law Council of Australia, *Submission 85*, p. 12.

Federal Circuit Court Rules 2001 (Cth), which adopt some of the Family Law Rules. Consequently, the court rules and procedures in each court differ in some respects.

- 2.51 This section outlines some key procedural events as families experiencing family violence seek to navigate through the family law courts.

Initiating application

- 2.52 A person commences proceedings in a family court by filing an ‘Initiating Application (Family Law)’ form. The form is the same for the Family Court, the Federal Circuit Court and the Family Court of Western Australia. In the form, the applicant provides details about the parties and any children, and sets out the orders sought. The form also includes a place to provide information about ‘any existing orders, agreements, parenting plans or undertakings to this or any other court’ about ‘family law, child support, family violence or child welfare issues’ concerning any of the parties or children.⁵²
- 2.53 After an initiating application is filed, the respondent files a ‘Response to an Initiating Application (Family Law)’ form. In this form, the respondent sets out any disagreement with the facts or information contained in the initiating application, and the alternative orders sought.⁵³

Compulsory family dispute resolution

⁵² Federal Circuit Court of Australia, *Initiating Application (Family Law)*, at <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/court-forms/form-topics/family+law/initiating-application>>, last accessed 11 September 2017.

⁵³ Family Court of Australia, *Response to Initiating Application*, <http://www.familycourt.gov.au/wps/wcm/connect/653e502b-a393-495c-bfa0-a3ffa1f9cd01/R_InitiatingApplication_0313_V4a.pdf?MOD=AJPERES&CONVERT_TO=url&CA-CHEID=ROOTWORKSPACE-653e502b-a393-495c-bfa0-a3ffa1f9cd01-lp9Mbrk>, last accessed 11 September 2017.

- 2.54 Both the Family Court and the Federal Circuit Court require parties seeking parenting orders to participate in family dispute resolution (FDR) before commencing court proceedings. In FDR, an independent FDR practitioner assists the parties to resolve parenting disputes, through mediation, conciliation or other means. Parties who participate in FDR obtain a s 60I certificate, which must be attached to the initiating application.⁵⁴ Information disclosed in FDR is admissible in court proceedings only in very limited circumstances.
- 2.55 There are five different types of s 60I certificates, two of which have particular relevance to family violence:
- A certificate under s 60I(8) is issued where the FDR practitioner considers that FDR would not be appropriate, bearing in mind the matters set out in the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*. These matters include violence, the safety of the parties, inequalities of bargaining power and the risk, of child abuse.⁵⁵
 - It may not always be apparent to the FDR practitioner that these risk factors are present until FDR has commenced. In such circumstances, s 60I(8)(d) provides for a certificate to be issued where a person begins FDR but the FDR practitioner considers that it is inappropriate to continue.
- 2.56 Importantly, it is possible for parties to bypass FDR by arguing one of the exceptions to obtaining a s 60I certificate, including where there are reasonable grounds to believe there has been, or there is a risk of, child abuse or family violence.⁵⁶ Parties that rely on this exception must satisfy the Court that they have received information from a FDR practitioner about services and options available in cases of abuse and violence.⁵⁷ In both the Family Court and the Federal Circuit Court, a registrar will usually determine if the requirements for an exception have been met.

Notice of Child Abuse or Family Violence (Form 4)

⁵⁴ *Family Law Act 1975* (Cth), s 60I(7).

⁵⁵ *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), reg 25.

⁵⁶ *Family Law Act 1975* (Cth), s 60I(9)(b).

⁵⁷ *Family Law Act 1975* (Cth), s 60J.

- 2.57 A party who alleges that a child has been abused or is at risk of abuse must file a Notice of Child Abuse or Family Violence (Form 4).⁵⁸ The *Family Law Rules* also require that a Form 4 be filed if there are allegations that there has been, or there is a risk of, family violence involving a child, or a member of the child's family.⁵⁹ In the form, parties can provide details about the family violence or child abuse, or the risk of such violence or abuse.
- 2.58 Under the Family Law Act, once a Form 4 is filed, the Court must consider making orders to enable the parties to obtain appropriate evidence, and to protect the child or any party to the proceedings.⁶⁰

Affidavits and other documents

- 2.59 An affidavit setting out the facts of the case can form part of the evidence before the Court. In the Family Court, parties are only to file affidavits if the parties seek interim or procedural orders.⁶¹ A different rule applies in the Federal Circuit Court, where the initiating application and response must be accompanied by affidavits.⁶²
- 2.60 Parties to parenting proceedings in either court are required to file copies of any protection orders made under state or territory family violence legislation that affect the child or a member of the child's family.⁶³ This is usually done by attaching a copy of any orders to the initiating application.

Procedural hearings

Family Court

- 2.61 In the Family Court, the first hearing is usually before a registrar and deals with procedural matters. In parenting proceedings, the registrar can refer the parties to the Child Responsive Program, which involves meetings between the parties and a family consultant assigned to the case.⁶⁴ The family consultant may also meet with any children, if appropriate. The objective of

⁵⁸ *Family Law Act 1975* (Cth), s 67Z.

⁵⁹ *Family Law Rules 2004* (Cth), r 2.04B.

⁶⁰ *Family Law Act 1975* (Cth), s 67ZBA(2).

⁶¹ *Family Law Rules 2004* (Cth), r 5.02.

⁶² *Federal Circuit Court Rules 2001* (Cth), r 4.05.

⁶³ *Family Law Act 1975* (Cth), s 60CF; *Family Law Rules 2004* (Cth), r 2.05.

⁶⁴ *Family Law Rules 2004* (Cth), r 12.03(5).

the program is to encourage parents to focus on the needs of their children when determining parenting arrangements, and to reach agreement about the parenting arrangements that support the best outcomes for the children.⁶⁵

- 2.62 The family consultant also screens for family violence, and where there are identified concerns about family violence, the consultant may take protective action, including notifying relevant child protection authorities. The family consultant provides the parties, their legal representatives and the Court with a written report of the main issues affecting the family.⁶⁶ Significantly, this process differs from FDR in that the information gathered in meetings is admissible in court.
- 2.63 One or both of the parties may elect to engage a private practitioner to provide an expert opinion to the Court by way of a written report. The Court may also appoint a private practitioner for the purpose of obtaining expert evidence in a particular matter. These private practitioners are referred to as ‘single expert witnesses’. In some cases a single expert witness may prepare a report similar to a family report prepared by a family consultant. When this occurs, sometimes the expert witness is described as a ‘family report writer’.⁶⁷
- 2.64 If agreement is not reached, the registrar may conduct further procedural hearings to prepare the matter for hearing before a judicial officer. In addition to these procedural steps, at least 28 days before the final hearing, parties to parenting proceedings must complete a parenting questionnaire, which includes questions about family violence and child abuse, alcohol and drug use, and the details of the parties’ current living and parenting arrangements. This information can be admitted as evidence before the Court.⁶⁸

Federal Circuit Court

- 2.65 In the Federal Circuit Court, the first hearing is usually before the judge assigned to the case. The judge can make a variety of orders about the conduct of the proceedings, including referring the parties to other forms of

⁶⁵ Professor Richard Chisholm, *Family Courts Violence Review*, 2009, p. 224.

⁶⁶ Professor Richard Chisholm, *Family Courts Violence Review*, 2009, pp. 224-226.

⁶⁷ Attorney-General’s Department, *Submission 89.1*, p. 8.

⁶⁸ Professor Richard Chisholm, *Family Courts Violence Review*, 2009, p. 229.

dispute resolution,⁶⁹ or a conciliation conference.⁷⁰ Conciliation conferences are more likely to be part of property division matters rather than parenting proceedings.⁷¹

- 2.66 While there is no Child Responsive Program in the Federal Circuit Court, the Court can order parties to meet with a court-appointed family consultant at a Child Dispute Conference.
- 2.67 In either court, an Independent Children's Lawyer may also be appointed to represent the best interests of a child in the proceedings on the application of any of the parties or an organisation concerned with the child's welfare, or in the initiative of the Court.⁷²
- 2.68 For parenting proceedings, the Court is required to conduct proceedings (both procedural and trials) in a way that will safeguard parties to proceedings against family violence.⁷³ This includes, for example, empowering the Court to limit (or not allow) cross-examination of a particular witness.⁷⁴ However, this does not apply in financial proceedings. This is discussed further in Chapter 5.

Trial

- 2.69 The law requires that both the Family Court and the Federal Circuit Court adopt a 'less adversarial' approach when conducting child-related proceedings.⁷⁵ This means that the proceedings are conducted with as little formality as possible, and the judicial officer actively directs the conduct of the proceedings.⁷⁶ In addition, at any point in the trial, either court may refer parties to FDR or counselling.
- 2.70 As with the procedural hearings discussed above, either court may order that a court-appointed family consultant prepare a family report if the care,

⁶⁹ *Federal Circuit Court Rules 2001* (Cth), r 4.05.

⁷⁰ *Federal Magistrates Act 1999* (Cth), s 26.

⁷¹ Professor Richard Chisholm, *Family Courts Violence Review*, 2009, p. 262.

⁷² *Family Law Act 1975* (Cth), s 68L.

⁷³ *Family Law Act 1975* (Cth), s 69ZN; Legal Aid NSW, *Submission 90*, p. 23.

⁷⁴ *Family Law Act 1975* (Cth), s 69ZX; Legal Aid NSW, *Submission 90*, p. 23.

⁷⁵ *Family Law Act 1975* (Cth), s 69NZ.

⁷⁶ *Family Law Act 1975* (Cth), s 69NZ.

welfare or development of a child is relevant to the proceedings.⁷⁷ The Court may also appoint a single expert witness to prepare a report on the family.⁷⁸

2.71 In determining whether to order a family report, the Best Practice Principles suggest a number of matters that the Court may direct the family report writer or single expert witness to address in cases where family violence or child abuse is alleged, including:

- the impact of the family violence or abuse;
- the harm, or risk of family violence, to the children;
- any benefits if the child spends time with the parent against whom the allegations are made; and/or
- whether the safety of the child and the parent alleging the family violence or abuse can be secured if there is contact with the person against whom allegations have been made.⁷⁹

Interim hearings

2.72 Both the Family Court and the Federal Circuit Court can make orders on an interim basis pending final orders. In some circumstances, interim orders can be made without notice to the other parties to the proceedings, including where there are family violence or child abuse concerns.

Consent orders

2.73 Consent orders are orders agreed to by the parties about parenting arrangements or property division. The orders must be put before the Court, which will consider making formal orders that bind the parties.

2.74 Parties may apply for consent orders at any stage of the proceedings in the Family Court and the Federal Circuit Court. Where there are current proceedings before the Court, consent orders can be made on oral application or by lodging a draft consent order. Where there are no current proceedings, consent orders may be sought by lodging an 'Application for Consent Orders'.⁸⁰

⁷⁷ *Family Law Act 1975* (Cth), s 62G.

⁷⁸ *Family Law Act 1975* (Cth), s 69ZX(1)(d).

⁷⁹ Family Court of Australia and Federal Circuit Court of Australia, *Family Violence Best Practice Principles*, 2016, 4th Edition, pp. 18-19.

⁸⁰ *Family Law Rules 2004*, sub-r 10.15(1); see also Family Court of Australia, *Submission 44*, pp. 4-5.

- 2.75 For matters involving parenting disputes, each party must advise the Court whether a child or one of the parties has been, or is at risk of being, subjected to family violence, and importantly, how the consent orders appropriately respond to family violence issues.⁸¹
- 2.76 The Court retains discretion about whether or not to make the consent orders as sought, or to make other orders it considers more appropriate.⁸² The Family Law Act however mandates that the Court, when exercising its discretion, must consider the paramount consideration in parenting proceedings: the best interests of the child.⁸³ This includes the need to protect children from abuse, neglect and family violence.⁸⁴
- 2.77 For matters involving property settlements, the Court will not make an order unless it is satisfied that in all circumstances the orders are just and equitable.⁸⁵
- 2.78 Consent orders (for either parenting or property matters) are usually considered by a registrar of the Court. The registrar can refer the matter to a judge where appropriate, including to deal with family violence issues.
- 2.79 Where a consent order includes allegations of family violence, registrars are to consider a number of factors, including the following:
- the seriousness of the allegations;
 - the extent of the involvement of the child in any incidents of violence or abuse;
 - how the orders address the violence and abuse issues;
 - where there is any reason to believe the orders would be used to continue to control or maintain contact with the parent with whom the child lives;
 - where there are other issues such as mental illness, drug and alcohol abuse or serious parental incapacity which would present a risk to the child;
 - whether the parties had had legal advice;

⁸¹ *Family Law Rules 2004*, sub-r 10.15A; see also Family Court of Australia, *Submission 44*, p. 5; Law Council of Australia, *Submission 85*, pp. 20-21.

⁸² Family Court of Australia, *Submission 44*, p. 5.

⁸³ *Family Law Act 1975* (Cth), s 60CA; see also Family Court of Australia, *Submission 44*, p. 5.

⁸⁴ *Family Law Act 1975* (Cth), s 60CC; see also Family Court of Australia, *Submission 44*, p. 5.

⁸⁵ *Family Law Act 1975* (Cth), s 79(2); see also Family Court of Australia, *Submission 44*, p. 5.

- whether the Court can be satisfied that the parties have agreed to the orders without pressure;
- whether the party who alleged the violence or abuse is genuinely satisfied the orders do not present an unacceptable risk to the child or any other person; and
- if an Independent Children’s Lawyer has been appointed, whether he or she agrees to the consent orders.⁸⁶

2.80 The Family Court advised the Committee that applications for consent orders comprise approximately two-thirds of filings in the Family Court.⁸⁷

Exercise of family law jurisdiction by state and territory courts

2.81 The Family Law Act allows consideration of certain parenting and property matters in courts of summary jurisdiction in each state and territory.⁸⁸

Courts with summary jurisdiction include the Local Court of New South Wales, and the magistrates courts of Victoria, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory, and the Northern Territory (hereafter state and territory magistrates courts).⁸⁹

2.82 For example, proceedings for a parenting order can be commenced in a state or territory magistrates court, however those courts are limited in the orders that they may grant. If the parties do not agree to the exercise of the jurisdiction by a state or territory magistrates court, the Court must transfer the matter to a federal family court.⁹⁰

2.83 The effect of this limitation is that a state or territory court can only make parenting orders where both parties agree on the content of the order, or where both parties agree that the Court hear and determine the matter.

2.84 Magistrates courts are also vested with jurisdiction under the Family Law Act when making or varying a protection order under state or territory legislation, to vary a parenting order.⁹¹ The Court may only revive, vary,

⁸⁶ Family Court of Australia and Federal Circuit Court of Australia, *Family Violence Best Practice Principles* (4th Edition), December 2016, p. 27; see also Family Court of Australia, *Submission 44*, pp. 5-6.

⁸⁷ Family Court of Australia, *Submission 44*, p. 6.

⁸⁸ *Family Law Act 1975* (Cth), s 69J.

⁸⁹ For ease of reference, these courts will be collectively referred to as ‘magistrates courts’ in this report.

⁹⁰ *Family Law Act 1975* (Cth), s 69N(2).

⁹¹ *Family Law Act 1975* (Cth), s 68R.

discharge or suspend a parenting order to the extent that it relates to a person spending time with a child,⁹² and where it has information that was not before the Court that made the original parenting order.⁹³ The power to amend such orders does not require that the parties apply for an amendment to parenting orders. The Court may exercise the jurisdiction upon its own initiative.⁹⁴

- 2.85 The effect of amending parenting orders differs depending on whether it is amended during proceedings for an interim protection order or a final protection order. Magistrates courts are not permitted to discharge a parenting order during proceedings for an interim protection order.⁹⁵ Further, amendments during proceedings for an interim protection order will only have effect for 21 days.⁹⁶

Interaction of family law and state/territory family violence legislation

- 2.86 Family violence is not an issue in all cases before federal family courts, although it is raised in the majority of cases heard before those courts.⁹⁷ Similarly, not all people who seek family violence protection orders are involved in proceedings in the family courts whether because separation and parenting matters are not an issue or because families have difficulties accessing the family courts.
- 2.87 However, for those families that do need to seek orders from a state or territory court to ensure personal protection and also resolve family law

⁹² *Family Law Act 1975* (Cth), s 68R(1).

⁹³ *Family Law Act 1975* (Cth), s 68R(3).

⁹⁴ *Family Law Act 1975* (Cth), s 68R(2).

⁹⁵ *Family Law Act 1975* (Cth), s 68R(4).

⁹⁶ *Family Law Act 1975* (Cth), s 68T(1).

⁹⁷ Fifty per cent of matters before the Family Court of Australia, 70 per cent of matters before the Federal Circuit Court of Australia and 65 per cent of matters before the Family Court of Western Australia, involve allegations of family violence. See Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms*, 2009, p. 314; see also Monash University – Castan Centre for Human Rights Law, *Submission 57*, p. 2.

matters, it is important that the two legal systems ‘facilitate this as seamlessly and effectively as possible’.⁹⁸

- 2.88 As a consequence of the overlap between the two law systems, family law orders and protection orders may both regulate contact between family members. Further, in some circumstances, family law and protection orders may also both deal with property of the parties. This means that there is potential for inconsistency between a protection order made by a state or territory court and an order made by a federal family court in relation to the same family.
- 2.89 For example, as the joint report of the Australian Law Reform Commission and the New South Wales Law Reform Commission (ALRC/NSWLRC report) noted, a protection order may specify that a person is not to communicate with, or come within a certain distance of, the person protected by the order. However, a parenting order made by a federal family court may require contact between the separated parents for the purposes of facilitating arrangements for each parent to spend time with the children.⁹⁹ In a more troubling example, the Commissions noted that a protection order may prohibit a person from coming within a specified distance of the other parent’s home, while a parenting order allows the parent to collect and return the child at the home.¹⁰⁰
- 2.90 As noted above, the Family Law Act provides that a protection order made under state or territory family violence legislation that is inconsistent with a Family Law Act order which provides for, requires or authorises a person to spend time with a child, is invalid to the extent of the inconsistency.¹⁰¹ This means that conditions in a parenting order made under the Family Law Act will override any inconsistent requirements in a protection order, which in itself, can lead to a gap in protection. This protection gap was addressed by a number of submissions to the inquiry and is addressed in Chapters 3, 4 and 6.

⁹⁸ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 689.

⁹⁹ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 681.

¹⁰⁰ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 690.

¹⁰¹ *Family Law Act 1975* (Cth), s 68Q(1).

- 2.91 In practice, the inconsistency is often avoided by the state and territory courts making exceptions for contact or communication authorised or required by a family law order.¹⁰² The ALRC/NSWLRC report noted that ‘in effect, this means that responsibility for deciding how contact should take place, when there are children involved, is left to a decision by the federal family law courts or agreement between the parties’.¹⁰³

Interaction of family law system and child protection systems

- 2.92 Each state and territory has its own child protection system and legislation, however, the ‘overall philosophy and principles of these systems are similar’.¹⁰⁴ In contrast to the family law system, child protection systems are designed to protect children from abuse and neglect, and to support vulnerable families, rather than mediate parental disputes.¹⁰⁵ The two systems intersect however by regulating parental responsibility and contact between parents and children.
- 2.93 Each state and territory provides a statutory test for substantiating allegations of abuse or neglect. While terminology varies between the jurisdictions, the threshold for statutory intervention is generally considered similar.¹⁰⁶ Most jurisdictions provide a definition of a ‘child in need of protection’¹⁰⁷ or a child ‘at risk’.¹⁰⁸ A child is usually only considered to be in

¹⁰² Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 691.

¹⁰³ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 691.

¹⁰⁴ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Interim Report, 2015, p. 5; see also Australian Institute of Health and Welfare, *Child Protection Australia 2012-13, 2014*, Child Welfare Series No. 58, p. 2.

¹⁰⁵ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Interim Report, 2015, p. 5.

¹⁰⁶ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Interim Report, 2015, p. 8.

¹⁰⁷ *Children and Young People Act 2008* (ACT), s 345; *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 71; *Care and Protection of Children Act 2007* (NT), s 20; *Children, Youth and Families Act 2005* (Vic), s 162; *Children and Community Services Act 2004* (WA), s 28.

¹⁰⁸ *Children’s Protection Act 1993* (SA), s 6(2); *Children, Young Persons and Their Families Act 1997* (Tas), s 4.

need of protection if there is no parent able and willing to protect the child.¹⁰⁹

- 2.94 Types of abuse or neglect that are included in most definitions of a child in need of protection include where the child has suffered or is likely to suffer:
- physical injury;
 - sexual abuse;
 - emotion or psychological harm; or
 - neglect, such as a lack of basic care, including medical care.¹¹⁰
- 2.95 Some jurisdictions require the harm to be ‘significant’ or ‘serious’.¹¹¹
- 2.96 A family usually becomes involved with the child protection system following a report or notification to the relevant state or territory child protection department, which may come from family members, neighbours or professionals who work with children. In its interim report, the Family Law Council noted that family members are the most common group of notifiers of suspected child abuse. This is despite legislative requirements that mandate professionals who work with children to report any suspicions of ‘significant’ abuse and neglect.¹¹²
- 2.97 Responses to reports of child abuse or neglect vary across the different systems. Generally, there is an intake stage when the department decides whether to conduct an investigation, refer the family to support services or take no action. If an investigation is conducted, the department will subsequently determine whether the report is ‘substantiated’, meaning that there is sufficient reason to believe that the child has been or is likely to be abused, neglected or otherwise harmed.
- 2.98 Once a report of abuse has been substantiated, the child protection department may apply to the state or territory children’s court for a care and protection order. The Family Law Council noted that this is ‘usually

¹⁰⁹ *Children and Young People Act 2008* (ACT), s 345(1)(b); *Children’s Protection Act 1993* (SA), s 6(2)(c); *Children, Youth and Families Act 2005* (Vic), s 162(1); *Child Protection Act 1999* (Qld), s 10.

¹¹⁰ *Children and Young People Act 2008* (ACT), ss 342 and 343; *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 71; *Child Protection Act 1999* (Qld), s 9; *Children’s Protection Act 1993* (SA), s 6(2); *Children, Youth and Families Act 2005* (Vic), s 162(1); *Children and Community Services Act 2004* (WA), s 28.

¹¹¹ See: *Care and Protection of Children Act 2007* (NT), s 15; *Children, Youth and Families Act 2005* (Vic), s 162(1); *Children’s Protection Act 1993* (SA), s 6(2); *Child Protection Act 1999* (Qld), s 10.

¹¹² Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Interim Report, 2015, p. 5.

considered an option of last resort', commenting that 'for cases where risks of actual child abuse and neglect are lower, family support services can be arranged to provide general support to the family'.¹¹³

- 2.99 The number of children removed from their families into out of home care has continued to increase, particularly for Aboriginal and Torres Strait Islander children, where family violence is 'the leading driver of child protection intervention'.¹¹⁴ Between 2009 and 2013, the rate of Aboriginal or Torres Strait Islander children on care and protection orders has increased from 43.8 to 59.2, while the non-Indigenous rate has remained 'relatively stable', increasing from 5.2 to 5.8 per 100,000 children.¹¹⁵
- 2.100 Most state and territory jurisdictions have a specialised children's court for both care and protection orders as well as youth justice matters.¹¹⁶ In the Northern Territory and Tasmania there is no specialist children's court. In those jurisdictions, child protection matters are head by generalist magistrates who work across a range of areas of criminal and civil jurisdiction.¹¹⁷
- 2.101 When considering child protection orders, the paramount consideration under child protection legislation is variously described as the child's best interests,¹¹⁸ the safety, welfare and well-being of the child,¹¹⁹ or the safety, wellbeing and best interests of the child.¹²⁰

¹¹³ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems*—Interim Report, 2015, p. 6.

¹¹⁴ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems*—Interim Report, 2015, p. 6.

¹¹⁵ Australian Institute of Health and Welfare, *Child Protection Australia 2012-13*, 2014, Child Welfare Series No. 58, p. 43; see also Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems*—Interim Report, 2015, p. 6.

¹¹⁶ *Magistrates Court Act 1930* (ACT), chapter 4A (note that the Court is called the Children's Court); *Children's Court Act 1987* (NSW), s 4; *Children's Court Act 1992* (Qld), s 4; *Children, Youth and Families Act 2005* (Vic), s 504; *Children's Court of Western Australia Act 1988* (WA), s 4.

¹¹⁷ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems*—Interim Report, 2015, p. 7.

¹¹⁸ For example: *Care and Protection of Children Act 2007* (NT), ss 10, 90; *Children, Youth and Families Act 2005* (Vic), s 10; *Children and Community Services Act 2004* (WA) s 7; *Children and Young People Act 2008* (ACT), s 8.

¹¹⁹ *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 9.

¹²⁰ *Child Protection Act 1999* (Qld), s 5A.

2.102 There is ‘a large variation’ in the types of orders that can be made by children’s courts, however they can be broadly categorised as follows:

- administrative arrangements (voluntary agreements between child protection departments and parents that transfer custody or guardianship without going to court);
- interim and temporary orders (a limited period of supervision or placement of a child in out of home care);
- finalised supervisory orders (the department supervises or directs the level and type of care to be provided to the child, though parents usually retain guardianship and parental responsibility);
- finalised third-party parental responsibility orders (orders transferring all parental responsibilities to a person considered appropriate by the Court such as a relative); and
- finalised guardianship or custody orders (orders that place the child in the custody of the department, while the parent retains legal guardianship).¹²¹

The system in practice

Different pathways

2.103 Research from the Magistrates’ Court of Victoria, indicates that the most common pathway into the legal system for families experiencing violence is through a state or territory magistrates court, with police commencing proceedings for an intervention order.¹²²

2.104 It is important to note however, that not all families commence in state and territory courts and then proceed to the federal family law courts. Families often proceed through the legal system in a non-linear or iterative way. Indeed, the types of behaviours that satisfy the legal definition of family violence often mean that families will not seek police involvement at all, nor seek an intervention order in a magistrates court.

2.105 As noted in Chapter 1, this report advocates for an accessible, equitable and responsive family law system which better prioritises the safety of families.

¹²¹ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Interim Report, 2015, p. 10.

¹²² Magistrates’ Court of Victoria, *Submission 56*, p. 5.

It should be noted that the Magistrates’ Court of Victoria was the only state or territory court to make a submission to the inquiry.

Significantly, this should occur regardless of how families first enter the system. The remainder of this report seeks to address these requirements.

3. Challenges of current system

Introduction

- 3.1 The family law system has a central role in identifying and responding appropriately to family violence, yet in many cases, it can fail to protect families from violence¹ on a multi-dimensional basis.² Evidence to the inquiry suggests that the family law system ‘does not recognise the reality of family violence’,³ nor ‘recognise and address power imbalances, financial and emotional abuse tactics and ... victims’ right to safety’.⁴
- 3.2 Although there is ‘some great practice in the family law system’, problems arise in the failure to achieve consistency within and across jurisdictions,⁵ and the experience of parties is that this can be destabilising, uncertain and creates fear for families.⁶
- 3.3 This chapter presents the evidence received that identifies the key challenges of the current family law system’s response to family violence including that:

¹ Ms Joanna Fletcher, Chief Executive Officer, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 17; see also Dr Andrew Bickerdike, Chair, National Board, Relationships Australia, *Committee Hansard*, Canberra, 8 August 2017, p. 2.

² Cara House, *Submission 21*, p. 3.

³ Mrs Dianne Gipey, Chief Executive Officer, Alice Springs Women’s Shelter, *Committee Hansard*, Alice Springs, 22 August 2017, p. 1.

⁴ Cara House, *Submission 21*, p. 3.

⁵ Ms Joanna Fletcher, Chief Executive Officer, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 17.

⁶ Safe Steps Family Violence Response Centre (Safe Steps), *Submission 34*, p. 6.

- the adversarial system is inappropriate for resolving family law disputes;
- it does not respond appropriately to reports of family violence;
- it is inaccessible for most families;
- it is open to abuse of process, including ongoing coercion and control of victims;
- it does not respond sufficiently to perjury and false allegations; and
- the structure and interaction with other jurisdictions including the state and territory family violence legislation and child protection systems is fragmented, leading to inconsistent approaches and exposing families to a greater risk of harm.

Adversarial system

3.4 A recurring theme in a significant body of evidence to the inquiry, and the conclusions of other reviews, is that the current adversarial system is inappropriate for resolving family law disputes, particularly those involving family violence.⁷ The inappropriateness of an adversarial system to family law was identified as early as 1976 by the first Chief Justice of the Family Court of Australia (the Family Court).⁸

⁷ National Child Protection Alliance, *Submission 5*, pp. 2, 12; Australian Paralegal Foundation, *Submission 8*, p. 4; Interrelate, *Submission 15*, p. 1; Divorce Partners, *Submission 20*, p. 4; Queensland Domestic Violence Services Network, *Submission 30*, p. 4; Safe Steps, *Submission 34*, p. 15; Capricorn Community Development Association, *Submission 43*, p. 3; Stop Male Suicide Project, *Submission 45*, p. 5; Victims of Crime Assistance League NSW (VOCAL), *Submission 46*, p. 4; Child Protection Party, *Submission 50*, p. 2; Jannawi Family Centre, *Submission 51*, pp. 5-6; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 1; Eastern Domestic Violence Service, *Submission 68*, p. 2; For Kids Sake, *Submission 79*, p. 2; Family and Relationship Services Australia (FRSA), *Submission 80*, p. 18; Kay E Hull AM, *Submission 86*, p. 1; Eastern Community Legal Centre, *Submission 91*, p. 8; Dr Augusto Zimmerman, *Submission 94*, p. 7; Mr Michael Hart, *Submission 99*, p. 3; Mr Michael Callautti, *Submission 107*, p. 3; Justice for Children, *Submission 118*, p. 1; Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 12; Dr Heather Nancarrow, Chief Executive Officer, Australia's National Research Organisation for Women's Safety, *Committee Hansard*, Sydney, 31 July 2017, p. 6; Dr Andrew Bickerdike, Chair, National Board, Relationships Australia, *Committee Hansard*, Canberra, 8 August 2017, p. 2; Mr Glen Dooley, Principal Legal Officer, Central Australian Aboriginal Legal Aid Service, *Committee Hansard*, Alice Springs, 22 August 2017, p. 17.

⁸ Ms Ashleigh Saint, Acting Assistant Secretary, Family Law Branch, Civil Justice Policy and Programs Division, Attorney-General's Department, *Committee Hansard*, Canberra, 17 October 2017, p. 10.

- 3.5 Perhaps most critically, stakeholders identified that the existing adversarial approach is ‘too confronting’,⁹ leading to ‘escalation of conflict by its very nature’.¹⁰ As a result, families may not raise family violence concerns or not seek to use the family law system to protect them from ongoing risk of harm. For example, the Eastern Community Legal Centre argued:

As the family law system is adversarial ... allegations of family violence are often viewed in a suspicious and oppositional manner. This attitude does not contribute to any sense of safety for victims of family violence, and in fact acts as a clear obstacle for family violence victims to: a) disclose their experiences of family violence and b) even engage in the family law system at all.¹¹

- 3.6 Australia’s National Research Organisation for Women’s Safety (ANROWS) commented that the adversarial system is not effective where there is a power imbalance in the relationship of the two parties:

Certainly the adversarial system does not seem to be very effective where you have a power imbalance. This is part of the problem of coercive controlling violence, where you have a perpetrator who is engaging in a process of advocating for themselves and expecting a victim of coercive controlling violence to advocate for themselves in an adversarial system; so it is problematic.¹²

- 3.7 Similarly, Jannawi Family Centre highlighted that the adversarial approach where parties are in conflicting roles, mirrors the dynamic of abusive relationships:

[T]he family court system appears to function as a closed system which limits feedback and differing viewpoints. It mirrors the very dynamics of families where there is violence and abuse and this in itself is abusive and ineffective. A family law system which places safety at its core needs to be implemented in Australia.¹³

⁹ Safe Steps, *Submission 34*, p. 15.

¹⁰ Dr Andrew Bickerdike, Chair, National Board, Relationships Australia, *Committee Hansard*, Canberra, 8 August 2017, p. 2; see also Good Shepherd Australia New Zealand, *Submission 58*, p. 5; Law Council of Australia, *Submission 85*, p. 9.

¹¹ Eastern Community Legal Centre, *Submission 91*, p. 8.

¹² Dr Heather Nancarrow, Chief Executive Officer, Australia’s National Research Organisation for Women’s Safety, *Committee Hansard*, Sydney, 31 July 2017, p. 6.

¹³ Jannawi Family Centre, *Submission 51*, p. 6.

Box 3.1 Adversarial system

The following is a selection of responses to the Committee's questionnaire:

'The family law system is very much the wrong system to deal with family violence issues. It is adversarial, not designed to produce an outcome that doesn't promote rage when a perpetrator doesn't 'win' that then puts the victim 'winner' in grave danger of revenge'.

—*Respondent from South Australia*

'An adversarial system invites parties to fight to the bitter end for what they perceive to be their "rights" as parents ... Family law matters should be resolved with a panel that includes a judge, but also includes other professionals such as a social worker, educational psychologist and even the family's [general practitioner]'.

—*Respondent from Queensland*

'Family violence matters are heard as part of an adversarial system which creates further trauma to victims. It would be better to take family violence cases out of the Family Court altogether and make the focus on finding the truth of the matter by family violence experts asking informed questions to both parties and their children. Also by making the protection of children in family violence matters a top priority by listening to the children and their experiences of family violence. The adversarial system that we currently have in place only encourages abusive people who want to use power and control to further harm their ex-partner'.

—*Respondent from Victoria*

'It seems there needs to be a tribunal type approach to the whole family law space that deals with everything from [domestic violence orders] though to divorce ... so that these matters can be judged on their merits rather than through the traditional adversarial approach—it doesn't help anyone in the family situation when the aim is to get winners and losers'.

—*Respondent from the Australian Capital Territory*

- 3.8 Even where families do access the family law system to address family violence concerns, the adversarial nature of that system does not necessarily

lead to appropriate outcomes for that family. The Eastern Domestic Violence Service explained that poorly-resourced parties traumatised by family violence are ‘clearly disadvantaged’ in an adversarial system where it is the responsibility of the parties to collect, collate and tender the evidence to the Court for it to decide upon that evidence.¹⁴ Jannawi Family Centre similarly commented that the adversarial nature of the existing family law system also ‘inhibits creative, meaningful solutions to family problems, instead leading to long delays and entrenching already problematic behaviours and patterns’.¹⁵

- 3.9 In light of these criticisms, it was suggested to the Committee that Australia adopt an inquisitorial approach to family law disputes, particularly those involving family violence.¹⁶ For example, the Eastern Domestic Violence Service commented that as the evidentiary burden falls to the Court in an inquisitorial system, ‘fewer children would be subjected to high levels of conflict, stress and trauma’.¹⁷ In an inquisitorial court system, the Court or a part of the Court is more actively involved in investigating the facts of the case.
- 3.10 In May 2017, the Australian Government announced a pilot of parent management hearings in Parramatta, which will adopt a non-adversarial approach to parenting matters, led by a multi-disciplinary panel.¹⁸ At time of writing, it is not clear whether disputes involving allegations of family violence could proceed to a parent management hearing. Parent management hearings are discussed further in Chapter 4.

Unresponsive to reports of family violence

- 3.11 Evidence to the inquiry also indicates that the current family law system is unresponsive to reports of family violence. This can be through strategic disincentives to raising family violence concerns, dismissing reports of family violence, or court delays. Each is examined below.

¹⁴ Eastern Domestic Violence Service, *Submission 68*, p. 2.

¹⁵ Jannawi Family Centre, *Submission 51*, p. 5.

¹⁶ Professor Patrick Parkinson AM, *Submission 64*, p. 10; Eastern Domestic Violence Service, *Submission 68*, p. 2; For Kids Sake, *Submission 79*, p. 2.

¹⁷ Eastern Domestic Violence Service, *Submission 68*, p. 3.

¹⁸ Senator the Hon George Brandis QC, Attorney-General, ‘Transforming the family law system’, *Media Release*, 9 May 2017; see also Professor Patrick Parkinson AM, *Submission 64*, p. 10.

Legal strategy of not raising family violence

3.12 A number of submissions noted that families are frequently advised not to raise family violence during family law matters for reasons of legal strategy.¹⁹ In a submission, Safe Steps Family Violence Response Centre quoted Emeritus Professor Rosalind Croucher AM, who wrote that families will hear ‘conflicting messages and divergent expectations at different points in the continuum of the broad family law system’.²⁰

3.13 Professor Croucher best described the legal conundrum faced by families:

[W]hen a mother is experiencing family violence that may have attracted the attention of the relevant child protection authority, she is told that she is expected to be ‘protective’, otherwise she faces the potential that the interest of the child protection authority may lead to her ‘losing’ her children. And yet, if she is drawn into family law proceedings, she is faced by the allegation that she is not being a ‘friendly parent’, so, in order that her children have a ‘meaningful relationship’ with both parents, she is faced with a parenting order that requires contact with the man she fears—particularly at moments of ‘handover’ of the children to their father—and her fear continues.²¹

3.14 Similarly, ANROWS advised that:

[M]any women decide not to refuse contact time with the father for fear of being perceived as an ‘unfriendly parent’ and being penalised for it—as this would then lead to children residing with the father and risking exposing them to even further violence ... In this instance, the use of the ‘unfriendly parent’ provision is often counter-productive as it tends to be used against women who report family or domestic violence.²²

¹⁹ National Child Protection Alliance, *Submission 5*, p. 3; Women’s Legal Services Queensland, *Submission 81*, p. 19.

²⁰ Safe Steps, *Submission 34*, p. 8; Emeritus Professor Rosalind Croucher AM, ‘Family Law: Challenges for responding to family violence in a federal system’ in Australian Institute of Family Studies, *Families, policy and the law: Selected essays on contemporary issues for Australia*, May 2014, <<https://aifs.gov.au/publications/families-policy-and-law/21-family-law-challenges-responding-family-violence-federal>>.

²¹ Emeritus Professor Rosalind Croucher AM, ‘Family Law: Challenges for responding to family violence in a federal system’ in Australian Institute of Family Studies, *Families, policy and the law: Selected essays on contemporary issues for Australia*, May 2014, <<https://aifs.gov.au/publications/families-policy-and-law/21-family-law-challenges-responding-family-violence-federal>>.

²² Australia’s National Research Organisation for Women’s Safety (ANROWS), *Submission 73*, p. 11; see also Sexual Assault Support Service, *Submission 32*, p. 5.

- 3.15 Sexual Assault Support Service noted that sexual violence is ‘rarely raised’ in family law proceedings, referencing the Australian Law Reform Commission (ALRC) finding that legal representatives may be ‘reluctant’ to advise the Court of intimate partner sexual violence.²³

Box 3.2 Legal strategy of not raising family violence

The following is a selection of responses to the Committee’s questionnaire:

‘In my case, anything to do with family violence was not brought up as [the] lawyer said I would be looked down upon and it would go against me.’

—*Respondent from Victoria*

‘I was advised from the start when completing the affidavit by my own lawyers [not] to mention the domestic violence, that it wasn’t relevant, that the judge would see it as a ploy or false or would make me look bad’.

—*Respondent from New South Wales*

‘Family violence was not taken into consideration. [I was] advised not to pursue’.

—*Respondent from Victoria*

‘I was advised not to raise [family violence] by my lawyer’.

—*Respondent from New South Wales*

- 3.16 Reflecting on the legal conundrum, Eastern Community Legal Centre strongly advocated that families affected by violence ‘should not be encouraged by the legal system to hide their experiences of family violence out of fear that they will face disadvantage in the family law system’.²⁴

²³ Sexual Assault Support Service, *Submission 32*, p. 4; see also Australian Law Reform Commission and New South Wales Law Reform Commission, *Family violence – A national legal response*, ALRC Report 114/ NSWLRC Report 128, 2010, p. 1124.

²⁴ Eastern Community Legal Centre, *Submission 91*, p. 11.

Dismissing reports of family violence

3.17 Participants noted that where families do report family violence, these reports can either be dismissed or viewed with suspicion.²⁵ For example, the Domestic Violence Crisis Service advised:

[W]e are still being told by women that their lawyers warn them about raising abuse allegations and are pressured to sign consent orders they fear will endanger their children. Victims are still finding that both their disclosures and those of their children are diminished or disbelieved.²⁶

3.18 Jannawi Family Centre also reported that the family law system ‘fails to listen’ to families who report family violence, particularly children,²⁷ and does not recognise how trauma may impact disclosure:

Jannawi believes the way that child sexual assault disclosures are managed in the family law system requires an overhaul. The lack of recognition of the way complex trauma impacts on brain functioning, particularly memory and the ability to provide significant recall is a barrier to disclosing. This is then further exacerbated by a system which may not believe, or discredits disclosures. It appears that disclosures are viewed as a tactic to prevent contact or that children have been coached and this is a dangerous starting point.²⁸

3.19 In their research, Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih found that family violence can be invalidated by the family law system, including in family reports, by:

- re-constructing domestic violence as inconsequential and thereby diminishing its relevance to parenting arrangements;
- naming coercive control is reconstructed as something else—it is ‘not that serious’, episodic, ‘only parental conflict’, and/or an act from the past that victims needed to ‘get over’;
- adopting normative gender misconceptions that demand maternal support of the perpetrator/child relationship and call into question women’s credibility by labelling them dishonest and manipulative; and

²⁵ National Child Protection Alliance, *Submission 5*, p. 4; Women’s Legal Service Queensland, *Submission 81*, p. 19.

²⁶ Domestic Violence Crisis Service, *Submission 29*, p. 3.

²⁷ Jannawi Family Centre, *Submission 51*, p. 4.

²⁸ Jannawi Family Centre, *Submission 51*, p. 5.

- the selective silencing and misconstruing of children's voices.²⁹

Box 3.3 Dismissing reports of family violence

The following is a selection of responses to the Committee's questionnaire:

'Take the risk seriously, believe that a woman who presents herself that she is afraid of an ex-husband as being the truth until proven otherwise. Part of the flaws with[in] the system are that these matters take time to be proven and as a result are ignored by the family court. In our case, the Court writer completely dismissed any risk of harm to children despite one felony, one misdemeanour and an apprehended domestic violence order (all proven in Court) against ex-husband. It's just appalling'.

— Respondent from New South Wales

'The judge was dismissive of the violence and that it had no bearing on the outcome or was taken into account in the decision making process'.

— Respondent from Queensland

'I was re-traumatised by my family report writer who did not understand family violence and subjected me to ... inappropriate questions ..., was dismissive and stated that he didn't care about family violence and didn't want me to talk about it'.

— Respondent from Queensland

'Family violence has so far not been taken into account and dismissed as "he said, she said" or "not severe enough".'

— Respondent from Queensland

Delays

²⁹ Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, p. 7.

- 3.20 The family law system's lack of responsiveness to reports of family violence can be exacerbated by significant delays in the system,³⁰ exposing families to 'exponentially' more risk.³¹
- 3.21 The Law Council of Australia advised that delays from court filing to the commencement of a trial can be as high as 36 months in both the Family Court and the Federal Circuit Court of Australia (Federal Circuit Court).³² The Council explained how the delays can increase the risk of harm to families:
- If a man applied to the Family Court of the Federal Circuit Court today seeking contact with his children, the first thing is that that is not treated as an urgent issue by the court. You will not get an urgent hearing for that, because the Court simply does not have the resources to give them an urgent hearing. So it is not uncommon these days for a man who is not seeing his children to wait six months for a hearing and then another, say, three months for there to be some identification by a family consultant of the dynamics in the family. There might be really good reasons why he should not be seeing his child, but the risk that that puts the woman in while the man is not seeing his children exponentially grows. We all know that women, particularly those who are victims of coercive and controlling violence, are at most risk of homicide in the 12 months post-separation. If you make him wait to have a proper determination, where he has a chance to say his story, even if he is going to be unsuccessful, you really raise the risk for that woman.³³
- 3.22 In remote or regional areas, delays can be even greater.³⁴ In Alice Springs, the federal family courts sit only three or four times per year, presenting

³⁰ Baptist Care Australia, *Submission 28*, p. 6; Law Council of Australia, *Submission 85*, p. 9; Kay E Hull AM, *Submission 86*, p. 2; Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 2; Ms Rosie Batty, Private Capacity, *Committee Hansard*, Melbourne, 24 July 2017, p. 14; Ms Joanna Fletcher, Chief Executive Officer, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 21; Ms Faye Spiteri, Chair of the Board, InTouch Multicultural Centre Against Family Violence, *Committee Hansard*, Melbourne, 24 July 2017, p. 54.

³¹ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 2.

³² Law Council of Australia, *Submission 85.1*, p. 1.

³³ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 2.

³⁴ Kay E Hull AM, *Submission 86*, p. 2.

significant problems for families who require urgent family law orders to provide protection from family violence.³⁵

- 3.23 InTouch Multicultural Centre Against Family Violence also advised that, increasingly, there are long delays for family consultants and the development of family reports to aid in the courts' decisions.³⁶

Box 3.4 Court delays

The following is a selection of responses to the Committee's questionnaire:

'The property settlement was fairly quick. Settled out of court in a matter of months. Took my ex[partner] a couple of months after the deadline to actually make the payment'.

— Respondent from New South Wales

'The process for property order was delayed for several years while Family Court decisions were being made regarding residence of children'.

— Respondent from Queensland

'The delays make domestic violence and trauma go on so much longer'.

— Respondent from New South Wales

'The system takes too long and perpetrators can delay and manipulate systems to their own gain to cause ongoing anxiety to the families'.

— Respondent from Queensland

'The family violence services were hard to access due to delays and inflexible times for appointments'.

— Respondent from Victoria

³⁵ Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 9.

³⁶ InTouch Multicultural Centre Against Family Violence (InTouch), *Submission 13*, p. 7.

- 3.24 Delays across the family law system can be exacerbate low levels of trust in the existing system to respond effectively to that violence,³⁷ with families feeling their 'lives are on hold while waiting for a resolution'.³⁸
- 3.25 According to evidence to the Inquiry, the family law system's lack of responsiveness to family violence is also encouraging families to stay in violent relationships. For example, the Alice Springs Women's Shelter advised that in such situations, families are forced back to 'environments where they must measure the level of violence they will experience in order to stay safe by relying on safety planning rather than legitimate justice outcomes'.³⁹
- 3.26 Alternatively, families are relying on informal arrangements⁴⁰ or outcomes that are not in their interests,⁴¹ without the certainty and protection that a court decision might otherwise provide. The Law Council of Australia noted that families who have experienced violence may develop 'litigation fatigue and make poor decisions about their case as a result of an inability or unwillingness to continue with litigation to obtain more suitable orders... [including] parenting arrangements'.⁴²
- 3.27 Similarly, Micah Projects noted that:
- ... women living with violence often feel that staying is the safest option. Many feel that separation will put them and their children at greater risk of harm and threats. Many women are unwilling to expose the children to unsupervised contact with an abusive father.⁴³
- 3.28 This accords with evidence from the National Family Violence Prevention and Legal Services Forum that family law proceedings can trigger the re-emergence or escalation of family violence, leading to particularly unsafe

³⁷ The Deli Women and Children's Centre (The Deli Centre), *Submission 67*, p. 1.

³⁸ InTouch, *Submission 13*, p. 8.

³⁹ Alice Springs Women's Shelter (ASWS), *Submission 121*, p. 2.

⁴⁰ Ms Sophie Broughton-Cunningham, Court Support Officer, Alice Springs Women's Shelter, *Committee Hansard*, Alice Springs, 22 August 2017, p. 4; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 2.

⁴¹ Domestic Violence Crisis Service, *Submission 29*, p. 5; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 2.

⁴² Law Council of Australia, *Submission 85*, p. 9.

⁴³ Micah Projects, *Submission 24*, p. 3.

environments.⁴⁴ ANROWS research also found that actual or impending separation is associated with an increased risk of family violence, particularly lethal violence.⁴⁵

- 3.29 The Family Court acknowledged in a submission to the inquiry that ‘it is unacceptable for matters involving family violence to be maintained in the family law system for a long period of time as this increases the risk of conflict’.⁴⁶

Family law system is inaccessible

- 3.30 The current family law system is inaccessible for many families due to the cost of legal representation, as well as the complexity of navigating the family law system. For example, Victoria Legal Aid advocated that ‘the primary barrier victims of violence face, is not, in our view, the legislative framework. It is access to an expensive and onerous system’.⁴⁷ Both issues are addressed below.

Costs

- 3.31 The cost of accessing the family law system is prohibitive for most families,⁴⁸ or ‘impoverishes’ those families that do access the system.⁴⁹ Domestic Violence NSW advised:

[W]omen from all backgrounds, professions and income strata ... have borrowed thousands of dollars to pay for representation in the Family Court ... We are aware that many women give up because they are in huge debt as a result of court costs.⁵⁰

⁴⁴ National Family Violence Prevention and Legal Services Forum (NFVPLSF), *Submission 78*, p. 14.

⁴⁵ ANROWS, *Submission 73*, p. 4.

⁴⁶ Family Court of Australia, *Submission 44*, p. 4; see also Law Council of Australia, *Submission 85*, p. 9.

⁴⁷ Ms Gayathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 26.

⁴⁸ Queensland Law Society, *Submission 38*, p. 4; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 1; For Kids Sake, *Submission 79*, p. 5, Australian Brotherhood of Fathers, *Submission 110*, p. 16.

⁴⁹ Supriya Singh, Marg Liddell, Jasvinder Sidhu, *Submission 65*, p. 5.

⁵⁰ Domestic Violence NSW, *Submission 48*, p. 15.

Box 3.5 Costs of accessing the family law system

The following is a selection of responses to the Committee's questionnaire:

'The biggest issue was facing financial hardship and without being able to get legal aid I needed to self-represent. I still incurred legal costs which drained any funds I had, and I was continually under stress and unable to settle into the employment which I had acquired'.

— Respondent from Queensland

'I do have very limited funds and have found the costs of lawyers, barristers etc. quite crippling financially. I am in debt to my parents and have no idea how or if I will ever be able to repay them. This seems unfair given that I have done nothing wrong and have been a victim of family violence. In fact, the financial hardship I have faced as a result feels like an extension of the violence I have experienced'.

— Respondent from Victoria

'I ran out of money early on in the court process. All of my settlement money went into the legal custody battle. I wasn't entitled to Legal Aid because I had "too many assets" (I owned my car and that was it). My parents then took over payment my legal costs and I owe them close to \$200,000 to date, on top of the \$100,000 or so I paid out of my settlement money'.

— Respondent from the Australian Capital Territory

'The legal costs of attempting to gain a fair settlement are prohibitive. Abusive men will fight to the death (figuratively speaking) to ensure they win. Abused women just want peace, so they back down and take the little they're thrown'.

— Respondent from Western Australia

3.32 During the course of the inquiry, the Committee heard in private on multiple occasions of private legal representation in family law matters, costing well over \$100,000, and in one matter over \$600,000. In addition to hourly solicitor fees, parties to proceedings can incur significant additional

costs including file management and transcription costs, court fees and third party disbursements such as the costs of counsel.

3.33 Women's Legal Services Australia commented:

If you are in the family law system with a private lawyer over a two- or three-year period, you are quite easily going to get up to \$100,000 of legal fees because it is likely that there is going to be regular contact with the lawyer in between the parties over that period. If you had some earlier decision-making, it may well be that a lot of those costs could be avoided. Frequently, the cost imperative for people who have private lawyers is that they resolve their matters earlier in the process.⁵¹

3.34 Responding to questions from the Committee regarding the hourly rate for some private family law practitioners, which can be as high as \$600 per hour, the Law Council of Australia commented:

I think you would find that there are a whole bulk of family lawyers who do not charge at that level. There are absolutely lawyers—and I am one of them—who charge at that level, because I have clients who can afford it and who have the resources to do it and pay that amount of money. But there are a whole raft of family lawyers who do not charge anything like that ... The scale rate under the Family Law Act is about \$235 an hour, which is not quite a third of what you might find in more superior courts' scales.⁵²

3.35 The Council noted however, that court delays and the number of court appearances 'significantly drives' up the cost of legal representation for parties in family law proceedings: 'people spend less when they are in the system for less time. They have fewer court events, they need less judicial time and there is only so much money that they can spend in that period of time'.⁵³ Law firm Lander & Rogers concurred with this new, further commenting that costs of legal representation can also be exacerbated when parties do not comply with court orders. To address this, Lander & Rogers

⁵¹ Ms Helen Matthews, Director, Legal and Policy, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 29.

⁵² Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, pp. 9-10.

⁵³ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 10.

recommended strengthening the enforcement of family law orders.⁵⁴ Enforcement of family law orders is examined in Chapter 4.

- 3.36 Interrelate, a not-for-profit provider of relationship services, was of the view that both financial and emotional costs of access are preventing a large percentage of families who have been granted exemptions from family dispute resolution from accessing the Court, with no resolution or protection.⁵⁵ Interrelate advised that as many as 43 per cent of clients attending family dispute resolution are granted exemptions from mandatory family dispute resolution, of which 49 per cent commence proceedings in the family courts. Of that 49 per cent, only 17 per cent proceed to final orders.⁵⁶ Analysing these results, Interrelate commented:

... a picture emerges of a high percentage of parents who are issued with a certificate but do not access the Family Court. Well-known barriers are the costs involved, delays in obtaining orders and a distrust of the legal system.⁵⁷

- 3.37 The cost of private representation can also force families to represent themselves in family law proceedings. Increasingly, self-represented litigants are representing a significant portion of users of the family law system. According to the Family Court's Annual Report, in 2015–16, 11 per cent of matters involved parties without a legal representative at trial, and in 26 per cent of matters only one party had a legal representative at trial.⁵⁸ The challenges for self-represented litigants are address in detail in Chapter 4.

Overly complex processes

⁵⁴ Ms Rachell Davey, Special Counsel, Lander & Rogers, *Committee Hansard*, Sydney, 31 July 2017, pp. 35-36; see also Ms Nerida Harvey, Principle Solicitor, Community Referral Service, Law Society of New South Wales, *Committee Hansard*, Sydney, 31 July 2017, p. 36.

⁵⁵ Mr Ross Butler, Senior Manager, Family Dispute Resolution, Interrelate Limited, *Committee Hansard*, Sydney, 31 July 2017, p. 15.

⁵⁶ Mr Ross Butler, Senior Manager, Family Dispute Resolution, Interrelate Limited, *Committee Hansard*, Sydney, 31 July 2017, p. 10.

⁵⁷ Mr Ross Butler, Senior Manager, Family Dispute Resolution, Interrelate Limited, *Committee Hansard*, Sydney, 31 July 2017, p. 10.

⁵⁸ Attorney-General's Department, *Submission 89.1*, p. 6; see also, Family Court of Australia, *Annual Report 2015/16*, Figure 3.21.

3.38 Complex processes may also impede families from accessing the family law system,⁵⁹ particularly where one or both parties are self-represented. Navigating the family law system can be difficult for an average person with no legal training. The required forms are difficult to identify and complete. Determining what evidence needs to be put to the Court can be confusing. The formal legal language and processes used in the family law system can be intimidating.

3.39 Significantly, the processes between the Family Court and the Federal Circuit Court differ, adding to the complexity. As the Magistrates' Court of Victoria noted:

Currently, there are two sets of rules which apply in relation to family law proceedings; rules which apply in the Federal Circuit Court and the Family Courts respectively. Given that most family law proceedings take place in the Federal Circuit Court, the Federal Circuit Rules 2001 apply to most family law proceedings. However, family law proceedings which are initiated in the Magistrates' Court are bound by the Family Law Rules 2004. However, when family law proceedings are transferred they are transferred to the Federal Circuit Court. These anomalies have created some confusion and inconsistencies in the administration of the family law jurisdiction, particularly for self-represented litigants.⁶⁰

3.40 For parties escaping family violence, the stress and difficulty involved in being able to summarise relationship history, financial situation, contribution to assets of the relationship, and any likely future needs or other considerations to be taken into account on division of the property, is compounded by the anxiety created by the likelihood of facing an abusive ex-partner in court. Navigating the complexity can be re-traumatising for families who have experienced family violence.⁶¹

3.41 If a family is experiencing additional barriers such as cultural or language barriers, low literacy or the ramifications of trauma, accessing the family law system is more difficult again.⁶² Some families, including Aboriginal and Torres Strait Islander and culturally and linguistically diverse families, as

⁵⁹ Centacare Brisbane, *Submission 22*, p. 3; People with Disabilities Australia, *Submission 25*, p. 7; Baptist Care Australia, *Submission 28*, p. 5; Magistrates' Court of Victoria, *Submission 56*, p. 3; NFVPLSF, *Submission 78*, p. 12; FRSA, *Submission 80*, p. 3; Ms Miranda Kaye, *Submission 95*, p. 1.

⁶⁰ Magistrates' Court of Victoria, *Submission 56.1*, p. 3.

⁶¹ Baptist Care Australia, *Submission 28*, p. 5.

⁶² Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women's Legal Service Victoria, 2015, p. 38.

well as families with parents or children with disabilities, may face additional accessibility challenges. These specific challenges are addressed in detail in Chapter 7.

Abuse of process

- 3.42 Abuse of process is the exploitation of rules or processes to control, financially damage or abuse another person. It includes vexatious behaviour by the other party, controlling parties through the emotional and economic toll of ongoing court proceedings.⁶³ These tactics are also referred to as malicious, frivolous, vexatious or querulous.⁶⁴ Some examples include the perpetrator failing to appear in court, repeatedly seeking adjournments, or appealing decisions on tenuous grounds.⁶⁵
- 3.43 The opportunity for perpetrators to continue to exert control over a family was discussed widely in evidence to the inquiry.⁶⁶ Perpetrators can employ tactics, such as being able to continuously delay court proceedings, which is not just costly for families and coercing them to accept unsafe arrangements,

⁶³ Women's Legal Services Australia, *Submission 6*, p. 34; see also Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women's Legal Service Victoria, 2015, p. 42.

⁶⁴ ACT Human Rights Commission, *Submission 33*, p. 4.

⁶⁵ ACT Human Rights Commission, *Submission 33*, p. 4.

⁶⁶ Statewide Children's Resource Program, *Submission 3*, p. 2; National Child Protection Alliance, *Submission 5*, p. 4; InTouch, *Submission 13*, p. 8; Women Everywhere Advocating Violence Elimination, *Submission 16*, p. 4; Cara House, *Submission 21*, pp. 19-20; Centacare Brisbane, *Submission 22*, p. 2; Junction Australia, *Submission 23*, pp. 2, 6; Victim Survivors' Advisory Council, *Submission 26*, p. 7; Baptist Care Australia, *Submission 28*, p. 5; ACT Human Rights Commission, *Submission 33*, pp. 4-5; Safe Steps, *Submission 34*, pp. 5, 15; Sole Parent Alliance, *Submission 40*, p. 3; Mallee Family Care, *Submission 41*, p. 2; Council of Single Mothers and Their Children Victoria, *Submission 42*, p. 3; Springvale Monash Legal Service, *Submission 47*, p. 6; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 1; The Deli Centre, *Submission 67*, pp. 1, 6; Royal Australian and New Zealand College of Psychiatrists (RANZCP), *Submission 69*, p. 7; Women's Legal Service NSW, *Submission 71*, p. 4; Parent's Beyond Breakup, *Submission 72*, p. 2; ANROWS, *Submission 73*, p. 4; FRSA, *Submission 80*, p. 17; National Legal Aid (NLA), *Submission 88*, p. 8; Ms Rosie Batty, Private Capacity, *Committee Hansard*, Melbourne, 24 July 2017, p. 11; Ms Helen Matthews, Director, Legal and Policy, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, pp. 29-30; Ms Christine Craik, National Vice President, Australian Association of Social Workers, *Committee Hansard*, Melbourne 24 July 2017, p. 47; Ms Faye Spiteri, Chair of the Board, InTouch Multicultural Centre Against Family Violence, *Committee Hansard*, Melbourne, 24 July 2017, p. 54; Dr Heather Nancarrow, Chief Executive Officer, Australia's National Research Organisation for Women's Safety, *Committee Hansard*, Sydney, 31 July 2017, p. 6.

but also contributes to an escalation of risk.⁶⁷ Such tactics continue patterns of power and control that were mirrored in the violent relationship.

Box 3.6 Abuse of process

The following is a selection of responses to the Committee's questionnaire:

'I have been in this system for 20 plus years now. With my ex marriage ... my family and I have now been enduring systems abuse for 19 years'.

—*Respondent from Western Australia*

'Government systems are easily being used to facilitate further family violence i.e. "systems abuse"'.

—*Respondent from New South Wales*

'The [children's] father then abuses the systems to cause further emotional abuse. [He] decides to contest a domestic violence order application, [I] file [a] hearing affidavit as is required, [he] fails to file a hearing affidavit in response and then at the hearing immediately consents without admission to a Protection Order being made. Despite this [he] then immediately files an application in the family court with false allegations of [family violence] from the Mother, and supports it by referring to the Protection Order just made against him! [He] also applied for a Protection Order against [me]. Despite the Magistrate concluding that there were no grounds for a [family violence] order, the Father insisted ... and requested a 3 month adjournment'.

—*Respondent from Queensland*

3.44 Ms Rosie Batty described how abuse of process can manifest:

I have a particular person I know who you would say is a well-off woman. Her business is very successful. She has done well. She has already been through the family law court system once. She had the outcome she asked for that was deserving of her. There is nothing stopping him coming back and taking her through the system again. And that is exactly what he is doing, and

⁶⁷ Ms Christine Craik, National Vice President, Australian Association of Social Workers, *Committee Hansard*, Melbourne 24 July 2017, p. 47.

he is doing it at a time when he can see her thriving, see her achieving and see her rebuilding her life. He wants to bring her back down and put her back into a financially compromised position, and there is nothing stopping him from doing that.⁶⁸

- 3.45 Indeed, where unmeritorious applications are lodged by perpetrators, InTouch Multicultural Centre Against Family Violence commented that the family law system does not respond appropriately, advising that the Court does not strike out such applications, but rather allows successive adjournments.⁶⁹
- 3.46 Jurisdictional fragmentation can amplify abuse of process, as ‘what is going on in one system is not being picked up in the other’, and therefore perpetrators are able to exploit the fragmentation because the systems are not working as ‘one whole entity’.⁷⁰ ANROWS stated:
- [P]erpetrators of violence are very adept at manipulating the system and being able to articulate their experiences of verbal abuse or other aggression as intimate partner violence and to portray themselves as victims when, in fact, they are the perpetrators and there is a response.⁷¹
- 3.47 This practice can also occur in interviews with family consultants for the purpose of developing a family report to the Court, increasing the control exercised by the perpetrator over proceedings and the information provided to the Court.⁷²
- 3.48 A number of participants in the inquiry also reported that perpetrators, or their legal representatives, are issuing subpoenas for medical records,⁷³ or to specialist family violence services for confidential client files.⁷⁴ The Royal Australian and New Zealand College of Psychiatrists noted that applications

⁶⁸ Ms Rosie Batty, Private Capacity, *Committee Hansard*, Melbourne, 24 July 2017, p. 11; see also Springvale Monash Legal Service, *Submission 47*, p. 6.

⁶⁹ InTouch, *Submission 13*, p. 8; Junction Australia, *Submission 23*, pp. 2, 6.

⁷⁰ Dr Heather Nancarrow, Chief Executive Officer, Australia’s National Research Organisation for Women’s Safety, *Committee Hansard*, Sydney, 31 July 2017, p. 7.

⁷¹ Dr Heather Nancarrow, Chief Executive Officer, Australia’s National Research Organisation for Women’s Safety, *Committee Hansard*, Sydney, 31 July 2017, p. 6.

⁷² Cara House, *Submission 21*, p. 20.

⁷³ InTouch, *Submission 13*, p. 16; RANZCP, *Submission 69*, p. 7; Women’s Legal Service NSW, *Submission 71*, p. 4.

⁷⁴ Safe Steps Family Violence Response Centre, *Submission 34*, pp. 5, 15

for subpoenas for such records has ‘become a common event in court proceedings’, presenting ‘serious implications for patient welfare and the effectiveness of therapy’.⁷⁵

- 3.49 Similarly, Safe Steps Family Violence Response Centre noted that while each subpoena it has received was ultimately unsuccessful, should an application be successful in the future, it ‘may open the floodgates to applications of this nature, critically damaging the vulnerable trust relationship between family violence specialist providers and clients’.⁷⁶ To address the emerging practice, Women’s Legal Service NSW recommended the development of guidelines as to when therapeutic records be subpoenaed and produced.⁷⁷
- 3.50 The capacity for a perpetrator to cross-examine a target of their violence during court proceedings was also identified as abuse of process in evidence.⁷⁸ Chapter 4 addresses the capacity for a self-represented perpetrator to cross-examine a victim during court proceedings.
- 3.51 ANROWS identified that family violence expertise among family law professionals, including family consultants, is crucial to addressing abuse of process. Specific training on the way perpetrators use the system to perpetuate ongoing control over, and abuse of, the victim was also supported by Family and Relationship Services Australia.⁷⁹ Fragmentation and the intersection of the family law system with other systems is discussed further below; the capacity of family law professionals is discussed further in Chapter 8.
- 3.52 In December 2016, the Australian Government released an exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017, which proposes to reduce abuse of process by perpetrators of family violence, including by increasing the power of the Court to dismiss unmeritorious claims. The Amendment was supported by a number of organisations,⁸⁰ however, the ACT Human Rights Commission advised that the implementation of the Amendment alone is ‘insufficient’ to address

⁷⁵ RANZCP, *Submission 69*, pp. 7-8.

⁷⁶ Safe Steps, *Submission 34*, p. 15.

⁷⁷ Women’s Legal Service NSW, *Submission 71*, p. 4.

⁷⁸ InTouch, *Submission 13*, p. 15; Ms Faye Spiteri, Chair of the Board, InTouch Multicultural Centre Against Family Violence, *Committee Hansard*, Melbourne, 24 July 2017, p. 54.

⁷⁹ FRSA, *Submission 80*, p. 17.

⁸⁰ Parents Beyond Breakup, *Submission 72*, p. 1.

abuse of process in family law, further commenting that ‘in the absence of legal representation for victims, [the Amendment] may even result in more victims having legitimate claims dismissed as unmeritorious’.⁸¹

Coercion and consent orders

- 3.53 As noted in Chapter 2, consent orders are parenting or property division orders agreed to by the parties, which must be put before the court. In 2016-17, 14,182 applications for consent orders were filed in the Family Court.⁸² The Federal Circuit Court reported that in 2016-17, 52 per cent of family law applications related to matters involving children, 35 per cent related to property, and 12 per cent involved both children and property.⁸³ For parenting matters, the parties must advise the Court of any family violence, or the risk of such violence. In property matters, the Court will not make an order unless it is satisfied that in all circumstances, that the orders are just and equitable.
- 3.54 Although consent orders were identified as an opportunity for a quick settlement and offer a legally enforceable negotiated agreement,⁸⁴ a large number of participants in the inquiry also raised concerns about consent orders in matters involving family violence.⁸⁵ This echoed concerns raised by the Victorian Royal Commission into Family Violence with respect to both

⁸¹ ACT Human Rights Commission, *Submission 33*, p. 4.

⁸² Family Court of Australia, *Submission 44.1*, p. 3

⁸³ Federal Circuit Court of Australia, *Annual Report 2016/17*, p. 51. Data on the number of consent orders filed in the Federal Circuit Court was not included in the Court’s Annual Report.

⁸⁴ NFVPLSF, *Submission 78*, p. 14; Eastern Community Legal Centre, *Submission 91*, pp. 9-10.

⁸⁵ InTouch, *Submission 13*, p. 9; Help Family Law, *Submission 18*, p. 7; Cara House, *Submission 21*, pp. 9-10; Baptist Care Australia, *Submission 28*, p. 4; Domestic Violence Crisis Service, *Submission 29*, p. 4; Domestic Violence Crisis Service, *Submission 29*, p. 4; Queensland Domestic Violence Services Network, *Submission 30*, p. 3; Sexual Assault Support Service, *Submission 32*, p. 5; Queensland Law Society, *Submission 38*, p. 3; VOCAL, *Submission 46*, p. 10; Springvale Monash Legal Service, *Submission 47*, p. 6; Women’s Legal Service NSW, *Submission 71*, p. 3; ANROWS, *Submission 73*, p. 8; Salvos Legal Humanitarian, *Submission 74*, p. 2; Hume Riverina Community Legal Service, *Submission 76*, p. 5; Northern Rivers Community Legal Centre, *Submission 83*, p. 7; NLA, *Submission 88*, p. 11; Legal Aid NSW, *Submission 90*, pp. 14-15; Eastern Community Legal Centre, *Submission 91*, p. 9; Justice for Children, *Submission 118*, p. 4; Mrs Hetty Johntson AM, Founder and Executive Chair, Bravehearts Foundation, *Committee Hansard*, Melbourne, 24 July 2017, p. 5; Ms Helen Matthews, Director, Legal and Policy, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 20; Ms Kristen Wallwork, Executive Director, Springvale Monash Legal Service, *Committee Hansard*, Melbourne, 24 July 2017, p. 27.

family law orders and family violence intervention orders under state legislation.⁸⁶

- 3.55 As identified in the previous section, power imbalances in situations involving family violence can be exacerbated in the family law system whereby a party will agree to unsatisfactory consent orders to avoid further litigation.⁸⁷ Queensland Domestic Violence Services Network commented that a ‘level playing field [is] required for consent orders to be freely negotiated’, but noted that this is unlikely due to the power imbalance in relationships where family violence has occurred.⁸⁸ The Network elaborated:

The experience of many of the clients of our services is that consent orders have been agreed to under duress or in the face of direct threats, are often unfair or unworkable, and frequently place children at greater risk of harm.⁸⁹

- 3.56 Further, Women’s Legal Service Queensland commented that these pressures on families affected by violence, results in unenviable decisions about consenting to orders before trial where the perpetrator’s contact with children may be for a shorter period rather than full time living arrangements where they can be exposed to ongoing violence, including sexual abuse.⁹⁰

Box 3.7 Coercion and consent orders

The following is a selection of responses to the Committee’s questionnaire:

‘I felt forced, coerced and unsatisfied with [the custody] agreement but was ‘scared’ into agreeing because if we couldn’t come to agreement I was told it would be another court appearance which I would not have legal representation and was told [that] the judge could go against me’.

— Respondent from New South Wales

⁸⁶ Victorian Royal Commission into Family Violence, *Report and Recommendations*, 2016, Volume III, p. 178; see also Whole of Victorian Government, *Submission 87*, pp. 5-6.

⁸⁷ InTouch, *Submission 13*, p. 9; see also Hume Riverina Community Legal Service, *Submission 76*, p. 5.

⁸⁸ Queensland Domestic Violence Services Network, *Submission 30*, p. 3; see also ANROWS, *Submission 73*, p. 8; Eastern Community Legal Centre, *Submission 91*, p. 9.

⁸⁹ Queensland Domestic Violence Services Network, *Submission 30*, p. 3.

⁹⁰ Women’s Legal Service Queensland, *Submission 81*, p. 19.

‘I agreed to consent orders because I was terrified the judge would make a decision that could put my children at greater risk than anything I could negotiate outside of the court. So I settled on orders that continued to require me to put the kids at risk but gave clear parameters for breaching the conditions of their care’.

—*Respondent from Tasmania*

‘There was no mutual agreement. I was bullied each time into withdrawing interim intervention orders or into signing property consent orders and parenting plans. I was very dissatisfied each time and the children's best interests weren't taken into account at all’.

—*Respondent from Victoria*

‘The orders were based on a forced negotiation in which I felt obliged to accept his offer given the fact that continuing the hearing in court was beyond my financial capability. The judge approved the consent orders in spite of the fact that I felt they were not child focussed’.

—*Respondent from Victoria*

‘I was forced by my lawyers to sign the consent orders for my children to spend time with the[ir] abusive father. My daughter developed anxiety and depression within [three] months of unsupervised overnight visits and I was told that I had to send her every week by force to her father’.

—*Respondent from New South Wales*

3.57 The Sexual Assault Support Service explained how power imbalances and legal strategy can further compromise a party’s ability to freely consent to arrangements:

[M]any victims of family violence feel pressured to enter into consent orders ... often because of a justified fear — perpetuated by the court system — that if they resist the other parent having contact with the child/children they will be seen as alienating the child/children from their other parent, and may then risk losing custody of the child/children.⁹¹

⁹¹ Sexual Assault Support Service, *Submission 32*, p. 5; see also VOCAL, *Submission 46*, p. 10.

- 3.58 Women's Legal Service NSW similarly stated that many of their clients disclose that they have 'agreed to consent orders as they are fearful that the perpetrator of violence will retaliate if they do not get the orders that they are seeking'.⁹² A number of participants were therefore of the view that family law matters involving family violence should not be resolved through consent orders.⁹³
- 3.59 Family and Relationship Services Australia stated that the process for applying for consent orders is not client friendly, noting that the Family Court's online application form is 25 pages long and 'requires a paralegal resource to complete it'.⁹⁴ Similarly, the National Family Violence Prevention and Legal Services Forum advised that without legal representation, Aboriginal families, in most circumstances, would 'be unable' to apply for consent orders and effectively enforce their rights and safety, nor the safety of their children.⁹⁵
- 3.60 InTouch Multicultural Centre Against Family Violence recommended that before making consent orders in cases involving family violence, the Court should be required to ensure that each party has obtained legal advice and had sufficient time to consider that advice.⁹⁶ Domestic Violence Crisis Service, and the Queensland Law Society made similar recommendations.⁹⁷
- 3.61 Although mandatory for parenting applications to the court, a Notice of Risk Form is not required to be lodged with an Application for Consent orders made orally or in writing to the Court.⁹⁸ This means that consent orders may be issued without the Court being fully informed of the presence of family violence,⁹⁹ or without 'full consideration of risk'.¹⁰⁰ Hume Riverina Community Legal Service commented that 'this has the potential to result in

⁹² Women's Legal Service NSW, *Submission 71*, p. 3.

⁹³ Queensland Domestic Violence Services Network, *Submission 30*, pp. 3-4.

⁹⁴ FRSA, *Submission 80*, p. 12.

⁹⁵ NFVPLSF, *Submission 78*, p. 14.

⁹⁶ InTouch, *Submission 13*, p. 9.

⁹⁷ Domestic Violence Crisis Service, *Submission 29*, p. 4; Queensland Law Society, *Submission 38*, pp. 3-4.

⁹⁸ Hume Riverina Community Legal Service, *Submission 76*, p. 5.

⁹⁹ Hume Riverina Community Legal Service, *Submission 76*, p. 5.

¹⁰⁰ Cara House, *Submission 21*, p. 10.

unjust outcomes simply because the Court is unaware of the circumstances of the parties'.¹⁰¹

3.62 To address this, Eastern Community Legal Centre recommended a change to the filing Application Form for consent orders to require information about the presence of family violence. The Centre stated:

Whilst it cannot be guaranteed that a judicial officer would allow consent orders to be changed, this option at least provides an opportunity for victim/survivors of family violence to be able to identify that they have/are experiencing family violence. It would also operate as a 'red flag' to alert judicial officers to consider family violence if there are future applications to change consent orders.¹⁰²

3.63 Legal Aid NSW recommended stronger action: codification of the Court's positive obligation to scrutinise consent orders to confirm that they are in the child's best interest.¹⁰³ This proposal is discussed further in Chapter 3.

3.64 In a submission to the inquiry, the Family Court advised that it is 'aware that at times consent orders may be agreed by a party for reasons other than the best interests of the child, for example, fear of further violence or lack of financial resources to litigate'.¹⁰⁴ The Court stated that 'this is addressed in the process for making consent orders set out in the legislation and ... the Best Practice Principles'.¹⁰⁵

3.65 Beyond the Court making consent orders, Family and Relationship Services Australia recommended regular and ongoing monitoring of the arrangements agreed to in consent orders to ensure those arrangements are in the best interests of families. It recommended that ongoing management could be reviewed by a court-appointed family counsellor.¹⁰⁶

Perjury and false allegations

3.66 Evidence to the inquiry also discussed instances of alleged perjury and false allegations being used as a tactic to influence parenting disputes in

¹⁰¹ Hume Riverina Community Legal Service, *Submission 76*, p. 5.

¹⁰² Eastern Community Legal Centre, *Submission 91*, p. 11.

¹⁰³ Legal Aid NSW, *Submission 90*, p. 16; *T & N* [2003] FamCA 1129 (4 November 2003) at [39].

¹⁰⁴ Family Court of Australia, *Submission 44*, p. 6.

¹⁰⁵ Family Court of Australia, *Submission 44*, p. 6.

¹⁰⁶ FRSA, *Submission 80*, p. 13.

particular.¹⁰⁷ The Lone Fathers Association advised that many of its members have had false allegations of family violence made against them.¹⁰⁸ The Stop Male Suicide Project also discussed the impact that false allegations of family violence can have on parents' relationships with children and on a party's mental health.¹⁰⁹

3.67 The Central Australian Women's Legal Service also reported scenarios where their clients have had false allegations of family violence made against them in parenting disputes.¹¹⁰ Women's Legal Services Australia stated that perjury needs to be responded to, commenting:

If a person is lying on oath, that is really something that the police would need to respond to and that the Court would be directing the police to. I am not really familiar with perjury matters having been taken up ... in many years of practice despite having seen judges become aware that somebody is saying something that is blatantly not true. One issue is that people in that private court system—the family law system—are not looking to punish parents for poor behaviour ... I think there should be references for perjury if it is blatantly the case that that has happened. Possibly some people facing criminal prosecution over it may well be examples of why people should be more cautious about saying things that are clearly untrue in court or in their documentation.¹¹¹

Box 3.8 Perjury and false allegations

The following is a selection of responses to the Committee's questionnaire:

'Some parents make up false allegations in order to maintain an upper hand in family law matters. If it was not considered I feel the level of

¹⁰⁷ Lone Fathers Association, *Submission 17*, p. 3; Stop Male Suicide Project, *Submission 45*, p. 5; The Deli Centre, *Submission 67*, p. 9; Dr Augusto Zimmerman, *Submission 93*, pp. 6-14; Australian Brotherhood of Fathers, *Submission 110*, p. 18; Ms Anna Ryan, Senior Lawyer, Central Australian Women's Legal Service, *Committee Hansard*, 22 August 2017, p. 31; Mr Barry Williams, President, Lone Fathers Association, *Committee Hansard*, Canberra, 8 August 2017, p. 14.

¹⁰⁸ Mr Barry Williams, President, Lone Fathers Association, *Committee Hansard*, Canberra, 8 August 2017, p. 14.

¹⁰⁹ Stop Male Suicide Project, *Submission 45*, p. 5.

¹¹⁰ Ms Anna Ryan, Senior Lawyer, Central Australian Women's Legal Service, *Committee Hansard*, 22 August 2017, p. 31.

¹¹¹ Ms Helen Matthews, Director, Legal and Policy, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 23.

allegations would drop considerably’.

— *Respondent from New South Wales*

‘In my experience, because the applicant can commit perjury by filing an erroneous Notice of Risk against [the other parent], it seems that it’s a case of “guilty, until proven innocent”’.

— *Respondent from Queensland*

‘Perjury in [the Family Court of Australia] needs to be enforced and all perjury evidence should be considered in the judgement process’.

— *Respondent from Victoria*

‘Make people accountable for their actions of filing false affidavits, perjury, false accusations’.

— *Respondent from Western Australian*

‘Remove the incentives for making false accusations. Then there would be more resources for genuine cases’.

— *Respondent from South Australia*

‘[My] ex made false allegations. I’d been fathering my son since he was one and my word meant nothing’.

— *Respondent from Queensland*

3.68 A number of organisations supported stronger responses to instances of perjury and false allegations.¹¹² To respond more effectively to false allegations and perjury, the Lone Fathers Association recommended that the Court have access to better information on which to assess risk to families and children, and ensure that there is a significant deterrent to those who would make false allegations. In Chapter 4, the Committee considers options to improve:

¹¹² Lone Fathers Association, *Submission 17*, p. 3; The Deli Centre, *Submission 67*, p. 9; Australian Brotherhood of Fathers, *Submission 110*, p. 18; Mr Barry Williams, President, Lone Fathers Association, *Committee Hansard*, Canberra, 8 August 2017, p. 11.

- the disincentives to parties not to make false allegations or provide false evidence to the Court; and
- the information available to the Court in determining the risk to families as well as a proposal to determine family violence allegations earlier in proceedings.

Fragmentation of jurisdictions

- 3.69 As noted in Chapter 2, no single jurisdiction has sole responsibility for family violence matters; this responsibility is shared. The ‘constitutionally entrenched fragmentation’ of the federal family law system as well as the child protection and family violence systems at the state and territory level, is a key source of difficulty in family law matters involving family violence.¹¹³
- 3.70 Such disputes cannot usually be ‘neatly divided into public and private’ spheres. Yet, families who have experienced violence must use multiple federal and state systems to obtain legal orders necessary for safety and dispute resolution.¹¹⁴ Indeed, the jurisdictional fragmentation is ‘most acute’ in these matters.¹¹⁵
- 3.71 However, when these jurisdictions do not operate with sufficient integration and referral, a fragmented system not only creates confusion for families, it ‘potentially limits the protection offered by each court’.¹¹⁶ The three jurisdictions can, in effect, operate as ‘silos’ resulting in ‘increased vulnerability’¹¹⁷ and potentially, the ‘re-traumatisation of victims of family violence, who are required to navigate a complex system and re-tell their story of trauma’.¹¹⁸
- 3.72 In 2014, the Productivity Commission found that the ‘interaction and overlap between jurisdictions can result in multiple proceedings and inconsistent orders, which can cause unsafe and traumatic situations for

¹¹³ Monash University – Castan Centre for Human Rights Law (Castan Centre for Human Rights Law), *Submission 57*, p. 2.

¹¹⁴ Castan Centre for Human Rights Law, *Submission 57*, p. 2.

¹¹⁵ Castan Centre for Human Rights Law, *Submission 57*, p. 5.

¹¹⁶ Queensland Domestic Violence Service Network, *Submission 30*, p. 3; see also Centacare Brisbane, *Submission 22*, p. 1.

¹¹⁷ Queensland Government, *Submission 75*, p. 1.

¹¹⁸ Baptist Care Australia, *Submission 28*, p. 5; see also Jannawi Family Centre, *Submission 51*, p. 4.

parents and children'.¹¹⁹ The Family Law Council similarly addressed the fragmentation between the family law system and the child protection systems in two separate reports in 2015 and 2016. The fragmentation of jurisdictions and resulting inconsistencies, were discussed by a large number of stakeholders.¹²⁰

3.73 For example, the Springvale Monash Legal Service described the challenge of fragmented jurisdictions, each with a different focus:

There are serious variances between state based [intervention order] system and the inevitable transfer of the matter to the Federal Family Law System. [State courts] tend to concentrate on immediate safety while the Federal system has a stronger emphasis on children and their meaningful relationships with parents. It becomes difficult to keep the issue of [family violence] forefront in proceedings as the focus of the Judiciary shifts.¹²¹

3.74 Queensland Domestic Violence Services Network explained that it has witnessed state courts providing an exception in intervention orders to permit a perpetrator to have contact with a family affected by violence, despite the safety risk that poses to that family:

... the primary response [in local Queensland courts] remains for the making of an exception in Domestic Violence Protection Orders of contact being allowed for 'family law court, mediation and child protection matters'. In a practical sense, the Court is determining an aggrieved is in need of significant protection, including no contact and in many cases ouster orders, however allows for permitted contact with an aggrieved for child handover [under family law]. Our experience confirms that this is a significantly risky time,

¹¹⁹ Productivity Commission, *Access to Justice Arrangements Inquiry Report*, Report No 72, Vol II, p. 865; see also Castan Centre for Human Rights Law, *Submission 57*, p. 3.

¹²⁰ InTouch, *Submission 13*, p. 21; Centacare Brisbane, *Submission 22*, p. 1; Junction Australia, *Submission 23*, p. 5; Baptist Care Australia, *Submission 28*, p. 5; Queensland Domestic Violence Services Network, *Submission 30*, p. 3; Safe Steps, *Submission 34*, p. 12; Jannawi Family Centre, *Submission 51*, p. 4; Monash School of Social Sciences, *Submission 100*, pp. 6-7; Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, pp. 1-2; Ms Rosie Batty, Private Capacity, *Committee Hansard*, Melbourne, 24 July 2017, p. 15; The Hon Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 2; Dr Heather Nancarrow, Chief Executive Officer, Australia's National Research Organisation for Women's Safety, *Committee Hansard*, Sydney, 31 July 2017, p. 6; Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 14.

¹²¹ Spingvale Monash Legal Service, *Submission 47*, p. 5.

which can in fact elevate the use of abuse in front of children—the ultimate contradictory aim of the system.¹²²

- 3.75 Safe Steps Family Violence Response Centre and the Gippsland Community Legal Service provided similar evidence.¹²³
- 3.76 Jannawi Family Centre was of the view that the family law system shifts responsibility to state-based child protection agencies, creating ‘significant and detrimental gaps for the safety and wellbeing of children’.¹²⁴ The Centre further commented that the ‘silo nature of the child protection, domestic violence and family law systems is problematic and creates a situation where neither system adequately addresses family violence effectively’.¹²⁵
- 3.77 Some organisations also asserted that the family law courts have either dismissed or disregarded intervention orders made under state and territory family violence legislation.¹²⁶ For example, research by Monash School of Social Sciences found that family law orders ‘appeared to ignore, or fail to take sufficient account of’ intervention orders or prior criminal histories around family violence, ‘creating a new and critical area of risk’.¹²⁷ Other organisations reported that the family law courts have taken family violence orders as an indication that the parent will be unwilling to co-parent with the perpetrator parent, and awarded custody to that latter parent.¹²⁸ This is examined in greater detail in Chapter 6.

Box 3.9 Fragmentation of jurisdictions

The following is a selection of responses to the Committee’s questionnaire:

‘Breaches which are made at Magistrates court are not automatically sent through to Federal Court or to the portal relating to the parties. It should be put in place that all matters relating to the case and parties should be

¹²² Queensland Domestic Violence Services Network, *Submission 30*, p. 7.

¹²³ Safe Steps, *Submission 34*, p. 4; Gippsland Community Legal Service, *Submission 66*, p. 1.

¹²⁴ Jannawi Family Centre, *Submission 51*, p. 4.

¹²⁵ Jannawi Family Centre, *Submission 51*, p. 4.

¹²⁶ National Child Protection Alliance, *Submission 5*, p. 4; Monash School of Social Sciences, *Submission 100*, p. 6.

¹²⁷ Monash School of Social Sciences, *Submission 100*, p. 6.

¹²⁸ National Child Protection Alliance, *Submission 5*, p. 4.

made available on the [Commonwealth] courts portal’.

—*Respondent from Victoria*

‘The Magistrate and Family Courts do not share information as easily and freely as they should’.

—*Respondent from Tasmania*

‘The two courts are unaware of the action occurring in the other court ... [causing] huge delay and confusion’.

—*Respondent from Victoria*

‘[There is] no communication between courts and the departing and incoming judges regarding adjourned matters’.

—*Respondent from Victoria*

‘Communication between Magistrates, Family Courts, police and child services [was] non-existent’.

—*Respondent from New South Wales*

3.78 The Castan Centre for Human Rights Law noted that in recent years a number of solutions have been proposed to overcome the constitutional limitations of a fragmented jurisdiction, including:

- state referral of powers to the federal family courts;
- establishing a single, unified family law court to deal with all matters relating to family law and violence;
- expanding the jurisdiction of the federal family courts so that they have the power to make child protection orders and more effective family violence orders; and
- giving state and federal courts corresponding jurisdictions so that they can decide cases under both systems.¹²⁹

3.79 The recommendations of the joint ALRC and New South Wales Law Reform Commission report in 2010 and the Victorian Royal Commission into Family

¹²⁹ Castan Centre for Human Rights Law, *Submission 57*, p. 5; see also Victorian Royal Commission into Family Violence, *Report and Recommendations*, 2016, Volume IV, p. 190.

Violence in 2016 advocated working within existing limits, without creating new courts but encouraging and supporting state and territory magistrates to exercise family violence, child protection and family law matters could be dealt with by a single judge.¹³⁰

- 3.80 These recommendations align with evidence to the present inquiry. Building upon the recommendations of the Family Law Council,¹³¹ and of the Victorian Coroner in the report of the inquest into the death of Luke Batty,¹³² the Law Council of Australia and others recommended improved collaboration between and within jurisdictions for family violence matters.¹³³ The challenges of jurisdictional fragmentation was acknowledged by the Attorney-General's Department, which commented that better supporting the interaction between these jurisdictions was 'a current focus' of the Department's work.¹³⁴ Opportunities for collaboration between jurisdictions are addressed in Chapter 4.

Committee comment

- 3.81 The Committee is of the strong view that that the family law system should not encourage families affected by violence to hide their experiences of out of fear that they will face disadvantage in the law system, the purpose of which is to protect and support families.¹³⁵ For families who choose to report family violence and seek protection and support from the family law system, it seems incongruent for that system to continue to provide the structural disincentives reported to this Committee.

¹³⁰ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 54; Victorian Royal Commission into Family Violence, *Report and Recommendations*, 2016, Volume IV, p. 211.

¹³¹ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Interim Report*, 2015; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Final Report*, 2016.

¹³² Coroners' Court of Victoria, *Inquest into the death of Luke Geoffrey Batty*, 2015.

¹³³ Junction Australia, *Submission 23*, p. 5; Micah Projects, *Submission 24*, p. 3; Baptist Care Australia, *Submission 28*, p. 5; Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, pp. 1-2; Ms Rosie Batty, Private Capacity, *Committee Hansard*, Melbourne, 24 July 2017, p. 15; Dr Heather Nancarrow, Chief Executive Officer, Australia's National Research Organisation for Women's Safety, *Committee Hansard*, Sydney, 31 July 2017, p. 6.

¹³⁴ Attorney-General's Department, *Submission 89*, p. 2.

¹³⁵ Eastern Community Legal Centre, *Submission 91*, p. 11.

- 3.82 The Committee is deeply concerned that the family law system can fail to protect and support families from ongoing family violence. Evidence indicates that this can be the result of the very design of the current family law system. Particularly for matters involving family violence, the structural design of an adversarial system—where parties are in direct opposition to one another—fuels conflict and can mirror the very dynamics of abusive relationships.
- 3.83 Indeed, the Committee is of the view that the existing adversarial system for family law disputes is not appropriate to address matters involving family violence. The family law system must be restructured and redesigned so safety and accessibility are central.
- 3.84 The Committee is encouraged, however, that the Australian Government has commissioned the ALRC to undertake a broad review of the family law system, including whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children.
- 3.85 In light of overwhelming evidence received highlighting the complexity of navigating multiple jurisdictions, and multiple courts within the same jurisdiction, the Committee considers that the system of the two federal courts with concurrent jurisdiction should be simplified. While the Committee did not receive sufficient evidence to support a specific recommendation at this stage, this matter is worthy of further investigation. The ALRC, as part of its current review, might consider the benefits of combining the federal family courts into one court. This single court might provide more opportunity for appropriate triaging and case management upon filing, which could be more responsive to the needs of families who are affected by family violence.
- 3.86 As referenced in Chapter 1, the review of the family law system by the ALRC includes reviewing ‘whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children, and the opportunities for less adversarial resolution of parenting and property disputes’. The ALRC’s terms of reference are included in Appendix B of this report.
- 3.87 The Committee notes the considerable evidence received by this inquiry which highlighted the significant challenges of an adversarial model. Whilst felt most acutely by families experiencing, or at risk of, family violence, these challenges are also encountered by families where family violence has not occurred. The Committee therefore is encouraged by the inclusion of this

matter in the ALRC's which is substantially broader in its reference than the Committee's focus on the family law system's response to family violence. The Committee keenly awaits the final report of the ALRC on this matter.

- 3.88 Significantly, achieving structural reform of this kind will not be achieved easily or quickly. The ALRC has been requested to provide its report to the Attorney-General by 31 March 2019. Any reform recommended from the Commission's review is likely to take significant time to implement.
- 3.89 The Committee is therefore of the view, as noted in Chapter 1 of this report, that there is a chronic and critical need for reform both immediately, and in the medium-term, neither of which can be provided by the Commission's review.
- 3.90 Whilst acknowledging the significance of the Commission's review, the Committee's report provides both immediate and medium-term recommendations for reform to improve the support and protection that families affected by violence urgently require. The Committee also hopes that its recommendations, and its vision for a better family law system, are integrated into any long-term reforms the Commission may recommend to the Attorney-General.
- 3.91 As stated in Chapter 1, the Committee's vision for a reformed family law system is as follows: to better support and protect families affected by family violence, the family law system must be accessible, equitable responsive and prioritise safety.
- 3.92 The Committee concurs with comments from the Hon. Professor Marcia Neave AO that law reform alone is not going to be sufficient to address family violence.¹³⁶ Though fundamental, amending the Family Law Act must be accompanied by practical measures to ensure families' safety is better protected. The remainder of this report therefore focusses on these dual goals: law reform, and changes in practice and delivery. These initiatives will ultimately result in a more efficient, cost effective and, most importantly, safer family law system.

¹³⁶ The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, 24 July 2017, p. 1.

4. A new family law system

Accessible, equitable, responsive and better prioritising the safety of families

- 4.1 To address the challenges identified in Chapter 3, this chapter examines a number of proposals, both outside of the court system and within it. As the chapter will note, these proposals will better ensure that the family law system is accessible, equitable, responsive and prioritising the safety of families.
- 4.2 The chapter first addresses proposals for a new risk assessment tool for use across the entire family law system by all professionals working within the system.
- 4.3 The chapter then examines out of court processes, focussing on improvements that can be made to enhance and extend family dispute resolution to families affected by family violence, as well as recent government announcements for parenting managing hearings.
- 4.4 The chapter also discusses proposed improvements for court-based processes including suggestions for:
 - enhanced risk assessment upon filing;
 - case management and triaging;
 - information sharing as a way to address jurisdictional fragmentation;
 - determining family violence allegations earlier in proceedings;
 - improving the scrutiny required of consent orders;
 - increasing the exercise of family law jurisdiction by state and territory magistrates; and

- greater use of specialist family violence courts, divisions and lists.
- 4.5 The chapter then presents evidence received on the challenges and limitations of obtaining legal representation in family matters, and proposals for extending the information sharing platform attached to the National Domestic Violence Order Scheme to include all family law orders and orders issued by children’s courts.
- 4.6 Lastly, the chapter addresses recent government announcements to increase the availability of legal and non-legal support to families navigating the family law system.
- 4.7 The Committee’s comment and recommendations appear at the end of this chapter.

A new risk assessment tool across the entire family law system

- 4.8 A key theme in evidence to the inquiry was that, at present, the family law system does not adequately screen for the risks associated with family violence.¹ The importance of risk assessment was identified by Women’s Legal Services Australia who stated:

The identification of risks associated with family violence and other safety concerns is the first step toward supporting families to reduce or at least manage these risks.²

- 4.9 Jannawi Family Centre similar noted that appropriate screening and assessment is ‘a critical and important first step, as without it, safety cannot be established and any future orders or arrangements made will inevitably lead to risks escalating or harm being caused’.³

¹ InTouch Multicultural Centre Against Family Violence (InTouch), *Submission 13*, p. 6; Cara House, *Submission 21*, p. 6; Monash University – Castan Centre for Human Rights Law (Castan Centre for Human Rights Law), *Submission 57*, p. 8.

² Women’s Legal Services Australia (WLSA), *Submission 6*, p. 14; see also Jannawi Family Centre, *Submission 51*, p. 3.

³ Jannawi Family Centre, *Submission 51*, p. 3.

- 4.10 To address this, a significant number of participants in the inquiry advocated for a new risk assessment tool that can be used across the system by different professions.⁴
- 4.11 There are a number of existing risk-screening assessment tools, many of which differ by state. For example, the Detection of Overall Risk Screen (DOORS) was commissioned by the Attorney-General's Department through Relationships Australia, South Australia. Released in 2011–2012, DOORS is:
- ... a validated, culturally sensitive front-line common screening and risk assessment tool, framework and associated package and software system that assists separating families and family law professionals to detect and respond to wellbeing and safety risks in families, at the entry point to services, across the family law system. It is particularly focused on risks to families exposed to family violence and child abuse, and assists professionals to develop client safety plans and refer clients to other appropriate services.⁵
- 4.12 Stakeholders indicated that DOORS is not widely used as many professions are not aware of the screening tool, or because it is not sufficiently tailored to each profession working within the family law system.⁶
- 4.13 The Castan Centre for Human Rights Law stated that although DOORS was developed for the federal family law system, 'it is not used by all family law professionals, especially family lawyers'.⁷ This was also the conclusion of the Australian Institute of Family Studies in a 2015 evaluation.⁸
- 4.14 Two other risk assessment tools were raised in evidence. In New South Wales, the Domestic Violence Safety Assessment Tool (DVSAT) provides 'a standardised set of questions that provide recognised risk indicators'.⁹ In

⁴ InTouch, *Submission 13*, p. 6; Help Family Law, *Submission 18*, p. 4; Cara House, *Submission 21*, p. 6; Centacare Brisbane, *Submission 22*, p. 1; Baptist Care Australia, *Submission 28*, pp. 3-4; Queensland Law Society, *Submission 38*, p. 1; Domestic Violence NSW, *Submission 48*, p. 9; Castan Centre for Human Rights Law, *Submission 57*, p. 9; Legal Aid NSW, *Submission 90*, p. 10; Monash School of Social Sciences, *Submission 100*, pp. 5, 8-9.

⁵ Attorney-General's Department, *Submission 89*, pp. 2-3.

⁶ WLSA, *Submission 6*, p. 15; InTouch, *Submission 13*, p. 6.

⁷ Castan Centre for Human Rights Law, *Submission 57*, p. 9.

⁸ Australian Institute of Family Studies, *Evaluation of the 2012 family violence amendments*, 2015, p. 47 (Table 4.1); see also, WLSA, *Submission 6*, p. 15.

⁹ Baptist Care Australia, *Submission 28*, p. 4; see also Cara House, *Submission 21*, p. 6; Legal Aid NSW, *Submission 90*, pp. 10-11.

Victoria, the Common Risk Assessment Framework (CRAF) is used.¹⁰ Stakeholders identified that the CRAF has ‘the potential to provide a best-practice model for a validated risk assessment tool which could be used nationally’.¹¹

- 4.15 The Castan Centre for Human Rights Law commented that multiple risk assessment tools used across jurisdictions and among different professions ‘creates the dangerous potential for family violence cases to go unidentified or for a lack of responsiveness ... creating safety risks for victims and their families’.¹² This was also a finding by the Coroner in the Luke Batty Inquest in Victoria, who noted the problem of risk assessment tools that were not validated, uncoordinated, not uniform in approach, and which were not routinely shared between service providers.¹³ The Coroner’s report recommended that national risk assessment tools need to be:

... dynamic, collaborative, comprehensive, and up-to date. That is, once commenced, a risk assessment considers all the information available to all relevant agencies, is updated and maintained for a family where family violence has been indicated or reported.¹⁴

- 4.16 In recent years, there have been numerous recommendations made by reviews of the family law system for improved risk assessment screening tools. For example, the Family Law Council recommended improved risk assessment and management in the family law system, as well as a simplified risk identification mechanism.¹⁵
- 4.17 This recommendation was also central to the recommendations of the Victorian Royal Commission into Family Violence (the Royal Commission).¹⁶ The Royal Commission recommended that the Victorian Government, through the Council of Australian Government pursue the development of a national family violence risk assessment framework with consistent use of

¹⁰ Castan Centre for Human Rights Law, *Submission 57*, p. 9; see also WLSA, *Submission 6*, p. 16.

¹¹ Castan Centre for Human Rights Law, *Submission 57*, p. 9; see also Hume Riverina Community Legal Service, *Submission 76*, p. 3.

¹² Castan Centre for Human Rights Law, *Submission 57*, p. 8.

¹³ Coroner’s Court of Victoria, *Inquest into the Death of Luke Batty*, 2015, p. 4.

¹⁴ Coroner’s Court of Victoria, *Inquest into the Death of Luke Batty*, 2015, p. 104.

¹⁵ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*—Final Report, 2016, Recommendations 2, 3, and 4, pp. 12-13.

¹⁶ Victorian Royal Commission into Family Violence, *Report and Recommendations*, Volume IV, 2016, p. 209.

this tool by state, territory and federal courts, lawyers, government and non-government service providers.¹⁷

4.18 These recommendations were echoed in evidence to this inquiry. Women’s Legal Services Australia, for example, recommended the development of a national risk assessment frame that is:

- nationally consistent;
- multi-method, multi-informant, while placing particular emphasis on the victim’s own assessment of risk;
- culturally sensitive; and
- supported by appropriate training.¹⁸

4.19 This recommendation was broadly supported by other stakeholders.¹⁹ Legal Aid NSW was of the view that a nationally consistent screening and risk assessment tool would help ensure:

- continuity, so that the same risks were being assessed in the same manner and with the same degree of prioritisation;
- more accurate identification of risk factors, as well as broader social needs which elevate the risk of family violence (such as drug and alcohol use, mental health and homelessness);
- earlier identification of risk factors as well as social welfare needs, resulting in better service referral and safety measures;
- greater awareness of risk and urgency;
- a flag or common language for all services about safety concerns;
- improved communication between services and jurisdictions; and
- collection of consistent data.²⁰

4.20 The Castan Centre for Human Rights Law strongly supported the development of a nationally consistent family violence risk assessment

¹⁷ Victorian Royal Commission into Family Violence, *Report and Recommendations*, Volume IV, 2016, Recommendation 134, p. 218.

¹⁸ WLSA, *Submission 6*, p. 18.

¹⁹ Help Family Law, *Submission 18*, p. 4; Centacare Brisbane, *Submission 22*, p. 1; Baptist Care Australia, *Submission 28*, pp. 3-4; Queensland Law Society, *Submission 38*, p. 1; Domestic Violence NSW, *Submission 48*, p. 9; Castan Centre for Human Rights Law, *Submission 57*, p. 9; Legal Aid NSW, *Submission 90*, p. 10; Monash School of Social Sciences, *Submission 100*, pp. 5, 8-9.

²⁰ Legal Aid NSW, *Submission 90*, p. 10.

framework, commenting that it should be developed as ‘a matter for urgent priority’.²¹

- 4.21 Women’s Legal Services Australia further recommended adopting an established assessment framework such as the Victorian CRAF or the NSW DVSAT.²² It also advocated that the risk assessment tool should be used across the family law system by family lawyers and family dispute resolution (FDR) practitioners that is either consistent with or an adapted version of the framework used by the courts. Legal Aid NSW recommended the DVSAT as a model, commenting that it has ‘already demonstrated ... great benefits’.²³
- 4.22 Jannawi Family Centre commented that a process for screening for family violence needed to identify ‘dynamics of control and coercion, an imbalance of power and the presence of fear’.²⁴ Australia’s National Research Organisation for Women’s Safety (ANROWS) recommended the inclusion of screening tools to detect economic abuse and determine the impact on financial wellbeing.²⁵
- 4.23 The Attorney-General’s Department (the Department) advised that in the ‘short to medium term’, the Australian Government:
- is looking to work with the states and territories to improve family violence risk assessment processes within the justice sector, underpinned by the work on the National Risk Assessment Principles.²⁶
- 4.24 Under the Third Action Plan of the *National Plan to Reduce Violence Against Women and their Children*, the Council of Australian Governments has agreed to develop and implement ‘national principles of risk assessment’.²⁷ This is being led by the Department of Social Services through ANROWS, and will be completed by June 2018.
- 4.25 The Department advised:

²¹ Castan Centre for Human Rights Law, *Submission 57*, p. 9.

²² WLSA, *Submission 6*, p. 18.

²³ Legal Aid NSW, *Submission 90*, p. 10.

²⁴ Jannawi Family Centre, *Submission 51*, p. 3.

²⁵ Australia’s National Research Organisation for Women’s Safety (ANROWS), *Submission 73*, p. 13.

²⁶ Attorney-General’s Department, *Submission 89*, p. 3.

²⁷ Attorney-General’s Department, *Submission 89*, p. 2.

The National Principles will establish best-practice and complement work undertaken by the states and territories. Given the multi-disciplinary and diverse nature of services providing assistance, government agreed to the development of national risk principles, rather than a national risk assessment tool. This approach allows for variations in approaches and tools in different jurisdictions that reflect their existing systems and legislation.²⁸

- 4.26 Also of note, in 2016 both the Family Court of Australia (the Family Court) and the Federal Circuit Court of Australia (the Federal Circuit Court) announced a new screening approach for family violence cases, including pre-interview screening in all locations at interim hearings.²⁹

Out of court processes

Family dispute resolution

Overview of family dispute resolution and family violence

- 4.27 Compulsory FDR was first introduced in 2006 with the intent of providing a workable alternative to adversarial processes in the courts. The FDR system was described in evidence as a ‘diversionary system’: ‘designed to catch people early, when [they are] beginning their transit through the family law system’.³⁰
- 4.28 However, as discussed in Chapter 2, family violence matters are often screened out of FDR due to safety concerns which ‘may limit the opportunity for early resolution’.³¹
- 4.29 Relationships Australia estimates that 70 per cent of families who attend FDR are families who have experienced family violence.³² Family and Relationship Services Australia similarly reported that the family violence is present in ‘the majority of cases’, with the majority of its member

²⁸ Attorney-General’s Department, *Submission 89*, p. 2.

²⁹ Federal Circuit Court of Australia, *Media Release – Family law system needs more resources to deal with an increasing number of cases involving family violence*, 20 June 2016.

³⁰ Dr Andrew Bikerdike, Chair, National Board, Relationships Australia; and Chief Executive Officer, Relationships Australia Victoria, *Committee Hansard*, Canberra, 8 August 2017, p. 2; see also Interrelate Limited, *Submission 15*, p. 1.

³¹ WLSA, *Submission 6*, p. 25.

³² Dr Andrew Bikerdike, Chair, National Board, Relationships Australia; and Chief Executive Officer, Relationships Australia Victoria, *Committee Hansard*, Canberra, 8 August 2017, p. 1.

organisations reporting that family violence was present in 60 to 80 per cent of cases at the point of intake.³³

4.30 If family violence is identified, the FDR practitioner may:

- issue a 60I certificate for the matter to proceed to the Court; or
- continue mediation, where appropriate, whilst continuing to monitor levels of conflict and violence and provide ongoing external support services.³⁴

4.31 Evidence also suggested that some FDR practitioners are working with legal assistance services to provide legally-assisted mediation once family violence has been assessed,³⁵ but this does not appear to be a wide spread practice.

4.32 Relationships Australia estimated that 80 per cent of those families who are issued with 60I certificates are affected by family violence.³⁶ Similarly, Interrelate provided data that in 72 per cent of its cases, parties were issued with 60I certificates to proceed to the Court, despite 46 per cent of clients wanting the FDR process to continue.³⁷ Interrelate reported a 14 per cent increase in the number of 60I certificates being issued in recent years.

4.33 Although the majority of cases presenting for FDR include family violence issues, Interrelate reported that of those, only 49 per cent commence proceedings in the Court. Of that 49 per cent, 17 per cent proceed through to final orders.³⁸ The majority of cases do not formally resolve, leaving many families with informal arrangements for both parenting and property matters following separation.

Improving consistency when identifying violence in FDR

4.34 FDR practitioners may become aware of family violence issues at any stage of the FDR process, and 'their capacity to respond is determined by the

³³ Family and Relationship Services Australia (FRSA), *Submission 80*, p. 5.

³⁴ Interrelate Limited, *Submission 15*, pp. 3-4.

³⁵ Interrelate Limited, *Submission 15*, p. 3.

³⁶ Dr Andrew Bikerdike, Chair, National Board, Relationships Australia; and Chief Executive Officer, Relationships Australia Victoria, *Committee Hansard*, Canberra, 8 August 2017, p. 4.

³⁷ Interrelate Limited, *Submission 15*, p. 2.

³⁸ Mr Ross Butler, Senior Manager, Family Dispute Resolution, Interrelate Limited, *Committee Hansard*, Sydney, 31 July 2017, p. 10.

information they receive throughout the process'.³⁹ Interrelate stated that although clients are asked directly about family violence as part of the intake process, 'unless a client discloses the violence (or other forms of abuse) the FDR practitioners cannot support the client or intervene in regard to the violence'.⁴⁰

4.35 Evidence to this inquiry suggests that FDR practitioners' assessments of family violence may not be consistent across family relationship centres, or appropriately managed.⁴¹ Indeed, although there is a high incidence of families affected by violence using FDR, the Australian Institute of Family Studies (AIFS) has found that FDR practitioners are not appropriately managing family violence during FDR processes.⁴²

4.36 However, some stakeholders advised that screening for and identifying family violence is challenging work for FDR practitioners. Family and Relationship Services Australia commented:

The challenge of meeting the needs of these clients in potentially volatile situation, and the careful and comprehensive ways in which the family and relationships sector is meeting needs, is not always fully appreciated by people outside the sector. Services have developed comprehensive screening tools and processes that assist them to respond to family and domestic violence. However, despite this, the increasing demand on all parts of the family law system ... indicates the need for improvements [in] ... support services and an adequate resource base.⁴³

4.37 If family violence is not identified, either by the parties themselves or FDR practitioners working with the parties, the family may inappropriately proceed to non-legally assisted FDR. Women's Legal Services Australia were of the view that 'this carries with it a significant risk that power imbalances are perpetrated through the process', which can lead to the parties agreeing to arrangements that 'do not adequately take into consideration family violence'.⁴⁴

³⁹ Interrelate Limited, *Submission 15*, p. 3.

⁴⁰ Interrelate Limited, *Submission 15*, p. 3.

⁴¹ Interrelate Limited, *Submission 15*, p. 3; Queensland Domestic Violence Services Network, *Submission 30*, p. 3; Castan Centre for Human Rights Law, *Submission 57*, p. 3.

⁴² Australian Institute of Family Studies, *Evaluation of the 2012 family violence amendments*, 2015, pp. 240-245; see also Castan Centre for Human Rights Law, *Submission 57*, p. 3.

⁴³ FRSA, *Submission 80*, p. 5.

⁴⁴ WLSA, *Submission 6*, p. 25.

- 4.38 A number of stakeholders supported the development of a common family violence assessment tool for FDR practitioners to ensure consistent screening of families participating in FDR.⁴⁵ In 2010, the joint report by the Australian Law Reform Commission and the New South Wales Law Reform Commission (ALRC/NSWLRC report) recommended improving the standards in identification and management of family violence by FDR practitioners, and training in improved risk assessment tools and frameworks for these practitioners.⁴⁶
- 4.39 Relationships Australia also identified that training is needed to ensure that FDR practitioners ask all FDR clients about family violence and that they do so in a way that is likely to elicit disclosure, commenting that FDR practitioners must 'at a minimum, be able to effectively assess for, and make decisions about, consequent capacity and safety to participate in FDR'. The professional capacity of FDR practitioners is discussed in Chapter 8.
- 4.40 Family and Relationship Services Australia further advocated greater regulation of FDR practitioners to ensure a systematic approach is employed to identify family violence.⁴⁷ It recommended:
- amendment to *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* to extend the obligations of family dispute resolution practitioners to their clients to encompass the following:
 - preparation of a safety plan and referral to a specialised family violence support service;
 - referral for legal advice on personal protection orders and options for addressing parenting arrangements;
 - referral for therapeutic support for affected parents and children; and
 - referral to behaviour change programs, and other referrals for other support needs including housing, mental health or substance misuse needs.⁴⁸

⁴⁵ Interrelate Limited, *Submission 15*, p. 4; FRSA, *Submission 80*, p. 5; Mr Ross Butler, Senior Manager, Family Dispute Resolution, Interrelate Limited, *Committee Hansard*, Sydney, 31 July 2017, p. 11.

⁴⁶ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, Recommendations 21-1, 21-2, 21-5, p. 33; see also Australian Law Reform Commission (ALRC), *Submission 31*, p. 3.

⁴⁷ Interrelate Limited, *Submission 15*, p. 4.

⁴⁸ FRSA, *Submission 80*, p. 6.

- 4.41 Relationships Australia was of the view that assessing families for family violence is not, of itself, sufficient and advocated for a model that requires 'all clients assessed as family violence-affected to be referred to a specialist family violence case coordinator (family safety practitioner) who proactively prioritises the safety of [families]'.⁴⁹ Under this model, the family safety practitioner would coordinate services by providing key elements such as the joint planning of interventions, facilitate service delivery by a range of agencies or practitioners, with a view to developing a case plan. Referrals to other services would also be made where appropriate. Relationships Australia advocated that if embedded in each family relationship centre, family safety practitioners could 'provide a first point of contact network across Australia and would be a readily identifiable resource that the courts, community sector ... could refer'.⁵⁰
- 4.42 Relationships Australia advised that it is conducting a 'small pilot' of this model which will conclude by August 2018.⁵¹

Box 4.1 Family Dispute Resolution

The following is a selection of responses to the Committee's questionnaire:

'The Family Dispute Centre Staff were very kind and understanding of our family's situation. They helped my ex-husband and I formulate a Parenting Plan that was appropriate to manage the fall-out from what he had done'.

— *Respondent from Queensland*

'The mediation organisation ... ended up telling me that if they did mediation it would be detrimental to my case and just issued the family dispute resolution certificate, even though I pleaded with them to do mediation, as I couldn't afford to go through the courts'.

⁴⁹ Relationships Australia, *Submission 55*, p. 8; see also Ms Emily McDonald, General Manager, Practice Quality and Evaluation, Relationships Australia Victoria, Relationships Australia, *Committee Hansard*, Canberra, 8 August 2017, pp. 3, 8-9.

⁵⁰ Relationships Australia, *Submission 55*, p. 9.

⁵¹ Ms Emily McDonald, General Manager, Practice Quality and Evaluation, Relationships Australia Victoria, Relationships Australia, *Committee Hansard*, Canberra, 8 August 2017, p. 9.

—*Respondent from Queensland*

‘[Family dispute resolution] attempts didn’t proceed as it was considered not appropriate to proceed and 60i certificates were issued’.

—*Respondent from New South Wales*

‘Many attempts at Family Dispute Resolution did not address family violence appropriately, with the tick boxing questionnaires and inexperienced staff’.

—*Respondent from Queensland*

‘Family Dispute Resolution Services are great but there is no consequence to not participating. Getting a certificate to begin a case in the Family Court is wrong. If a court order was made on the same day as the [family dispute resolution] that may work, but waiting for months on end... is terrible for children’s interests’.

—*Respondent from Victoria*

‘Family dispute resolution was a disaster as the children were interviewed with their father. He became aggressive during the process. The children were traumatised by the process’.

—*Respondent from Queensland*

Legally-assisted family dispute resolution for matters involving family violence

4.43 A number of stakeholders advocated removing the restrictions on families affected by family violence from participating in FDR,⁵² with some making

⁵² Statewide Children’s Resource Program, *Submission 3*, p. 2; WLSA, *Submission 6*, pp. 25-26; Interrelate Limited, *Submission 15*, p. 4; Micah Projects, *Submission 24*, p. 7; Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 12; Ms Joanna Fletcher, Chief Executive Officer, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, 24 July 2017, p. 17; The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 10.

specific recommendations for the greater use of legally-assisted FDR to address power imbalances that may exist in the relationship.⁵³

- 4.44 Women's Legal Services Australia advocated that a 'well-supported and safe mediation process, with expert lawyers and mediators' who have a sound understanding of family violence and family law 'can be an empowering process for a victim'.⁵⁴ The Service noted that 'simply referring a matter into a complex court system rarely results in a good outcome'.⁵⁵
- 4.45 The Law Council of Australia advised that there are some families affected by violence who do wish to participate in FDR but noted that they are not the majority.⁵⁶
- 4.46 Women's Legal Services Australia identified a number of legally-assisted FDR processes as models for consideration. This included models where legal assistance services partnered with family relationship centres in a number of sites throughout Victoria and Western Sydney.⁵⁷
- 4.47 A number of participants made specific reference to the Coordinated Family Dispute Resolution (CFDR) pilot, recommending the extension of the pilot.⁵⁸ The CFDR was piloted in five sites (Perth, Brisbane, Newcastle, Western Sydney and Hobart) in 2012. It involved an FDR practitioner, specialist family violence professionals for both the perpetrator and victim, and a legal advisor for each party. Children's consultants were also included where appropriate.
- 4.48 The process was a multi-agency, multidisciplinary setting and aimed to provide a safe, non-adversarial and child-sensitive means for parents to resolve post-separation parenting disputes where there were allegations or

⁵³ Ms Joanna Fletcher, Chief Executive Officer, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, 24 July 2017, p. 17; The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 10; Ms Janet Taylor, Managing Principal Solicitor, Central Australian Women's Legal Service, *Committee Hansard*, Alice Springs, 22 August 2017, p. 26.

⁵⁴ WLSA, *Submission 6*, p. 25.

⁵⁵ WLSA, *Submission 6*, p. 25.

⁵⁶ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 12.

⁵⁷ WLSA, *Submission 6*, p. 26.

⁵⁸ WLSA, *Submission 6*, p. 26; Interrelate Limited, *Submission 15*, p. 5; Micah Projects, *Submission 24*, p. 7; Sexual Assault Support Service, *Submission 32*, p. 3; Domestic Violence NSW, *Submission 48*, p. 17.

findings of family violence. CFDR provided intensive support to parents to ensure that power imbalances resulting from family violence did not impede parents' ability to participate effectively in the process.⁵⁹

- 4.49 The AIFS evaluated the CFDR pilots in 2012, finding that participants were 'mostly positive about the process, with some exceptions'. The AIFS concluded that the potential for victims to experience emotional trauma through mediation could 'not be underestimated', and cautioned that face-to-face mediation as a first preference in this context 'is questionable'. However, the AIFS evaluation also found that where CFDR mediation sessions were handled carefully, the parents involved in the evaluation indicated that the process 'can be safe and can empower parents to make appropriate arrangements for their children'.⁶⁰
- 4.50 In evidence to the present inquiry, Women's Legal Services Australia noted that CFDR's 'extremely positive' for families affected by family violence.⁶¹
- 4.51 Other mechanisms were also discussed in evidence. For example, the Law Society of New South Wales operates the Family Law Settlement Service which is a court-supported FDR process for property and parenting matters where parties report back to the Court.⁶² The Law Society of NSW commented that the service:
- ... is a cost-effective service which has the benefit of us reporting to the court. We see that people comply with those orders because they know that we advise the judge's associate if non-compliance has occurred, and then there can be cost implications to a party if they have not complied.
- 4.52 An FDR-process attached to the Court was supported by law firm Lander & Rogers, who stated that the process 'is absolutely the future of family law proceedings'.⁶³

⁵⁹ Australian Institute of Family Studies, *Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases – Final report*, 2012, p. x.

⁶⁰ Australian Institute of Family Studies, *Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases – Final report*, 2012, p. xi

⁶¹ Ms Joanna Fletcher, Chief Executive Officer, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, 24 July 2017, p. 17.

⁶² Ms Nerida Harvey, Principal Solicitor, Community Referral Service, Law Society of New South Wales, *Committee Hansard*, Sydney, 31 July 2017, p. 26.

⁶³ Ms Rachell Davey, Special Counsel, Lander & Rogers, *Committee Hansard*, Sydney, 31 July 2017, p. 36.

- 4.53 In another example, Victoria Legal Aid provides legally-assisted FDR through a series of ‘shuttle conferences’. A shuttle conference is where parties do not have to see or speak to the other party directly. The FDR practitioner speaks to each party and their lawyer separately. They can occur in safe rooms within the same building, or they can occur over the telephone.⁶⁴
- 4.54 Family and Relationship Services Australia advised however that its membership organisations have experienced issues with accessibility of lawyers to act in legally-assisted FDR as two different legal services are required to provide advice to both parties and ‘there is no additional funding to sustain this type of more costly [FDR] service despite its benefit’.⁶⁵ Similarly, Interrelate reported existing delays of up to three months before lawyers are available to assist in FDR processes.⁶⁶
- 4.55 Other stakeholders cautioned against this approach due to the inherent power imbalances in relationships where there has been family violence, or the capacity of FDR practitioners to manage these dynamics.⁶⁷ For example, Queensland Domestic Violence Services Network cautioned against resolving family law matters involving family violence through FDR, principally due to the ‘significant variation in the screening tools’ used by FDR practitioners.⁶⁸ Other stakeholders identified that FDR can even exacerbate family violence as it ‘constitutes another opportunity for coercion from perpetrators’.⁶⁹
- 4.56 For example, the National Family Violence Prevention and Legal Services Forum (NFVPLSF) similarly cautioned that FDR ‘presumes an equal playing field in which both parties have the capacity to put their views forward freely and effectively, without fear of censorship’. The Forum continued,

⁶⁴ Victoria Legal Aid (VLA), *Submission 60*, p. 19.

⁶⁵ FRSA, *Submission 80*, p. 14.

⁶⁶ Mr Ross Butler, Senior Manager, Family Dispute Resolution, Interrelate Limited, *Committee Hansard*, Sydney, 31 July 2017, p. 11.

⁶⁷ Queensland Domestic Violence Services Network, *Submission 30*, p. 3; National Family Violence Prevention and Legal Services Forum (NFVPLSF), *Submission 78*, p. 15; Alice Springs Women’s Shelter, *Submission 121*, p. 2; Ms Christine Craik, National Vice President, Australian Association of Social Workers, *Committee Hansard*, Melbourne, 24 July 2017, p. 52.

⁶⁸ Queensland Domestic Violence Services Network, *Submission 30*, p. 3.

⁶⁹ ANROWS, *Submission 73*, p. 4; see also Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 2.

commenting that ‘this is simply not the reality in situations of family violence which inevitably involve power imbalance, coercion and fear’.⁷⁰

4.57 The Australian Association of Social Workers similarly commented:

... mediation assumes equal power in the parties that are mediating. For a victim of family violence, that power is not there. It would, as you say, depend on the risk as well. It is a strongly held view that a woman would not sit there and tell the truth about what is going on if she is going back into that house with that perpetrator after the mediation session. It is just not going to happen. The fear will not allow it.⁷¹

4.58 The NFVPLSF stated that FDR, whether legally-assisted or not, is ‘not appropriate nor in the interests’ of Aboriginal and Torres Strait Islander families, though noted that legally-assisted FDR ‘can be a more attractive prospect than protracted proceedings for some clients’.⁷²

4.59 As part of the Third Action Plan under the *National Plan to Reduce Violence Against Women and Their Children*, the Australian Government allocated \$6.2 million over three years from 2016–17 for piloting enhanced models of legally-assisted and culturally appropriate FDR. These pilots are to be delivered by Family Relationship Centres. The Committee was informed that the pilots would commence in mid-2017 and ‘will be evaluated to determine whether they provide a safe and successful alternative to court’ with a particular emphasis on whether they assist Aboriginal and Torres Strait Islander families and culturally and linguistically diverse families.⁷³ Culturally-appropriate FDR for Aboriginal and Torres Strait Islander and culturally and linguistically diverse families is discussed further in Chapter 7.

4.60 Women’s Legal Services Australia welcomed the funding announcement, however commented:

... it is unclear whether this amount of funding meets the legal need there is for legally assisted dispute resolution in family law, over what period of time

⁷⁰ NFVPLSF, *Submission 78*, p. 15.

⁷¹ Ms Christine Craik, National Vice President, Australian Association of Social Workers, *Committee Hansard*, Melbourne, 24 July 2017, p. 52.

⁷² NFVPLSF, *Submission 78*, p. 14.

⁷³ Attorney-General’s Department, *Submission 89*, p. 6.

this funding will last and whether it is intended that services will be funded beyond the 'pilot' stage.⁷⁴

- 4.61 Rather, the Service recommended consideration of the Victoria Legal Aid Family Dispute Resolution Service and its partnership programs between legal assistance services and family relationship centres.⁷⁵

Parenting management hearings

- 4.62 In the 2017–18 Budget, the Government announced \$12.7 million to establish two pilots of a new model for resolving less complex family law disputes between self-represented parties. Parenting Management Hearings (PMH) will be a 'less-adversarial forum that will support self-represented parties to resolve their parenting disputes more quickly'.⁷⁶ The Department explained:

Unlike the traditional adversarial system, where two opposing sides present their cases, those managing the Hearings will undertake inquiries and gather information to promote informed and safe outcomes for families. The Hearings will be supported by wrap-around services to better support families, for example—financial counselling and drug and alcohol services. The PMH will not deal with matters involving families with complex needs, such as where there are allegations or substantiated claims of family violence.⁷⁷

- 4.63 The Department advised that the key objective of PMH is to 'divert less complex cases away from the Courts to ease the caseload burden and allow judicial resources to be concentrated on resolution of more complex cases'.⁷⁸
- 4.64 At a hearing, the Department advised that, while the final details had not yet been determined by government, it envisages that PMH will comprise a multidisciplinary panel of one to three members with a range of expertise including in family law, social work, psychology or child development.⁷⁹ The panel may also be assisted by an Independent Children's Lawyer and

⁷⁴ WLSA, *Submission 6*, p. 26.

⁷⁵ WLSA, *Submission 6*, p. 26.

⁷⁶ Attorney-General's Department, *Submission 89*, p. 8.

⁷⁷ Attorney-General's Department, *Submission 89*, p. 8.

⁷⁸ Attorney-General's Department, *Submission 89*, p. 8.

⁷⁹ Ms Ashleigh Saint, Acting Assistant Secretary, Family Law Branch, Attorney-General's Department, *Committee Hansard*, Canberra, 13 June 2017, pp. 5-6.

family consultants when conducting inquiries and fact-finding.⁸⁰ After undertaking inquiries, the PMH will make ‘short-form judgements or decisions’.⁸¹

- 4.65 Although the mechanics of the referral to the PMH are yet to be confirmed, the Department advised that parties may be referred to the PMH through a range of mechanisms, including self-referrals and from family relationship centres.⁸² At time of writing, the Department had not settled a position on whether parties would be required to attend FDR prior to commencing PMH proceedings or whether parties would be required to obtain a section 60I certificate.⁸³
- 4.66 The first pilot of the PMH will be located in Parramatta in April 2018, with a second site yet to be announced.⁸⁴
- 4.67 The Department advised that the PMH will include ‘triaging processes and risk identification processes’ to ensure that parties involved in those proceedings are not exposed to further risk. The Department explained that ‘if there were a case that [the PMH panel] did not consider was appropriate for them to consider, [the panel] would be able to refer that out, or not take that matter on, and it would be diverted into the Court system’.⁸⁵
- 4.68 As PMH will be administrative proceedings and not judicial proceedings, families will retain appeal rights to the Family Court to review decisions made by the PMH panel.⁸⁶

⁸⁰ Ms Ashleigh Saint, Acting Assistant Secretary, Family Law Branch, Attorney-General’s Department, *Committee Hansard*, Canberra, 13 June 2017, p. 5.

⁸¹ Ms Ashleigh Saint, Acting Assistant Secretary, Family Law Branch, Attorney-General’s Department, *Committee Hansard*, Canberra, 13 June 2017, p. 6.

⁸² Ms Ashleigh Saint, Acting Assistant Secretary, Family Law Branch, Attorney-General’s Department, *Committee Hansard*, Canberra, 13 June 2017, p. 4.

⁸³ Ms Ashleigh Saint, Acting Assistant Secretary, Family Law Branch, Attorney-General’s Department, *Committee Hansard*, Canberra, 13 June 2017, p. 7.

⁸⁴ Ms Ashleigh Saint, Acting Assistant Secretary, Family Law Branch, Attorney-General’s Department, *Committee Hansard*, Canberra, 13 June 2017, p. 4.

⁸⁵ Ms Ashleigh Saint, Acting Assistant Secretary, Family Law Branch, Attorney-General’s Department, *Committee Hansard*, Canberra, 13 June 2017, p. 7.

⁸⁶ Ms Ashleigh Saint, Acting Assistant Secretary, Family Law Branch, Attorney-General’s Department, *Committee Hansard*, Canberra, 13 June 2017, p. 6.

- 4.69 The Law Council of Australia expressed concern about families affected by family violence potentially being included in the PMH proceedings.⁸⁷ Women's Legal Services Australia expressed similar views, but were of the understanding that families affected by family violence would not be included in PMH.⁸⁸ National Legal Aid stated that it was not clear how family violence considerations will be triaged and managed, though were supportive of mechanisms that 'free up some of the resources of the family law courts to enable an earlier response to matters involving more complex issues'.⁸⁹ Former Commissioner of the Victorian Royal Commission into Family Violence, the Hon. Professor Marcia Neave AO also expressed concern and was of the view that legally-assisted mediation would be a preferable approach.⁹⁰
- 4.70 Professor Patrick Parkinson AM, who originally proposed an inquisitorial, panel-based mechanism in a paper to the Australian Government, stated:
- ... the enormous advantage of them, amongst many advantages, I think, is they are outside of Chapter III of the Constitution. Chapter III of the Constitution does, according to previous case law, seem to indicate that an adversarial approach should be normative ... But the idea is to give a very structured, inquisitorial process, rather than having self-represented people trying to manage the court systems, the forms and the procedures; a very proactive finding out about what the case is all about early on ... You would have a lawyer, but you might well have a paediatrician, a drug and alcohol specialist, a psychologist ... I believe a well set-up panel like that, given two hours, could get far closer to the heart of things than a court hearing taking two days.⁹¹
- 4.71 Professor Parkinson advocated that matters involving family violence should be included in the PMH pilot, commenting 'it would be an

⁸⁷ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 11.

⁸⁸ Ms Helen Matthews, Director, Legal and Policy, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 21; Ms Joanna Fletcher, Chief Executive Officer, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 21.

⁸⁹ National Legal Aid (NLA), *Submission 88*, p. 10.

⁹⁰ The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 10.

⁹¹ Professor Patrick Parkinson AM, Private Capacity, *Committee Hansard*, Canberra, 17 October 2017, p. 3.

extraordinary mistake if it didn't, because that's 60 per cent or more of the workload'.⁹²

- 4.72 The Department advised at a later public hearing that whether the PMH will examine matters involving family violence is pending a final decision by the Australian Government.⁹³ The evaluation of the PMH pilots will form part of the Australian Law Reform Commission's review of the *Family Law Act 1975* (Cth) (the Family Law Act).⁹⁴

Design and delivery of court processes

Introduction

- 4.73 Family violence matters form a significant part of the work of federal family courts as well as state and territory courts. Dealing with family violence has been described as 'core business' of the federal family courts.⁹⁵ Indeed, 50 per cent of matters before the Family Court, 70 per cent of matters before the Federal Circuit Court and 65 per cent of matters before the Family Court of Western Australia, involve allegations of family violence.⁹⁶
- 4.74 It is critical that the courts are appropriately designed around its core activities.⁹⁷ This section discusses the design and delivery of a number of court processes that are necessary to better support and protect families affected by family violence. In so doing, it does not examine the specifics of

⁹² Professor Patrick Parkinson AM, Private Capacity, *Committee Hansard*, Canberra, 17 October 2017, p. 6.

⁹³ Mr Cameron Gifford, First Assistant Secretary, Civil Justice Policy and Programs Division, Attorney-General's Department, *Committee Hansard*, Canberra, 17 October 2017, p. 10.

⁹⁴ Ms Ashleigh Saint, Acting Assistant Secretary, Family Law Branch, Attorney-General's Department, *Committee Hansard*, Canberra, 17 October 2017, p. 11.

⁹⁵ Ms Gayathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 26; Ms Joanna Fletcher, Chief Executive Officer, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 36.

⁹⁶ Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms*, 2009, p. 314; see also Castan Centre for Human Rights, *Submission 57*, p. 2; Professor Richard Chisholm, *Family Courts Violence Review*, 2009, p. 4.

⁹⁷ Ms Gayathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 26; Ms Joanna Fletcher, Chief Executive Officer, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 36.

property and parenting matters—these are addressed in separate chapters (Chapters 5 and 6 respectively). This section examines:

- introducing mandatory risk assessments upon filing matters in the courts;
- the role of case management and triaging within courts and between jurisdictions;
- avenues to improve information sharing across jurisdictions;
- determining family violence allegations earlier in the proceedings, as well as the way in which evidence can be adduced in court;
- strengthening the courts' review and scrutiny of consent orders;
- the role of state and territory magistrates in family law matters; and
- the capacity of specialist family violence courts and opportunities for their expansion.

Risk assessment upon filing

4.75 Evidence to the inquiry noted that the risk assessment tool as discussed earlier in this chapter should also be used within the Court. As discussed in Chapter 2, a party who makes allegations of family violence or child abuse must file a Notice of Child Abuse or Family Violence.⁹⁸ In 2009, Professor Chisholm concluded that the Notice of Risk form, as a risk assessment mechanism, was 'not working' and that:

... it would be better to have a system of risk identification and assessment that applies to all parenting cases. This approach would reflect the best available thinking about these issues, and would reinforce a lot of measures that are already being taken by the courts to identify and deal with issues of violence as early as possible.⁹⁹

4.76 In a submission to the inquiry, Queensland Law Society advised that the requirement to file a Notice of Risk form may be insufficient in itself to ensure that the Court is made aware of all relevant risk factors. The Society was particularly concerned for self-represented litigants or litigants which may not understand the breadth of the definition of family violence. It also highlighted that the Notice of Risk form is not required to be filed for matters that do not include parenting matters.¹⁰⁰

⁹⁸ *Family Law Act 1975* (Cth), s 67Z.

⁹⁹ Professor Richard Chisholm, *Family Courts Violence Review*, 2009, p. 72; see also WLSA, *Submission 6*, p. 17.

¹⁰⁰ Queensland Law Society, *Submission 38*, pp. 1-2.

4.77 In the experience of Women’s Legal Service NSW, formal risk assessments undertaken by the Court often do not take place until the preparation of a family report, further commenting:

This often does not take place until months after the legal proceedings have commenced and often occurs after Interim Hearings have taken place and decisions regarding the children’s contact with a perpetrator, albeit on a temporary basis, have already been made.¹⁰¹

4.78 Further the Committee was informed that, it is not uncommon for matters to settle via consent orders before a risk assessment is completed, and therefore the Court may make an order without being advised of the risk of family violence.¹⁰²

4.79 To improve the risk information available to the Court, Women’s Legal Services Australia recommended amending the Family Law Act and any other supporting legislation, to require that a risk assessment be automatically conducted by family violence specialists embedded within the court registry upon filing of any family law application.¹⁰³ It advocated for such a service to be embedded within the Court as opposed to a third party provider as it would ‘give any risk assessment greater credibility’.¹⁰⁴ This recommendation was broadly supported by participants in the inquiry.¹⁰⁵

4.80 Women’s Legal Service NSW was of the view that early risk assessment processes undertaken by an appropriately qualified family violence specialist would ‘significantly increase the safety’ of families.¹⁰⁶

4.81 People with Disability Australia supported the proposal, further recommending that specialists undertaking assessments should also receive

¹⁰¹ Women’s Legal Service NSW, *Submission 71*, p. 2.

¹⁰² Women’s Legal Service NSW, *Submission 71*, p. 2; Hume Riverina Community Legal Service, *Submission 76*, p. 5.

¹⁰³ WLSA, *Submission 6*, pp. 18-19.

¹⁰⁴ Ms Joanna Fletcher, Chief Executive Officer, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 18.

¹⁰⁵ Statewide Children’s Resource Program, *Submission 3*, p. 2; Northern Integrated Family Violence Services, *Submission 11*, p. 1; InTouch, *Submission 13*, p. 7; Micah Projects, *Submission 24*, p. 5; People with Disability Australia, *Submission 25*, pp. 5-6; Baptist Care Australia, *Submission 28*, p. 2; Springvale Monash Legal Service, *Submission 47*, p. 5; Domestic Violence NSW, *Submission 48*, p. 12; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 2; Women’s Legal Service NSW, *Submission 71*, p. 2.

¹⁰⁶ Women’s Legal Service NSW, *Submission 71*, p. 2.

disability awareness and competency training to ensure the Court is aware of additional risks of families with parents or children with disability.¹⁰⁷

- 4.82 The Law Council of Australia recommended that the risk assessment undertaken by the FDR practitioner prior to the filing of applications at the registry, could be incorporated into the court-based risk assessment.¹⁰⁸
- 4.83 InTouch Multicultural Centre Against Family Violence also recommended that court staff ‘check for the existence of family violence intervention orders prior to the first mention, and, if an intervention order is in place, provide this information to the judge and the parties’.¹⁰⁹
- 4.84 This reflects previous findings and recommendations from other reports: the ALRC/NSWLRC report made a number of recommendations to improve the information available to the Court to manage risk earlier. The Commissions recommended amendments to initiating application and response forms to:
- clearly seek information about past and current family violence protection and child protection orders obtained under state and territory law; and
 - seek more general information about safety concerns.¹¹⁰
- 4.85 Victoria Legal Aid was of the view that ‘simply to provide a family violence worker’s risk assessment to the judicial officer ... would not be adequate for the Court to effectively address risk’. Rather, it argued that providing a risk assessment to the Court is less helpful to the judicial officer presiding and present a challenge to the rules of procedural fairness. In this context, it stated that ‘providing a risk assessment to the judicial officer cannot replace judicial decision-making’.¹¹¹
- 4.86 As noted above, the Family Court and the Federal Circuit Court announced the implementation of a new screening approach for family violence cases.

¹⁰⁷ People with Disability Australia, *Submission 25*, p. 6.

¹⁰⁸ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 6.

¹⁰⁹ InTouch, *Submission 13*, p. 21.

¹¹⁰ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, Recommendation 30-1 and 30-2, p. 44; see also ALRC, *Submission 31*, p. 2.

¹¹¹ VLA, *Submission 60*, pp. 13-14.

This was welcomed by a number of organisations including Women’s Legal Services Australia and Domestic Violence NSW.¹¹²

4.87 Importantly however, ‘risk is not static’. Women’s Legal Service NSW commented:

We also note that risk is not static and that throughout the legal proceedings the risk to victims can change. It is not uncommon for proceedings to continue over several years and for new incidents of violence to occur during the proceedings. Any risk assessment process should include a mechanism for ongoing risk assessment and for parties to be referred back to the specialist embedded family violence support worker if circumstances have changed.¹¹³

4.88 Indeed, to actively manage dynamic risk requires appropriate case management, triage and referrals. This is discussed in the following section.

Case management, triage and referral

4.89 Evidence to the inquiry acknowledged that while there has been improvement in courts’ management of high-risk cases,¹¹⁴ there was broad recognition that this could be significantly enhanced further.¹¹⁵ The Hon. Professor Marcia Neave AO, explained the risks where the court system fails to triage and actively manage its case load:

I don’t think courts have been good enough in the past at triaging. They need to be able to identify the cases where there are urgent safety issues and deal with them quickly, but it’s also important to respond quickly to cases that aren’t as bad at the moment but may get worse over time ... For example, if you have an alleged perpetrator of violence who can’t see his children because an interim order is in place or can only see his children in a limited way for

¹¹² Domestic Violence NSW, *Submission 48*, p. 8.

¹¹³ Women’s Legal Service NSW, *Submission 71*, p. 3.

¹¹⁴ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia. *Committee Hansard*, 30 May 2017, p. 9; The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, pp. 1-2.

¹¹⁵ Northern Integrated Family Violence Services, *Submission 11*, p. 1; Baptist Care Australia, *Submission 28*, pp. 3, 5; Domestic Violence NSW, *Submission 48*, p. 12; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 3; Victorian Women Lawyers, *Submission 54*, p. 4; Community and Public Sector Union (CPSU), *Submission 70*, pp. 2, 8; FRSA, *Submission 80*, p. 8; NLA, *Submission 88*, p. 9; Legal Aid NSW, *Submission 90*, p. 13; Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, 30 May 2017, p. 9; The Hon. Professor Marcia Neave, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 2.

weeks or months, that's a recipe for rage, frustration and the matter becoming worse. That puts his partner and his children at a high risk of harm.¹¹⁶

- 4.90 A number of participants in the present inquiry recommended improved case management and triaging processes within each court and between courts of different jurisdictions.¹¹⁷ Both are discussed below.

Case management and triage within the court

- 4.91 To ensure that the Court responds to the dynamic family violence risk environment identified in the previous section, Women's Legal Services Australia emphasised the need to triage and case manage matters.¹¹⁸ This recommendation was supported by multiple participants,¹¹⁹ including Family and Relationship Services Australia who identified that improved triage would help to ensure that 'priority is given to children and parents genuinely at risk'.¹²⁰ Victorian Women Lawyers provided similar evidence.¹²¹
- 4.92 Previous reviews have recommended establishing processes of scrutiny and triage that identifies cases that require urgent attention by the courts.¹²²
- 4.93 Evidence to the inquiry also advocated for case management system modelled on the Magellan program.¹²³ Operating only in the Family Court,

¹¹⁶ The Hon. Professor Marcia Neave, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 2.

¹¹⁷ Northern Integrated Family Violence Services, *Submission 11*, p. 1; Baptist Care Australia, *Submission 28*, p. 3, 5; Domestic Violence NSW, *Submission 48*, p. 12; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 3; Victorian Women Lawyers, *Submission 54*, p. 4; CPSU, *Submission 70*, pp. 2, 8; FRSA, *Submission 80*, p. 8; NLA, *Submission 88*, p. 9; Legal Aid NSW, *Submission 90*, p. 13; Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, 30 May 2017, p. 9; The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 2.

¹¹⁸ WLSA, *Submission 6*, p. 19; see also WLSA, *Safety First in Family Law*.

¹¹⁹ Baptist Care Australia, *Submission 28*, p. 3; Domestic Violence NSW, *Submission 48*, p. 12; Professor Patrick Parkinson AM, *Submission 64*, p. 10; FRSA, *Submission 80*, p. 8.

¹²⁰ FRSA, *Submission 80*, p. 8.

¹²¹ Victorian Women Lawyers, *Submission 54*, pp. 3-5.

¹²² Professor Richard Chisholm, *Family Courts Violence Review*, 2009, p. 4.

¹²³ Queensland Law Society, *Submission 38*, p. 2; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 3; Family Law Practitioners of Western Australia,

the Magellan program is a dedicated, fast-tracked pathway for serious cases of child abuse. The program is discussed further in Chapter 6.

- 4.94 The Law Council of Australia identified that improved triaging of cases would require additional resources made available to the courts, specifically more registrars.¹²⁴ The Community and Public Sector Union also noted that additional resources would provide for early identification and support more effective responses to family violence.¹²⁵

Case management and referral between jurisdictions

- 4.95 Multiple stakeholders also discussed the need for improved case management between jurisdictions through establishing formalised referral pathways. The referral mechanisms discussed would enable state or territory magistrates, after making orders under state or territory family violence legislation, to refer the matter to the federal family courts for resolution of family law matters that may also provide support and protection for that family.

- 4.96 For example, the Law Council of Australia stated:

At the moment, there is no easy referral process. A magistrate cannot make an order referring a case to the Federal Circuit Court and guarantee that they will get a date within four weeks, for instance. That kind of seamless referral of cases would be fantastic.¹²⁶

- 4.97 The Central Australian Aboriginal Family Legal Unit similarly supported a referral pathway. It proposed a mechanism whereby a state or territory magistrate could issue an order referring the matter directly to the federal family courts that would allow the federal courts to ‘consider the material without further delay’. Under that model, the registries of the federal family courts would then seek to case manage the matter by supporting the parties to progress the matter in that second court. The Unit explained:

[There would be] no expectation then for the client to go off and see another lawyer and prepare a Family Court application; it’s immediately before the

Submission 53, p. 1; Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, pp. 14-15.

¹²⁴ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, 30 May 2017, p. 3.

¹²⁵ CPSU, *Submission 70*, p. 2.

¹²⁶ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, 30 May 2017, p. 9.

Federal Circuit Court, and they have got it in their intake, so they can then start to progress the matter ... It's almost like an invitation [to the parties] ... to move on their matter, rather than leaving it at the point that we often see — that is, a domestic violence order has been made, there's a provision for parenting orders and nothing happens. ... It basically streamlines it so that he or the people who are involved, such as the registry, can then allocate where matters go without so much delay.¹²⁷

4.98 Springvale Monash Legal Service also recommended an expedited link to the federal family courts from state and territory magistrates courts specifically for matters involving children.¹²⁸

4.99 Evidence to the present inquiry noted two recent trials of case management between the courts. The Law Council of Australia advised of a trial in Brisbane whereby matters were referred from a local magistrates court to the local Federal Circuit Court registry. The Council explained:

It was an informal arrangement between the local court in Brisbane and the Federal Circuit Court registry in Brisbane. If a local magistrate thought that someone needed to have an urgent family law order, it was fairly basic. They literally got a slip of paper signed off by the magistrate which they could take to the Federal Circuit Court and say, 'The magistrate said this case is urgent.'¹²⁹

4.100 The Council advised however that the process 'effectively failed because the Federal Circuit Court could not give the urgent dates that the magistrate thought they needed'. The Council stated that this was due to resourcing implications in the Federal Circuit Court.¹³⁰

4.101 In another case management trial, the ALRC/NSWLRC report noted that in Tasmania, the police, the magistrates court and the Tasmanian registry of the Family Court developed protocols to improve pathways between the courts. Under the protocol, if a family court contact order poses a risk to the safety of a victim of family violence, the police prosecutor alerts the magistrate to this concern. The magistrate can suspend the order for a period

¹²⁷ Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 12.

¹²⁸ Springvale Monash Legal Service, *Submission 47*, p. 5.

¹²⁹ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, 30 May 2017, p. 9.

¹³⁰ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, 30 May 2017, p. 9.

of days, and make a protection order. The magistrates court file setting out the grounds for the suspension is subsequently transferred to the Family Court for review of the contact order within the period of suspension.¹³¹

- 4.102 The ALRC/NSWLRC Report recommended that, subject to a positive evaluation of the Tasmania protocols, other states and territories adopt similar cooperative models to address inconsistent coexisting orders.¹³²

Information sharing across jurisdictions

- 4.103 As noted in Chapters 2 and 3, no single jurisdiction has sole responsibility for family violence matters; this responsibility is shared or ‘fragmented’.¹³³ The fragmentation of the family law, family violence and child protection systems (and resulting inconsistencies) were discussed by a large number of stakeholders.¹³⁴

- 4.104 A former Justice of the Family Court, the Hon. Professor Nahum Mushin AM advised of his experiences on the bench:

I was constantly concerned by the dangers of a lack of communication between the various Courts to ensure that everyone had all the relevant information about each matter. For example, if the [Family Court] did not know about the existence of a an intervention order, the consequences for a child in granting the perpetrator contact would be catastrophic. Judges live

¹³¹ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 96; see also Sexual Assault Support Service, *Submission 32*, p. 5.

¹³² Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 96; see also Sexual Assault Support Service, *Submission 32*, p. 5.

¹³³ Castan Centre for Human Rights Law, *Submission 57*, p. 2.

¹³⁴ InTouch, *Submission 13*, p. 21; Centacare Brisbane, *Submission 22*, p. 1; Junction Australia, *Submission 23*, p. 5; Baptist Care Australia, *Submission 28*, p. 5; Queensland Domestic Violence Services Network, *Submission 30*, p. 3; Safe Steps Family Violence Response Centre (Safe Steps), *Submission 34*, p. 12; Jannawi Family Centre, *Submission 51*, p. 4; Monash School of Social Sciences, *Submission 100*, pp. 6-7; Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, pp. 1-2; Ms Rosie Batty, Private Capacity, *Committee Hansard*, Melbourne, 24 July 2017, p. 15; The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 2; Dr Heather Nancarrow, Chief Executive Officer, Australia’s National Research Organisation for Women’s Safety, *Committee Hansard*, Sydney, 31 July 2017, p. 6; Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 14.

with that fear constantly ... There needed to be a central coordination body, administered at a high level, to ensure the constant flow of information.¹³⁵

- 4.105 Successive inquiries and reviews have proposed that information sharing across jurisdictions is the most effective way to address constitutionally fragmented systems.¹³⁶ For example, the Family Law Council's 2015 interim report identified two central initiatives: the sharing of reports and risk assessments; and the creation of a national database of court orders.¹³⁷
- 4.106 This echoed previous recommendations by ALRC/NSWLRC report. The Commissions also recommended a suite of changes to state and territory legislation to facilitate the provision of confidential information to the family courts and the development of protocols for the exchange of such information.¹³⁸
- 4.107 Evidence to the present inquiry described information sharing as an 'absolutely imperative',¹³⁹ with a large number of stakeholders identifying opportunities for greater collaboration to ensure risk is responded to appropriately.¹⁴⁰ For example, the Queensland Law Society stated:

¹³⁵ The Hon. Professor Nahum Mushin AM, *Submission 123*, p. 3.

¹³⁶ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Interim Report, 2015, and Final Report, 2016; Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, Coroner's Court of Victoria, *Inquest into the death of Luke Geoffrey Batty*, 2015; Victorian Royal Commission into Family Violence, *Report and Recommendations*, 2016; see also ALRC, *Submission 31*, p. 2.

¹³⁷ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Interim Report, 2015, pp. 88-90.

¹³⁸ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, Recommendation 30-16, p. 46; see also ALRC, *Submission 31*, pp. 2-3.

¹³⁹ The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 2.

¹⁴⁰ Centacare Brisbane, *Submission 22*, p. 5; Junction Australia, *Submission 23*, p. 5; Micah Projects, *Submission 24*, p. 7; Baptist Care Australia, *Submission 28*, p. 3; Queensland Law Society, *Submission 38*, p. 2; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 2; Family Law Practitioners of Western Australia, *Submission 53*, p. 1; Castan Centre for Human Rights Law, *Submission 57*, p. 10; ACT Policing, *Submission 61*, p. 7; Monash School of Social Sciences, *Submission 100*, p. 4; The Hon. Professor Nahum Mushin AM, *Submission 123*, p. 3; The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 2; Dr Heather Nancarrow, Chief Executive Officer, Australia's National Research Organisation for Women's Safety, *Committee Hansard*, Sydney, 31 July 2017, p.

A robust information sharing regime between child protection agencies, police and state health authorities would enhance the Court's capacity to properly assess the risk of family violence. [The Court should be able to] ... order a report from [these] relevant authorities... in matters involving family violence which would outline information relevant to the Court's assessment of family violence.¹⁴¹

4.108 Similarly, the Victorian Southern Metropolitan Region Integrated Family Violence Executive advocated for the sharing of information between courts of different jurisdictions:

Magistrates Courts and Family Courts needs to be automatically linked and have better communication and automatic alert systems, so that processes can be streamlined and sped up, especially for high risk cases ... systems not talking to each other and sharing information puts women and children at greater risk.¹⁴²

4.109 The Castan Centre for Human Rights Law commented that information sharing, including access to orders made by other courts, is 'crucial' to allowing proper identification and management of family violence risk. The Centre further commented that the current lack of information sharing is often a cause of delay in both state and territory magistrates courts and federal family courts, as matters have to be stood down to allow the Court to determine what orders have been made by other courts.¹⁴³ Avenues to improve information sharing about family law, child protection and family violence orders are discussed at the end of this chapter.

4.110 Some stakeholders identified that all family law, child protection and domestic and family violence matters should be determined in a single court,¹⁴⁴ 'ensuring that all relevant information is gathered to inform family law court orders, child protection orders and domestic and family violence orders'.¹⁴⁵ This proposal is also discussed later in this chapter.

6; Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 12.

¹⁴¹ Queensland Law Society, *Submission 38*, p. 2.

¹⁴² Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 3.

¹⁴³ Castan Centre for Human Rights Law, *Submission 57*, p. 10.

¹⁴⁴ Centacare Brisbane, *Submission 22*, p. 5; see also Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Interim Report, 2015, p. 87.

¹⁴⁵ Centacare Brisbane, *Submission 22*, p. 5.

Early determination of family violence allegations

- 4.111 There may be many months, ‘sometimes years’¹⁴⁶ between an allegation of family violence being raised in family law proceedings and the Court making a decision whether violence has occurred. Yet ‘without this finding, decisions ... are made without information that is vital to ensuring safety’.¹⁴⁷ For those against whom allegations are made, timely resolution is also vital.
- 4.112 Although the Family Law Act requires the Court to take prompt action in relation to allegations of child abuse or family violence,¹⁴⁸ Victoria Legal Aid advised that ‘this is not by itself resulting in early findings in matters involving family violence allegations’.¹⁴⁹ The Victims of Crime Assistance League NSW commented that ‘the current approach takes too long’ and increases the risk to safety and psychological health.¹⁵⁰ Similarly, Women’s Legal Services Australia commented that delays in determining family violence allegations:
- ... places victims of violence and their children at considerable risk as they can be pressured to agree to interim time arrangements that a court might well consider inappropriate had a finding actually been made on the allegation of violence or the questions of risk.¹⁵¹
- 4.113 Victoria Legal Aid noted that this could be the result of resourcing constraints and the absence of information required to make such a determination early,¹⁵² though it also reflects the ‘culture’ and ‘reluctance’ of the Court to make a determination at an early stage.¹⁵³
- 4.114 A number of stakeholders recommended legislative amendments to allow for early determination of family violence allegations in order to inform any

¹⁴⁶ Ms Gayrathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 26; see also Ms Joanna Fletcher, Chief Executive Officer, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 17.

¹⁴⁷ VLA, *Submission 60*, p. 13.

¹⁴⁸ *Family Law Act 1975*, s 67ZBB.

¹⁴⁹ VLA, *Submission 60*, p. 13.

¹⁵⁰ Victims of Crime Assistance League Inc. NSW (VOCAL), *Submission 46*, p. 9.

¹⁵¹ Ms Joanna Fletcher, Chief Executive Officer, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, pp. 17-18.

¹⁵² VLA, *Submission 60*, p. 13.

¹⁵³ VLA, *Submission 60*, p. 14.

orders made, or negotiations that progress out-of-court which run concurrent to court processes.¹⁵⁴ Victoria Legal Aid commented:

This restructuring of court process would place enquiry about safety at the start and centre of the court's task. Currently safety, although increasingly a court priority, remains the subject of later determination. This diminishes the court's impact in managing and responding to family violence risk.¹⁵⁵

- 4.115 It was also identified that early determination of family violence allegations would deliver cost efficiencies and make the family law system safer for families.¹⁵⁶
- 4.116 Victoria Legal Aid advised that earlier determinations about family violence will require increased resourcing for the Court as well as for the mechanisms the Court has available to it for gathering information about family violence risks, such as family reports and the appointment of Independent Children's Lawyers.¹⁵⁷
- 4.117 The Family Court advised that 'whether, and if so when, it is appropriate to make a finding of fact in relation to family violence is dependent upon the nature of the matter before the Court, and whether there is sufficient material before the Court to allow it to make such a finding'. The Court further noted that this may not occur until the final hearing of a matter.¹⁵⁸

Providing evidence

- 4.118 The Committee heard that providing evidence during either a criminal or family law trial can result in secondary victimisation and trauma.¹⁵⁹

¹⁵⁴ VLA, *Submission 60*, pp. 8, 13; NLA, *Submission 88*, p. 9; Ms Helen Matthews, Director, Legal and Policy, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 19; The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 7; Mr Barry Williams, President, Lone Fathers Association of Australia, *Committee Hansard*, Canberra, 8 August 2017, p. 11.

¹⁵⁵ VLA, *Submission 60*, p. 13.

¹⁵⁶ Ms Emma Smallwood, Acting Associate Director, Family Violence Response, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 30.

¹⁵⁷ VLA, *Submission 60*, p. 8.

¹⁵⁸ Family Court of Australia, *Submission 44.1*, p. 3.

¹⁵⁹ Baptist Care Australia, *Submission 28*, p. 3; Springvale Monash Legal Service, *Submission 47*, p. 7; NFVPLSF, *Submission 78*, pp. 6, 21.

- 4.119 To address this, evidence to the inquiry recommended that families affected by violence should be able to provide evidence to the Court by audio-visual links into the Court.¹⁶⁰ As noted below, specialist family violence courts often have the infrastructure of provide evidence via video-link into the court, so as to ensure victim's safety. It was identified that intimidation of witnesses could be minimised by providing evidence from remote locations within or outside court complex during family law proceedings.¹⁶¹
- 4.120 The provision of evidence remotely by remote technology was a recommendation of the Royal Commission with respect of family violence intervention order proceedings under that state's legislation.¹⁶² This recommendation was accepted by the Victorian Government, which advised in a submission to this inquiry that it is progressing with the roll-out of the required technology.¹⁶³
- 4.121 Further, a number of organisations proposed that the Family Law Act be amended to allow the introduction of evidence provided in a different court, such as a criminal court or a children's court.¹⁶⁴ For example, the Central Australian Aboriginal Family Legal Unit suggested:

If you're going to be asking clients to re-traumatise themselves and go through the story again and give further affidavit materials, that's another impediment. They could possibly, if there were more crossover and collaboration, rely upon some of the materials that they have in other courts and have that considered almost as the level of proof that's required for family violence so that there is no further delay. You shouldn't have to have clients speak again about their matters and the trauma that's then attached to that.¹⁶⁵

¹⁶⁰ Baptist Care Australia, *Submission 28*, p. 3; Springvale Monash Legal Service, *Submission 47*, p. 7; NFVPLSF, *Submission 78*, pp. 6, 21.

¹⁶¹ NFVPLSF, *Submission 78*, pp. 6, 21; Springvale Monash Legal Service, *Submission 47*, p. 7.

¹⁶² Victorian Royal Commission into Family Violence, *Summary and Recommendations*, 2016, Recommendation 71, p. 66; see also Victorian Government, *Submission 87*, p. 6.

¹⁶³ Victorian Government, *Submission 87*, p. 6.

¹⁶⁴ InTouch, *Submission 13*, p. 16; Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 11; Ms Janet Taylor, Managing Principal Solicitor, Central Australian Women's Legal Service, *Committee Hansard*, Alice Springs, 22 August 2017, p. 27.

¹⁶⁵ Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 11.

- 4.122 This recommendation was also supported by the Central Australian Women's Legal Service.¹⁶⁶
- 4.123 InTouch Multicultural Centre Against Family Violence recommended a cross-jurisdictional analysis be undertaken into 'ways of adducing evidence that reduce the need for victims to repeat their stories of violence, including where findings of fact have been made in earlier proceedings, with a view to adopting best practice'.¹⁶⁷
- 4.124 The Alice Springs Women's Shelter and the Central Australian Aboriginal Family Law Unit encouraged amendments that would allow for evidence to be provided from support services in the development of family reports or directly to the court, on the changing dynamics of risk to families during proceedings.¹⁶⁸
- 4.125 In a submission, the Family Court responded to a question in writing from the Committee regarding the extent to which a previous conviction could be relied upon the Court. The Court stated in its answer that this 'depends on the particular case and the material before the Court'.¹⁶⁹

Court scrutiny of consent orders

- 4.126 As discussed in Chapter 3, consent orders are an opportunity for a quick settlement and offer a legally enforceable negotiated agreement. However, a large number of participants in the inquiry raised concerns about consent orders in matters involving family violence and the level of judicial scrutiny of the agreements reached therein.
- 4.127 In considering the consent orders, the Court must be satisfied that any orders about children are in the best interests of those children before the orders are made.¹⁷⁰ Orders about property must be just and equitable.¹⁷¹

¹⁶⁶ Ms Janet Taylor, Managing Principal Solicitor, Central Australian Women's Legal Service, *Committee Hansard*, Alice Springs, 22 August 2017, p. 27.

¹⁶⁷ InTouch, *Submission 13*, p. 16.

¹⁶⁸ ASWS *Submission 121*, p. 3; Ms Sophie Broughton-Cunningham, Court Support Officer, Alice Springs Women's Shelter, *Committee Hansard*, Alice Springs, 22 August 2017, pp. 7-8; Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 14.

¹⁶⁹ Family Court of Australia, *Submission 44.1*, p. 3

¹⁷⁰ *Family Law Act 1975* (Cth), s 60CA; see also Family Court of Australia, *Submission 44*, p. 5.

¹⁷¹ *Family Law Act 1975* (Cth), s 79(2); see also Family Court of Australia, *Submission 44*, p. 5.

- 4.128 Current case law requires judicial scrutiny to be applied to all applications for consent orders. In *T & N* [2003], the Court held that consent does not displace the obligation of the Court to make orders that are judged to be in the best interest of children.¹⁷²
- 4.129 However, Victoria Legal Aid advised that in its experience there continues to be inconsistent application of this scrutiny from the court, commenting that ‘shortages of judicial time, resources and training no doubt contribute to these inconsistencies’.¹⁷³
- 4.130 To improve judicial scrutiny of consent orders, Victoria Legal Aid recommended a codification of the case law in the Family Law Act:
- No matter how a consent order has been negotiated, consistent application of this judicial scrutiny, informed by knowledge of the dynamics of family violence, is vital to ensure any consent orders support the safety of family members who have experienced family violence ... VLA suggests that one way to ensure greater scrutiny in the making of consent orders is codification of the case law on this matter.¹⁷⁴
- 4.131 It argued that including the ruling in *T & N* would provide a clearer direction to the Court to ‘more closely examine the arrangement agreed to by the parties, on a more consistent basis, ensuring these arrangements are safe’.¹⁷⁵
- 4.132 Springvale Monash Legal Service also called for improved scrutiny of consent orders, particularly where consent orders are filed for sole parenting responsibility.¹⁷⁶ The Service recommended in such circumstances, the Court hold a hearing to examine whether the orders were consented to freely, and whether family violence has occurred.¹⁷⁷

Role of state and territory magistrates courts

- 4.133 As noted in Chapter 2, state and territory magistrates courts have jurisdiction to determine certain parenting and property matters under the

¹⁷² *T & N* [2003] FamCA 1129; see also VLA, *Submission 60*, p. 13.

¹⁷³ VLA, *Submission 60*, p. 13.

¹⁷⁴ VLA, *Submission 60*, p. 13.

¹⁷⁵ VLA, *Submission 60*, p. 13.

¹⁷⁶ Ms Kristen Wallwork, Executive Director, Springvale Monash Legal Service Inc., *Committee Hansard*, Melbourne, 24 July 2017, p. 27.

¹⁷⁷ Springvale Monash Legal Service, *Submission 47*, p. 6.

Family Law Act. However, magistrates have been ‘very reluctant to use those powers’.¹⁷⁸ Evidence suggests state and territory magistrates rarely exercise the jurisdiction,¹⁷⁹ identifying a number of contributing causes, including:

- lack of expertise and knowledge of family law, which it acknowledged as complex,¹⁸⁰
- resourcing and a lack of time in busy courts;¹⁸¹
- structural impediments¹⁸² including:
 - the requirement that the parties must consent to the state or territory court exercising the family law jurisdiction in parenting matters,¹⁸³
 - the monetary limit (\$20,000) on hearing property division matters;¹⁸⁴ and
 - a 21 day limit on a state or territory court’s variation of a family law order.¹⁸⁵

4.134 A number of recent reviews recommended supporting state and territory magistrates to exercise their jurisdiction under the Family Law Act to overcome jurisdictional fragmentation so that family violence, child

¹⁷⁸ Dr Heather Nancarrow, Chief Executive Officer, Australia’s National Research Organisation for Women’s Safety, *Committee Hansard*, Sydney, 31 July 2017, p. 6.

¹⁷⁹ Australian Paralegal Foundation, *Submission 8*, p. 14; Castan Centre for Human Rights Law, *Submission 57*, p. 6; Gippsland Community Legal Service, *Submission 66*, p. 5; Ms Kristen Wallwork, Executive Director, Springvale Monash Legal Service Inc., *Committee Hansard*, Melbourne, 24 July 2017, pp. 30-31; Dr Heather Nancarrow, Chief Executive Officer, Australia’s National Research Organisation for Women’s Safety, *Committee Hansard*, Sydney, 31 July 2017, p. 6.

¹⁸⁰ Australian Paralegal Foundation, *Submission 8*, p. 14; Castan Centre for Human Rights Law, *Submission 57*, p. 6; Ms Kristen Wallwork, Executive Director, Springvale Monash Legal Service Inc., *Committee Hansard*, Melbourne, 24 July 2017, p. 31.

¹⁸¹ Castan Centre for Human Rights Law, *Submission 57*, p. 6.

¹⁸² Castan Centre for Human Rights Law, *Submission 57*, p. 6.

¹⁸³ *Family Law Act 1975* (Cth), s 69N(2); see also Gippsland Community Legal Service, *Submission 66*, p. 5.

¹⁸⁴ *Family Law Act 1975* (Cth), s 46(1); see also: Ms Helen Matthews, Director, Legal and Policy, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, pp. 34-35.

¹⁸⁵ Gippsland Community Legal Service, *Submission 66*, p. 5; Ms Helen Matthews, Director, Legal and Policy, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, pp. 34-35.

protection and family law matters could be dealt with by a single judge.¹⁸⁶
Most recently, the Royal Commission commented:

Magistrates' exercise of their power to resolve parenting disputes in the Magistrates' Court will make it easier for families to resolve such matters without having to navigate both state and federal courts. We believe that magistrates should also be encouraged to exercise their Family Law Act jurisdiction and family law matters should be listed in the Magistrates' Court, whenever possible. ... Some magistrates may lack expertise in family law and are not confident in dealing with these issues. We consider that magistrates should have sound and up-to-date knowledge of federal family law in addition to knowledge and skills in the area of family violence, so that they are equipped to exercise their jurisdiction.¹⁸⁷

4.135 A number of stakeholders to the present inquiry also identified the opportunity for state and territory magistrates to more frequently exercise their family law jurisdiction.¹⁸⁸

4.136 For example, Women's Legal Service Australia commented:

So while the one stop shop might be a good idea, again, it is a question of resourcing. It would be terrific for people to have their crisis of family violence upon separation, for example, dealt with in the one court that is looking at its intervention order where that same court can make some decisions regarding children. But that would only be if there were adequate resources and adequate time and not people being barrelled through.¹⁸⁹

4.137 The Hon. Professor Marcia Neave AO was of a similar view that if family law matters were resolved concurrent with family violence orders by state and territory courts, the risk of family violence may be prevented from escalating. Professor Neave explained:

¹⁸⁶ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 54; Victorian Royal Commission into Family Violence, *Report and Recommendations*, 2016, Volume IV, p. 211.

¹⁸⁷ Victorian Royal Commission into Family Violence, *Report and Recommendations*, 2016, Volume IV, p. 211.

¹⁸⁸ Castan Centre for Human Rights Law, *Submission 57*, p. 6; Gippsland Community Legal Service, *Submission 66*, p. 3; Hume Riverina Community Legal Service, *Submission 76*, p. 10; Ms Joanna Fletcher, Chief Executive Officer, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 31; Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, pp. 9-10.

¹⁸⁹ Ms Joanna Fletcher, Chief Executive Officer, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 31.

The other advantage of that is, if you do it early, you stop the escalation. It means that people aren't waiting for a long period of time to work out what's going to happen, you hope. But we don't know, so we need to have a ... demonstration court project.¹⁹⁰

- 4.138 The Castan Centre for Human Rights Law identified that encouraging state and territory magistrates courts to more regularly exercise family law jurisdiction would also improve access to justice for those who have experienced family violence.¹⁹¹
- 4.139 ANROWS informed the Committee of amendments introduced in Queensland that will require state magistrates sitting in the Specialist Domestic Violence Court to consider whether family law orders need to be varied or revoked to ensure the safety of children in those various systems.¹⁹² Specialist domestic violence courts are further examined below.
- 4.140 Women's Legal Services Australia noted that a referral from a state or territory magistrate to an FDR service, commenting: 'when somebody is in a violent situation and they leave that relationship, they do not have to jump in and make decisions about their family law picture. That is going to change over time'.¹⁹³ However, the Castan Centre for Human Rights Law noted that federally-funded services such as FDR, are currently 'oriented to the federal family court system and good links have not generally been established between local [FDR] service providers ... and local courts'.¹⁹⁴
- 4.141 Evidence to the present inquiry suggests that the state and territory magistrates courts would require additional training and resources to adequately and effectively exercise family law jurisdiction.¹⁹⁵ Professor

¹⁹⁰ The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 4.

¹⁹¹ Castan Centre for Human Rights Law, *Submission 57*, p. 6.

¹⁹² Dr Heather Nancarrow, Chief Executive Officer, Australia's National Research Organisation for Women's Safety, *Committee Hansard*, Sydney, 31 July 2017, p. 6.

¹⁹³ Ms Joanna Fletcher, Chief Executive Officer, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 31.

¹⁹⁴ Castan Centre for Human Rights Law, *Submission 57*, p. 6.

¹⁹⁵ Castan Centre for Human Rights Law, *Submission 57*, p. 6; NLA, *Submission 88*, p. 10; Legal Aid NSW, *Submission 90*, p. 15; Professor Belinda Fehlberg, *Submission 106*, p. 2; Ms Joanna Fletcher, Chief Executive Officer, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 31; The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 4.

Neave stated, 'the Australian Government cannot expect the magistrates court do to all this work and not provide it with funding to do this work'.¹⁹⁶ The Castan Centre for Human Rights Law similarly noted:

With busy lists and tight funding for family violence and child protection matters, the additional cost requirements imposed by increase family law load on the local courts will be prohibitive for many jurisdictions. Given that increased exercise of family law powers by the State and Territory courts is expected to reduce the caseload burden on the federal family courts, some form of payment by the Commonwealth is appropriate.¹⁹⁷

4.142 Submissions from the Victorian Government and the Northern Territory Government strongly advocated for additional resourcing to determine family law matters in the state and territory courts.¹⁹⁸ The Northern Territory Government also outlined a number of other impediments to the greater exercise of the jurisdiction in the Northern Territory including the absence of requisite family law expertise among magistrates.¹⁹⁹ Opportunities for improved training of state and territory magistrates is discussed further in Chapter 8.

4.143 As noted in Chapter 1, the Australian Government recently released an exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017 that would, among other things:

- expressly enable state and territory children's courts to exercise jurisdiction under the Family Law Act; and
- increase the monetary limit on the total property pool in property division matters; and
- remove the 21 day limit on a state or territory court's variation of a family law order.²⁰⁰

¹⁹⁶ The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 4.

¹⁹⁷ Castan Centre for Human Rights Law, *Submission 57*, p. 6.

¹⁹⁸ Victorian Government, *Submission 87*, pp. 3, 5; Northern Territory Government, *Submission 109*, p. 3.

¹⁹⁹ Northern Territory Government, *Submission 109*, p. 3.

²⁰⁰ Family Law Amendment (Family Violence and Other Measures) Bill 2017; see also Attorney-General's Department, *Consultation paper – Amendments to the Family Law Act 1975 to respond to family violence*, December 2016, p. 4.

- 4.144 Significantly however, and as the accompanying consultation paper acknowledges, it is not the Australian Government's intention for state courts to become the primary fora to hear family law matters.²⁰¹
- 4.145 Notably, the Law Council of Australia cautioned against encouraging state and territory magistrates courts to exercise jurisdiction under the Family Law Act due to the resourcing and time limitations:
- ... magistrates are under an enormous amount of pressure ... They are already overworked. To add to them the family law work is not sustainable. They could not do it. We also think that the federal courts have more experience to deal with it.²⁰²

Specialist courts, divisions and lists

- 4.146 The term 'specialised family violence courts' is a general description to refer to a division, program, specialised list or a specialist family violence court room within existing state or territory magistrates or local courts set up to deal with family violence. In Australia, family violence courts now operate in New South Wales, Victoria, Queensland, South Australia, Western Australia, and the Australian Capital Territory.
- 4.147 Specialised family violence courts differ significantly in their features and degree of specialisation. However, such courts will typically exhibit some, or all, of the following:
- Specialised personnel
 - These will include specialised judicial officers, but may also involve specialised prosecutors, lawyers, victim support workers, and community corrections officers. In some cases, these personnel may be chosen because of their specialised skills, or be given specialised training in family violence.
 - Specialised procedures
 - These will include special days in court dedicated to family violence matters ('dedicated lists'). They may also include 'case coordination mechanisms' to identify link, and track cases related to family violence, such as integrated case information systems, or the use of

²⁰¹ Attorney-General's Department, *Consultation paper – Amendments to the Family Law Act 1975 to respond to family violence*, December 2016, p. 4.

²⁰² Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, 30 May 2017, pp. 8- 9.

‘specialised intake procedures’ (specialised procedures that apply when the victim first enters the court system).

- Emphasis on specialised support services
 - There will be someone, employed by the Court or another organisation, available to support family violence victims in managing the court process, and often these workers are responsible for referring victims to other services, such as counselling. There may also be specialised legal advice or representation available for both the victim and defendant.
- Special arrangements for victim safety
 - Some courts will also include specially designed rooms and separate entrances to ensure the safety of victims, and may offer facilities which enable vulnerable witnesses to give evidence remotely.
- Perpetrator programs
 - Some courts have the capacity to order or refer an offender to a program which aims to educate the offender and address personal issues to prevent re-offending, usually through counselling. Some courts have offender support workers to engage and refer offenders to behavioural change programs.

4.148 Specialist family violence courts were discussed widely in the evidence to the inquiry.²⁰³ A number of previous reviews and reports have similarly discussed the benefits of specialist family violence courts. For example, in a 2015 report, the Family Law Council has noted the following:

Council also notes the existence and proposed expansion of specialist family violence courts in several states. ... These courts provide a ‘one judge, one family’ model, allowing a single magistrate to exercise multiple jurisdictions where appropriate to address the range of legal needs of clients affected by

²⁰³ Northern Integrated Family Violence Services, *Submission 11*, p. 1; Micah Projects, *Submission 24*, p. 6; People with Disability Australia, *Submission 25*, p. 6; Public Health Association of Australia (PHAA), *Submission 27*, p. 4; Baptist Care Australia, *Submission 28*, p. 3, 5; Safe Steps, *Submission 34*, pp. 4, 11-12; Single Parent Alliance, *Submission 49*, p. 3; VOCAL, *Submission 46*, pp. 21-22; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 3; Victorian Women Lawyers, *Submission 52*, pp. 6-7; Castan Centre for Human Rights Law, *Submission 57*, p. 6; The Deli Women and Children’s Centre (The Deli Centre), *Submission 67*, p. 3; Gippsland Community Legal Centre, *Submission 66*, pp. 3-4; FRSA, *Submission 80*, p. 14; Northern Rivers Community Legal Centre, *Submission 83*, pp. 4-5; Monash University School of Social Sciences, *Submission 100*, p. 8.

family violence. This includes powers to determine family violence protection matters, criminal matters related to family violence and family law matters.²⁰⁴

4.149 Three specific specialist courts were discussed during the inquiry:

- the current, Victorian Magistrates' Court Specialist Family Violence Division in Ballarat and Heidelberg courts, and the forthcoming Specialist Family Violence Court;²⁰⁵
- Queensland's pilot of the Specialist Domestic and Family Violence Court in Southport;²⁰⁶ and
- the Northern Territory's recent announcement of a specialist family violence court in Alice Springs.²⁰⁷

4.150 The Committee was advised however that not all magistrates exercise family law jurisdiction in specialist family violence courts,²⁰⁸ despite the improved risk management as highlighted by the Family Law Council above.

4.151 A number of stakeholders supported the expansion of specialist family violence courts within state and territory magistrates' courts around Australia as a way to better support and protect families affected by family violence.²⁰⁹

4.152 At a site inspection of the specialist family violence court division of the Victorian Magistrates' Court at Heidelberg, the Committee witnessed the importance of co-located services, and the provision of wrap-around services integrated into how the Court dealt with matters involving family violence. The importance of co-location of services and wrap-around

²⁰⁴ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Interim Report, 2015, p. 101.

²⁰⁵ Magistrates' Court of Victoria, *Submission 56*, p. 3; Mr Michael Brandenburg, Strategy Manager, No To Violence and Men's Referral Service, *Committee Hansard*, Melbourne, 24 July 2017, p. 39.

²⁰⁶ Centacare Brisbane, *Submission 22*, p. 5; Queensland Domestic Violence Services Network, *Submission 30*, p. 7; Alice Springs Women's Centre, *Submission 121*, p. 5.

²⁰⁷ Northern Territory Government, *Submission 109*, pp. 4-5; Mrs Dianne Gipey, Chief Executive Officer, Alice Springs Women's Shelter, *Committee Hansard*, Alice Springs, 22 August 2017, p. 2; Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 10.

²⁰⁸ The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 4; Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 10.

²⁰⁹ Safe Steps, *Submission 34*, p. 11; Ms Rosie Batty, Private Capacity, *Committee Hansard*, Melbourne, 24 July 2017, p. 15.

services were also identified in evidence to the inquiry.²¹⁰ This will be further discussed in Chapter 9.

- 4.153 Evidence to the present inquiry also discussed proposals to adopt the specialist family violence court model to the federal family courts. Some stakeholders recommended a specialist family violence court for the Federal Circuit Court.²¹¹ Other stakeholders proposed a specialist family violence listing in the Family Court modelled on that Court's Magellan program.²¹² This was discussed above at paragraph 4.93.

Legal representation in family law matters

Access to legal representation

- 4.154 As noted in Chapter 3, the cost of accessing the family law system is prohibitive for most families.²¹³ Many families simply cannot afford legal representation, and the legal aid system 'has never been funded at a level that would allow a lawyer appointed for every person who cannot afford one'.²¹⁴
- 4.155 Nationally, in 2015-16 legal aid commissions provided over 2.2 million services, of which one in five were related to family violence, child

²¹⁰ Northern Integrated Family Violence Services, *Submission 11*, p. 1; Micah Projects, *Submission 24*, p. 6; People with Disability Australia, *Submission 25*, p. 6; PHAA, *Submission 27*, p. 4; Single Parent Alliance, *Submission 49*, p. 3; Victorian Women Lawyers, *Submission 52*, pp. 6-7; The Deli Centre, *Submission 67*, p. 3; FRSA, *Submission 80*, p. 14; Northern Rivers Community Legal Centre, *Submission 83*, pp. 4-5.

²¹¹ Centacare, *Submission 22*, p. 5; Ms Emma Smallwood, Acting Associate Director, Family Violence Response, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 33; Ms Christine Craik, National Vice President, Australian Association of Social Workers, *Committee Hansard*, Melbourne, 24 July 2017, p. 47; Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, pp. 14-15.

²¹² Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 3; Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, pp. 14-15.

²¹³ Queensland Law Society, *Submission 38*, p. 4; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 1; For Kids Sake, *Submission 79*, p. 5, Australian Brotherhood of Fathers, *Submission 110*, p. 16.

²¹⁴ VLA, *Submission 60*, p. 21.

protection and/or family law matters.²¹⁵ In Victoria, 80 per cent of legally aided family law matters involve family violence.²¹⁶

- 4.156 The means tests for financial eligibility for a grant of legal assistance set by each legal aid commission to manage their fixed funding responsibly are 'quite strict'. Only parents with very minimal financial means qualify for legal aid.
- 4.157 In its recent report *Access to Justice Arrangements*, the Productivity Commission found that there are more people living in poverty (14 per cent) than are financially eligible for legal aid (8 per cent).²¹⁷ The Productivity Commission concluded that funding provided to legal aid commissions is inadequate to fulfil the commissions' roles, and that additional assistance in civil law areas (including family law) could prevent the costly escalation of disputes.²¹⁸ To address the unmet legal need, the Productivity Commission recommended an additional \$200 million per year be provided to fund legal assistance services.²¹⁹
- 4.158 A large number of participants in the inquiry discussed the limitations on access to legal assistance, with many making recommendations for increases in funding to legal assistance providers.²²⁰ For example, Queensland Law

²¹⁵ NLA, *Submission 88*, p. 2.

²¹⁶ Ms Gayathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 28.

²¹⁷ Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report*, No. 72, 2014, Volume 2, pp. 1021-1022.

²¹⁸ Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report*, No. 72, 2014, Volume 2, Recommendations 21.4 and 21.5, pp. 741-743; see also VLA, *Submission 60*, p. 17.

²¹⁹ Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report*, No. 72, 2014, Volume 2, Recommendation 21.4, p. 741.

²²⁰ Statewide Children's Resource Program, *Submission 3*, p. 3; Cara House, *Submission 21*, p. 14; Micah Projects, *Submission 24*, p. 3; People with Disability Australia, *Submission 25*, p. 3; PHAA, *Submission 27*, p. 4; Queensland Domestic Violence Services Network, *Submission 30*, p. 5; ACT Human Rights Commission, *Submission 33*, p. 1; Queensland Law Society, *Submission 38*, p. 4; VOCAL, *Submission 26*, p. 22; Australian Women Against Violence Alliance, *Submission 49*, p. 2; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 2; Family Law Practitioners of Western Australia, *Submission 53*, p. 1; VLA, *Submission 60*, p. 21; Federation of Ethnic Community Councils Australia, *Submission 62*, p. 2; Hume Riverine Community Legal Services, *Submission 76*, p. 6; NLA, *Submission 88*, p. 7; Legal Aid NSW, *Submission 90*, p. 21; National Association of Community Legal Centres, *Submission 115*, p. 2; The Hon. Professor Nahum Mushin AM, *Submission 123*, pp. 1-2.

Society was of the view that ‘to meaningfully engage in family law proceedings’, a party must have ‘capacity to pay for basic litigation costs including filing fees, process server fees, conduct money to issue subpoenas’. The Society noted that these costs can be prohibitive for many families.²²¹

4.159 Similarly, the Hon. Professor Nahum Mushin AM advised:

The consequences of significant reductions in legal aid funding have serious consequences on Courts, litigants and families, and particularly on children. An unrepresented party in family law proceedings faces unreasonable hurdles which are exacerbated in matters involving family violence.²²²

4.160 Women’s Legal Services Australia discussed the ‘missing middle—the gap between clients who are eligible for legal aid and people who can genuinely afford to pay’. It advised that the ‘missing middle’ is a ‘big gap and it is widening’.²²³ Similarly, the National Association of Community Legal Centres explained that community legal centres ‘try to meet the need that is not able to be picked up by the Legal Aid Commissions’. The Association stated:

[There] is a middle range of people who are not quite eligible for legal aid but are still earning less than \$50,000 or \$60,000 a year, and they do not have the ability to pay legal fees of \$30,000 or \$40,000-plus; it is just not possible for them to be able to engage private solicitors to go through the family law system.²²⁴

Box 4.2 Access to legal representation

The following is a selection of responses to the Committee’s questionnaire:

‘The biggest issue was facing financial hardship and without being able to get legal aid I needed to self-represent. I still incurred legal costs which drained any funds I had, and I was continually under stress and unable to settle into the employment which I had acquired’.

— Respondent from Queensland

²²¹ Queensland Law Society, *Submission 38*, p. 4;

²²² The Hon. Professor Nahum Mushin AM, *Submission 123*, p. 1.

²²³ Ms Joanna Fletcher, Chief Executive Officer, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 30.

²²⁴ Mr Nassim Arrage, Chief Executive Officer, National Association of Community Legal Centres, *Committee Hansard*, Sydney, 31 July 2017, p. 19.

‘For me [the problem is] about finances. It costs a lot for a family court lawyer - I wasn’t entitled to legal aid like my unemployed ex-partner ... I felt like it was a kick in the guts to have to pay out a fortune, especially where I feel like I was doing the right thing by my child at the time’.

—*Respondent from Tasmania*

‘Because I was working I was advised I couldn’t get Legal Aid so I found a local solicitor and was asked to pay her weekly. I went hungry almost every week to pay her. Her total account was \$25,000 and her representation was absolutely abysmal but being in a very small town I didn’t know where else to turn. A few more Legal Aid Solicitors in small areas or townships who could at least steer you in the right direction if need be’.

—*Respondent from Queensland*

‘Because my partner has a successful business I was turned away by legal aid despite having zero access to money to get legal support’.

—*Respondent from Victoria*

‘I spent about 18 months in the court system costing me \$26,000. I could not receive legal aid because of some equity we had in our home. In the end I had to give up fighting for my children’s safety due to my lack of finances and his endless supply’.

—*Respondent from South Australia*

‘It’s just too expensive. If you are on a middle income, you get no help, yet you cannot afford the \$500 per hour lawyer’.

—*Respondent from Queensland*

4.161 The inquiry also examined whether unmet legal need could be met with greater provision of pro bono services. The Australian Pro Bono Centre advised that while pro bono legal work ‘makes a small contribution to addressing unmet legal need, it is not, and cannot be, a substitute for substantial publicly funded legal assistance ... particularly in family law’.²²⁵

²²⁵ Australian Pro Bono Centre, *Submission 9*, p. 5; see also Mr John Corker, Chief Executive Officer, Australian Pro Bono Centre, *Committee Hansard*, Sydney, 31 July 2017, pp. 22, 30; Mr David

The Centre explained that providing pro bono assistance in family law matters is difficult as it requires an appreciation of the unique nature of family law and due to its complexity, rarely involves discrete tasks, which are best suited to pro bono assistance.²²⁶

- 4.162 Lander & Rogers, a commercial law firm providing pro bono family law services in Melbourne, advised that family law is significantly complex and requires specialisation:

Family law is certainly not an area of law where you can just read a book and become an expert on it ... It is not an area that you can dabble in. It is not an area that you can act in discrete tasks for. If you are doing family law, you need to be doing it every day of the week, and it is dangerous to do otherwise. Giving advice to litigants, particularly vulnerable women, giving advice to them in relation to appropriate parenting arrangements and appropriate property settlements when you do not have expertise in family law is dangerous.²²⁷

- 4.163 Victoria Legal Aid advised that ‘we are never going to be able to fund everyone to have a lawyer’. Consequently, it advocated that the family law system must be designed to better support self-represented litigants. This is discussed in the following section.

Self-represented litigants

- 4.164 The family law courts have ‘always had to deal with large numbers of people without legal representation’.²²⁸ Indeed, a significant volume of litigants engaged in the family law system are self-represented.
- 4.165 In 2016-17, 15 per cent of matters before the Family Court involved parties without legal representation at trial, and in 26 per cent of matters only one party had a legal representative at trial. For applications finalised by the Family Court in 2016-17, in four per cent of matters neither party had a legal

Hillard, Pro Bono Partner, Clayton Utz, *Committee Hansard*, Sydney, 31 July 2017, p. 27; Ms Michelle Hannon, Partner, Gilbert + Tobin, *Committee Hansard*, Sydney, 31 July 2017, p. 28; Ms Rachell Davey, Special Counsel, Lander & Rogers, *Committee Hansard*, Sydney, 31 July 2017, p. 37; Ms Nerida Harvey, Principal Solicitor, Community Referral Service, Law Society of New South Wales, *Committee Hansard*, Sydney, 31 July 2017, p. 37.

²²⁶ Mr John Corker, Chief Executive Officer, Australian Pro Bono Centre, *Committee Hansard*, Sydney, 31 July 2017, pp. 22-23.

²²⁷ Ms Rachell Davey, Special Counsel, Lander & Rogers, *Committee Hansard*, Sydney, 31 July 2017, p. 37.

²²⁸ VLA, *Submission 60*, p. 21.

representative at some point in proceedings, and in 19 per cent of matters only one party had a legal representative. In a submission, the Family Court stated that the percentage of those litigants without representation at trial has been steadily increasing in the period 2012-13 to 2016-17.²²⁹ The Federal Circuit Court did not make a submission to the inquiry, and its Annual Report does not refer to statistics on self-represented litigants.

- 4.166 The statistic is even higher in the Federal Circuit Court where 52 per cent of family law trials in 2014–15 involved at least one party who was unrepresented and in 20 per cent of these cases, both parties were unrepresented. Evidence to this inquiry suggests that the number of self-represented litigants is growing.²³⁰

Box 4.3 Self-represented litigants

The following is a selection of responses to the Committee’s questionnaire:

‘Imagine learning to walk for the first time, as an adult, that is what self-representing in court is like but there is not support and no clear understandable rulebook and guidelines. I had no idea what I was doing, it was impossible to get proper legal advice as the free legal services did not have time to go through your case properly and were unwilling to give any firm advice. It was scary being self-represented against ex’s lawyer and then ex himself when he began self-representing. I suffer post-traumatic stress disorder. [My] psychologist and I believe that had I not endured the court process as I did then I would not have [post-traumatic stress disorder], I was already well on the way to recovery from the violent relationship’.

— Respondent from Victoria

‘Due to the cost of legal representation, I was forced to represent myself at the final interim hearing. This was extremely stressful and placed me in front of my ex-husband and his lawyer, unsupported, with the public, and a raft of barristers and other people watching on. I had to navigate the legal process alone, whilst experiencing the visceral triggering that is the legacy of abuse’.

²²⁹ Family Court of Australia, *Submission 44.1*, pp. 3-4.

²³⁰ ACT Human Rights Commission, *Submission 33*, p. 4.

—*Respondent from New South Wales*

‘I have on numerous occasions decided not to reengage the court system despite ongoing abuse because I simple can’t afford to and don’t wish to self-represent because publically challenging him myself is very risky, scary and asks me to remember terrible violence’.

—*Respondent from New South Wales*

‘When I represented myself over a broken parenting plan, navigating the whole process [was] extremely challenging. It took hours of my time to research how I needed to respond and what I was able to submit to court. [It] was also incredibly daunting, I felt like I had no opportunity to let the judge know my real feelings’.

—*Respondent from Queensland*

4.167 The Queensland Law Society commented that in matters where one or more parties are self-represented, it is ‘more difficult for the Court to be provided with all the relevant evidence and hear relevant arguments necessary in making an informed decision’.²³¹ Victoria Legal Aid noted:

There will always be a number of people who do not qualify for legal aid. Legal aid also does not address when a parent chooses not to have a lawyer so that they can run their family law case on their own. Unfortunately, in a small number of cases this choice is made, including by an abusive party in order to use the legal process to intimidate or harass a victim of family violence. VLA recognises that matters involving self-represented litigants present a challenge for the family law system to manage.²³²

4.168 Queensland Domestic Violence Services Network described the disadvantages faced by self-represented litigants:

Self-represented litigants are often confused and bewildered by the court system and processes as a whole, and even with guidance, can be overwhelmed with the work that falls on them (tracking dates, developing

²³¹ Queensland Law Society, *Submission 38*, p. 4.

²³² VLA, *Submission 60*, p. 22.

affidavits, submitting appropriate forms in a timely fashion, communicating with the other party, and so on).²³³

4.169 Queensland Domestic Violence Services Network advocated for a 'less adversarial system employed in the cases of domestic or family violence, particularly where there are also self-represented litigants'.²³⁴ Parenting Management Hearings, as discussed above at paragraphs 4.62-4.72, are intended to provide a less-adversarial approach to parenting disputes for self-represented litigants.

4.170 As judges are limited in the assistance they can provide to self-represented litigants,²³⁵ a number of stakeholders recommended improving information available to inform self-represented parties of processes and admissible evidence, including family reports.²³⁶ Indeed, two recent ANROWS studies have found that existing arrangements to support self-represented families before the Court 'were not effective'.²³⁷

4.171 Salvos Legal Humanitarian recommended the development of plain language, culturally appropriate, accessible guidelines to drafting applications, responses and affidavits in line with established rules of evidence in written or video form. It recommended that such guidelines include the following:

- information regarding what type of evidence is admissible in court and how such evidence ought to be presented;
- proforma parenting orders;
- flow-charts outlining the stages of common law proceedings, including estimated timeframes of each stage of the proceedings; and
- plain language explanations of key sections of the Family Law Act such as section 60CC.²³⁸

Direct cross-examination

²³³ Queensland Domestic Violence Services Network, *Submission 30*, p. 4; see also VOCAL, *Submission 46*, p. 14.

²³⁴ Queensland Domestic Violence Services Network, *Submission 30*, p. 4.

²³⁵ The Hon. Professor Nahum Mushin AM, *Submission 123*, p. 1.

²³⁶ Help Family Law, *Submission 18*, p. 8; Salvos Legal Humanitarian, *Submission 74*, p. 3; Australian Brotherhood of Fathers, *Submission 110*, p. 18.

²³⁷ ANROWS, *Submission 73*, p. 10.

²³⁸ Salvos Legal Humanitarian, *Submission 74*, p. 3.

- 4.172 Under current rules, self-represented perpetrators may cross-examine victims during court proceedings and a self-represented victim may also have to cross-examine a perpetrator. Victoria Legal Aid noted that cross-examination is a ‘way of testing evidence to give the Court confidence it needs to rely on that evidence when making rulings’.²³⁹
- 4.173 Queensland Domestic Violence Services Network explained that the ability of a perpetrator to cross-examine the target of that violence ‘further traumatises victims, and props up the belief of the perpetrator that he is entitled to his abuse and is supported by the system in committing such abuse’.²⁴⁰

Box 4.4 Cross-examination

The following is a selection of responses to the Committee’s questionnaire:

‘It was extremely traumatic being cross-examined by my [ex-partner]. Even having him sit in the courtroom while I was questioned earlier on in the process was enough to make me feel uncomfortable and intimidated - he was laughing and smiling and making comments as I spoke and staring at me the entire time’.

— *Respondent from the Australian Capital Territory*

‘I felt very sad to be put in that position [of cross-examination]. It’s unnecessary theatre, whoever does the cross-examination’.

— *Respondent from New South Wales*

‘The cross-examination process makes the victim feel like they are partly to blame, it re-traumatises the victim and brings up unnecessary history to shame and rattle the victim. This process needs to be treated delicately, not based on smart legal tactics. It needs to be based on a process that can obtain the facts and provide recommendation, not by attacking victims in the witness box’.

— *Respondent from Victoria*

²³⁹ VLA, *Submission 60*, p. 22.

²⁴⁰ Queensland Domestic Violence Services Network, *Submission 30*, p. 4.

4.174 The ACT Human Rights Commission also commented that this can be as traumatic as the original violence:

For victims of family violence, the experience of being personally cross-examined by their perpetrator can be just as traumatic as the original violence itself. The current legislative framework is insufficient in ameliorating some of the negative experiences for victims of family violence during family law proceedings and does not protect victims from the effects of being directly confronted by their perpetrator.²⁴¹

4.175 Victoria Legal Aid emphasised that although a small number of matters before the Court reach a final hearing, ‘the mere possibility that direct cross-examination could occur can ... cause victims of violence to agree to unsafe consent orders or to abandon [proceedings]’.²⁴²

4.176 The Committee was advised that in criminal matters ‘all jurisdictions now impose restrictions upon the ability of a defendant in sexual offence proceedings to personally cross-examine the complainant, and some also apply to violence offence proceedings’.²⁴³ For example, Victorian family violence legislation prohibits perpetrators of family violence from cross-examining their ex-partners in family violence intervention order proceedings.²⁴⁴ Similarly, Western Australia recently enacted legislation granting the Court discretionary power to prohibit cross-examination of a victim by the defendant across a range of criminal proceedings.²⁴⁵

4.177 This issue was addressed in two separate reports: in 2014 the Productivity Commission recommended amending the Family Law Act to include provisions restricting personal cross-examination by alleged perpetrators ‘along the lines of provisions that exist in State and Territory family violence legislation’.²⁴⁶ The Commission noted however that adequate funding to

²⁴¹ ACT Human Rights Commission, *Submission 33*, p. 2.

²⁴² VLA, *Submission 60*, p. 22.

²⁴³ ACT Human Rights Commission, *Submission 33*, p. 3; see also Sexual Assault Support Service, *Submission 32*, p. 6.

²⁴⁴ Ms Faye Spiteri, Chair of the Board, InTouch Multicultural Centre Against Family Violence, *Committee Hansard*, Melbourne, 24 July 2017, p. 54.

²⁴⁵ Sexual Assault Support Service, *Submission 32*, p. 6.

²⁴⁶ Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report*, No. 72, 2014, Volume 2, Recommendation 24.2, p. 865.

legal aid commissions will not address completely the issue of direct cross-examination in the family law courts.²⁴⁷

- 4.178 More recently, the Family Law Council concluded in 2016 that the cross-examination of unrepresented vulnerable witnesses not only perpetuates the abuse but results in the Court receiving incomplete or poor quality evidence. The Council also found that it raises significant procedural fairness issues.²⁴⁸
- 4.179 There are several existing measures available to the Court to manage direct cross-examination in child-related family law proceedings and limit other potentially abusive behaviours by self-represented litigants, including:
- limiting or controlling in-person cross-examination;²⁴⁹
 - using remote witness facilities;²⁵⁰ or
 - making findings as to family violence at an early stage.²⁵¹
- 4.180 Significantly however, Victoria Legal Aid advised that in its experience, these measures are ‘inconsistently applied’ and ‘ultimately inadequate in many cases’.²⁵² It also advised that there are a number of options available to legal representatives of victims including careful responses to subpoenas, and requesting witness protection like remote evidence facilities. However, it noted that ‘unrepresented survivors are unlikely to be aware of these measures’.²⁵³
- 4.181 In July 2017, the Australian Government released an exposure draft of the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017. The exposure draft proposes amendments to the Family Law Act including a legislative ban to prevent an unrepresented party from directly cross-examining, or being cross-examined by, another party if there

²⁴⁷ Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report*, No. 72, 2014, Volume 2, p. 865.

²⁴⁸ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Final Report*, 2016, p. 102; see also Queensland Law Society, *Submission 38*, p. 4.

²⁴⁹ *Family Law Act 1975* (Cth), s 69ZN.

²⁵⁰ *Family Law Act 1975* (Cth), s 69ZQ.

²⁵¹ *Family Law Act 1975* (Cth), s 69ZR.

²⁵² VLA, *Submission 60*, p. 22.

²⁵³ VLA, *Submission 60*, p. 23.

is an allegation of family violence between them, and one or more of the following are satisfied:

- either party has been convicted, or is charged with, an offence involving violence, or a threat of violence, to the other party;
- a family violence order (other than an interim order) applies to both parties;
- an injunction for personal protection under sections 68B or 114 of the Family Law Act applies to both parties.²⁵⁴

4.182 The proposed amendments seek to maintain procedural fairness for all parties by allowing self-represented parties to ask questions through an intermediary, appointed by the Court. The only exception to this new proposed subsection would be where the Court grants leave (see below for when the Court can allow direct cross examination to occur). The proposed amendments would apply both in the case where the examining party is the alleged perpetrator of the family violence and the witness party is the alleged victim, and in the case where the examining party is the alleged victim and the witness party is the alleged perpetrator.²⁵⁵

4.183 Addressing the ability of perpetrators to cross-examine their victims was strongly supported by the vast majority of participants in the inquiry.²⁵⁶

²⁵⁴ Attorney-General's Department, *Consultation Paper – Addressing direct cross-examination in family law proceedings involving family violence*, July 2017, pp. 4-5.

²⁵⁵ Attorney-General's Department, *Consultation Paper – Addressing direct cross-examination in family law proceedings involving family violence*, July 2017, p. 4.

²⁵⁶ Statewide Children's Resource Program, *Submission 3*, p. 2; Northern Integrated Family Violence Services, *Submission 11*, p. 2; InTouch, *Submission 13*, pp. 15-16; Women Everywhere Advocating Violence Elimination, *Submission 16*, p. 6; Cara House, *Submission 21*, p. 15; Micah Projects, *Submission 24*, p. 6; People with Disability Australia, *Submission 25*, pp. 7-8; Domestic Violence Crisis Service, *Submission 29*, p. 4; Queensland Domestic Violence Services Network, *Submission 30*, p. 4; Sexual Assault Support Services, *Submission 32*, p. 3; ACT Human Rights Commission, *Submission 33*, pp. 1, 2-3; Queensland Law Society, *Submission 38*, p. 5; Mallee Family Care, *Submission 41*, p. 3; Springvale Monash Legal Service, *Submission 47*, p. 7; Domestic Violence NSW, *Submission 48*, pp. 13-14; Australian Women Against Violence Alliance, *Submission 49*, pp. 7-8; Family Law Practitioners of Western Australia, *Submission 53*, p. 1; Castan Centre for Human Rights, *Submission 57*, p. 12; WLSNSW, *Submission 71*, p. 3; ANROWS, *Submission 73*, p. 11; Hume Riverina Community Legal Service, *Submission 76*, p. 6; For Kids Sake, *Submission 79*, p. 13; Northern Rivers Community Legal Centre, *Submission 83*, pp. 7-8; Bravehearts, *Submission 84*, p. 5; Victorian Government, *Submission 87*, p. 4, 6; NLA, *Submission 88*, p. 10; Legal Aid NSW, *Submission 90*, pp. 19-21; Monash University School of Social Sciences, *Submission 100*, p. 7; Mrs Hetty Johnston AM, Founder and Executive Chair, Bravehearts Foundation Ltd, *Committee Hansard*, Melbourne, 24 July 2017, p. 4; Ms Rosie Batty, Private Capacity, *Committee Hansard*, Melbourne, 24 July 2017, p. 12; Ms Joanna Fletcher, Chief Executive Officer, Women's Legal

- 4.184 Some participants in the inquiry discussed the mechanism as proposed in the exposure draft, suggesting alternative mechanisms or amendments to the Australian Government's proposal.²⁵⁷ A number of participants emphasised the importance of legal representation,²⁵⁸ with the Law Council of Australia noting that legal representation would be required to implement the intention of the mechanism proposed in the exposure draft.²⁵⁹
- 4.185 Similarly, Women's Legal Services Australia explained:
- ... we believe the person asking the questions should be legally qualified and that there would, therefore, need to be funding for that. One of the reasons for that is that a legally qualified person has ethical obligations not to ask certain inappropriate questions. So rather than the judicial officer being the sole guard against that kind of harassing questions, if the professional asking those questions is not operating as some kind of a screen for them, you are not doing a great deal to address the underlying concern behind the provision, which is a perpetrator finding a mechanism to re-abuse a victim. So, yes, we think there should be a lawyer and we think there would need to be funding for that.²⁶⁰
- 4.186 Legal Aid Victoria cautioned against the use of a court appointed person to 'simply serve as a mouthpiece for the perpetrator litigant [as] this is unlikely

Service Victoria, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 20; Ms Gayathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 26; Mr Michael Brandenburg, Strategy Manager, No To Violence and Men's Referral Service, *Committee Hansard*, Melbourne, 24 July 2017, p. 40; Ms Christine Craik, National Vice President, Australian Association of Social Workers, *Committee Hansard*, Melbourne, 24 July 2017, p. 47; Ms Faye Spiteri, Chair of the Board, InTouch Multicultural Centre Against Family Violence, *Committee Hansard*, Melbourne, 24 July 2017, p. 54; Ms Meredith Lea, Policy Officer, Violence Prevention, People with Disability Australia, *Committee Hansard*, Sydney, 31 July 2017, p. 47.

²⁵⁷ Ms Gayathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 26; Mrs Alla Epelboym, Principal Lawyer and Legal Centre Manager, InTouch Multicultural Centre Against Family Violence, *Committee Hansard*, Melbourne, 24 July 2017, p. 59.

²⁵⁸ InTouch, *Submission 13*, p. 16; Mrs Alla Epelboym, Principal Lawyer and Legal Centre Manager, InTouch Multicultural Centre Against Family Violence, *Committee Hansard*, Melbourne, 24 July 2017, p. 59.

²⁵⁹ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 10.

²⁶⁰ Ms Joanna Fletcher, Chief Executive Officer, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 20.

to resolve the problems direct cross-examination presents'.²⁶¹ Rather, Legal Aid Victoria proposed a pilot of a Counsel Assisting role as recommended by the Family Law Council.²⁶²

4.187 In its 2016 report, the Family Law Council noted that a Counsel Assisting role would have a range of benefits:

The use of this model in such cases would assist the court's determination of the child's best interests by ensuring that all relevant evidence is identified and collated and that all relevant issues are ventilated before the Court in a coherent and efficient way. Council also notes the potential benefits of a Counsel Assisting model for an unrepresented party who has experienced family violence, including by assisting them to narrow the issues in dispute. Council further notes the potential for this approach to help maintain a focus on the best interests of the child throughout the hearing, which may be otherwise compromised in the context of adversarial proceedings.²⁶³

4.188 People with Disability Australia expressed concern with providing discretion to the Court without sufficient training for the Court to be able to appropriately identify family violence, or applying the restrictions in cases where there is no violence.²⁶⁴

Administration and enforcement of court orders

4.189 The administration and enforcement of court orders is critical for the protection of families affected by family violence. Two issues were raised in evidence: the need for a national database of family law, family violence and child protection orders; and challenges with breaches and enforcement of family law orders specifically. Both are addressed below.

A national approach

²⁶¹ Ms Gayathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 26.

²⁶² VLA, *Submission 60*, p. 24.

²⁶³ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Final Report, 2016, p. 134; see also VLA, *Submission 60*, p. 24.

²⁶⁴ Ms Meredith Lea, Policy Officer, Violence Prevention, People with Disability Australia, *Committee Hansard*, Sydney, 31 July 2017, p. 47; see also Mr Michael Brandenburg, Strategy Manager, No To Violence and Men's Referral Service, *Committee Hansard*, Melbourne, 24 July 2017, p. 40.

- 4.190 Successive reviews and reports have recommended a database or a national register that includes information about family violence orders, child protection orders and federal family law orders. In 2010, the ALRC/NSWLRC recommended that such information be available to federal, state and territory police, federal family courts, state and territory courts that hear matters related to family violence and child protection, and child protection agencies.²⁶⁵
- 4.191 This recommendation was more recently made by the Family Law Council, and the Royal Commission. Both reports recommended the creation of an expanded national database for family violence, child protection and family law orders, judgements, transcripts and other court documents that is accessible to each relevant court as well as child protection authorities and police.²⁶⁶
- 4.192 The Council of Australian Governments (COAG) agreed in 2015 to introduce a National Domestic Violence Order Scheme (the National Scheme), so that family violence orders issued in one Australian jurisdiction would be automatically recognised and enforced in all jurisdictions. All states and territories, other than Western Australia, have amended legislation to provide uniform recognition of family violence orders.
- 4.193 The COAG agreement to develop a National Scheme was strongly supported by stakeholders in the present inquiry.²⁶⁷ The National Scheme entered into force on 27 November 2017. From that date, family violence

²⁶⁵ Australian Law Reform Commission and NSW Law Reform Commission, *Family violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, Recommendation 30-18, p. 46.

²⁶⁶ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems – Interim Report*, 2015, Recommendation 5, p. 106; Victorian Royal Commission into Family Violence, *Report and Recommendations*, 2016, Volume IV, Recommendation 134, pp. 215-218.

²⁶⁷ WLSA, *Submission 6*, p. 50; InTouch, *Submission 13*, p. 21; Junction Australia, *Submission 23*, p. 7; VLA, *Submission 60*, p. 33; Baptist Care Australia, *Submission 28*, p. 6; Queensland Law Society, *Submission 38*, p. 6; Mallee Family Care, *Submission 41*, pp. 3-4; Springvale Monash Legal Service, *Submission 47*, p. 8; Salvos Legal Humanitarian, *Submission 74*, p. 4; Legal Services Commission of South Australia, *Submission 77*, p. 4; NFVPLSF, *Submission 78*, p. 23; Northern Rivers Community Legal Centre, *Submission 83*, p. 10; Eastern Community Legal Centre, *Submission 91*, p. 13.

orders issued in any Australian state or territory will be automatically recognised and enforceable nationwide.²⁶⁸

- 4.194 The scheme also includes a national information sharing system between courts and police across Australia which will be operational by the end of 2019.²⁶⁹ Significantly however, the National Scheme is limited to family violence orders issued under state and territory family violence legislation and does not include family law orders or child protection orders as originally recommended by the ALRC/NSWLRC report, and the subsequent Royal Commission and the Family Law Council reports.
- 4.195 Multiple participants in this inquiry proposed that the information sharing system of the National Scheme be extended to include family law and child protection orders as originally recommended by the ALRC/NSWLRC and the Royal Commission reports.²⁷⁰ For example, Victoria Legal Aid stated:
- A national database of court orders applying to families dealing with parenting disputes, family violence and child protection would make courts more effective in protecting vulnerable children. [Victoria Legal Aid's] research on clients seeking help for family issues over the five years to June 2014 showed 12,844 people with multiple family law problems requiring legal assistance. Each of these people could have benefitted from a national database making previous orders easily available.²⁷¹
- 4.196 Similarly, Legal Aid NSW was of the view that an expanded information sharing platform would provide the courts with instant access to information that would allow the presence of family violence to be identified and flagged earlier on. It would also allow courts to be aware of orders and proceedings in other jurisdictions that affect the same family, so as to help ensure consistency and the safety of family members.²⁷²

²⁶⁸ Senator the Hon. Michaelia Cash, Minister for Women, and The Hon Michael Keenan MP, Minister for Justice, 'National enforcement of Domestic Violence Orders to better protect victims', *Media Release*, 25 November 2017.

²⁶⁹ Attorney-General's Department, *Submission 89*, pp. 11-12.

²⁷⁰ Women Everywhere Advocating Violence Elimination, *Submission 16*, p. 7; Law Council of Australia, *Submission 85*, p. 37; VLA, *Submission 60*, p. 33; ANROWS, *Submission 73*, p. 16; Legal Aid NSW, *Submission 90*, p. 12; The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 12.

²⁷¹ VLA, *Submission 60*, p. 33.

²⁷² Legal Aid NSW, *Submission 90*, p. 12.

4.197 The Castan Centre for Human Rights Law supported the Royal Commission's recommendation, commenting that it should be urgently pursued.²⁷³

Breaches and enforcement of family law orders

- 4.198 A significant body of evidence to the inquiry also identified problems with enforcing family law orders following breaches and contraventions by a party, causing significant frustration, distress and considerable expense.²⁷⁴ The Committee was advised that contravention proceedings can take up to six months to resolve.²⁷⁵
- 4.199 Lander & Rogers advised that 'there is very little ramification for parties that do not comply with court orders'. To address this, the firm recommended strengthening enforcement and making enforcement applications easier for parties 'so that [they] do not need to come back to court multiple times to enforce orders that they have already received'.²⁷⁶
- 4.200 The Law Society of NSW similarly recommended the greater use of cost orders to ensure compliance with family law orders.²⁷⁷
- 4.201 As noted in Chapter 1, the Australian Government released an exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017 in December 2016. Among other amendments, the exposure draft proposes to amend the Family Law Act to create a new criminal offence for breaching a personal protection injunction issued under the Act.

²⁷³ Castan Centre for Human Rights Law, *Submission 57*, p. 10.

²⁷⁴ Access Community Services, *Submission 12*, p. 9; Mallee Family Care, *Submission 41*, p. 8; NFVPLSF, *Submission 78*, pp. 23-24; Legal Aid NSW, *Submission 90*, p. 30; Ms Anita Plesa, *Submission 103*, p. 4; Dr Renata Alexander, *Submission 108*, p. 3; Ms Christine Craik, National Vice President, Australian Association of Social Workers, *Committee Hansard*, Melbourne, 24 July 2017, pp. 47, 50; Ms Rachell Davey, Special Counsel, Lander & Rogers, *Committee Hansard*, Sydney, 31 July 2017, pp. 35-36.

²⁷⁵ Ms Anita Plesa, *Submission 103*, p. 4.

²⁷⁶ Ms Rachell Davey, Special Counsel, Lander & Rogers, *Committee Hansard*, Sydney, 31 July 2017, pp. 35-36.

²⁷⁷ Ms Nerida Harvey, Principal Solicitor, Community Referral Service, Law Society of New South Wales, *Committee Hansard*, Sydney, 31 July 2017, p. 36.

- 4.202 Currently, a breach of a personal protection injunction is a private law matter between parties that can only be enforced if the aggrieved party brings a civil enforcement action in a family court.²⁷⁸
- 4.203 The criminalisation of breaches of orders for personal protection was supported by stakeholders.²⁷⁹ For example, Women’s Legal Services Australia commented that the amendment ‘would be beneficial for women who see an escalation of violence after the commencement of family law proceedings [and that] ... women would not need to go to a new court to obtain and enforceable order’.²⁸⁰
- 4.204 The Hon. Professor Marcia Neave AO supported the proposal, though provided the following caution:
- I have some reservations about whether it will work in the way that we all hope. There will need to be an agreement between the Federal Police and the state police about who takes responsibility ... The legislation won’t change anything if that isn’t done. It will still be left to the Federal Circuit [Court].²⁸¹
- 4.205 Professor Neave further advised of the need to develop common sentencing practice for breaches of family violence orders under state and territory legislation and breaches of personal protection orders issued under the Family Law Act, commenting:
- ... it would be most unfortunate if you had sentences being imposed for breach of state orders and people got significant periods of jail time and different sentences were being imposed for breach in the Federal Circuit Court and the Family Court.²⁸²
- 4.206 This was echoed by Women’s Legal Services Australia who recommended that the Australian Government clarify the interaction between the

²⁷⁸ WLSA, *Submission 6*, p. 52.

²⁷⁹ WLSA, *Submission 6*, p. 51; Council of Single Mothers and Their Children, Victoria, *Submission 42*, p. 7; Victorian Government, *Submission 87*, p. 6; The Hon. Professor Marcia Neave AO, *Private Capacity, Committee Hansard*, Melbourne, 25 July 2017, p. 11.

²⁸⁰ WLSA, *Submission 6*, p. 52.

²⁸¹ The Hon. Professor Marcia Neave AO, *Private Capacity, Committee Hansard*, Melbourne, 25 July 2017, p. 11.

²⁸² The Hon. Professor Marcia Neave AO, *Private Capacity, Committee Hansard*, Melbourne, 25 July 2017, p. 11.

criminalisation of breaches of family law personal protection injunctions and the information sharing initiative of the National Scheme.²⁸³

- 4.207 Further, the National Family Violence Prevention and Legal Services Forum recommended that the bill be amended to clarify the interaction between the proposed criminalisation of breaches of personal protection injunctions under the Family Law Act and state and territory family violence orders.²⁸⁴
- 4.208 The Victorian Government supported the proposed criminalisation of breaches of personal protection injunctions, describing the proposal as ‘effectively establishing a system of Commonwealth [domestic violence orders]’. The Victorian Government’s support for the proposal is ‘subject to the establishment of’ information sharing arrangements between state and territory and federal courts and police.²⁸⁵
- 4.209 At the time of writing, the Family Law Amendment (Family Violence and Other Measures) Bill 2017 is yet to be introduced into the Parliament.

Box 4.5 Personal Protection Orders

The following is a selection of responses to the Committee’s questionnaire:

‘I’m on my 6th Protection Orders. He has breached it over 400 times and i have concrete proof and the police won’t charge him because I have family law orders. They have said so. The children are named on the Protection Order’.

—*Respondent from Queensland*

‘Each one of the two [protection orders] failed to go through as my abuser would retaliate through the justice system when served with my order and apply for an order himself, [continuing] his abuse of me and the children’.

—*Respondent from Victoria*

A recent initiative: Family Advocacy and Support Services

²⁸³ WLSA, *Submission 6*, pp. 50-51.

²⁸⁴ NFVPLSF, *Submission 78*, p. 7.

²⁸⁵ Victorian Government, *Submission 87*, pp. 6-7.

- 4.210 A recent initiative of the Australian Government and each state and territory government to address the challenges of self-representation is the pilot of the Family Advocacy and Support Services (FASS). Funded through a National Partnership between each government, the FASS integrates duty lawyer and family violence support services in family law court registries across Australia. The FASS is a refined program of that recommended by the Family Law Council in 2016.²⁸⁶
- 4.211 The FASS is delivered by legal aid commissions. In some locations, legal aid commissions have partnered with local community legal centres to provide legal assistance to both parties.²⁸⁷
- 4.212 Launched in May 2017, the FASS operate in 23 family law court registries across Australia.²⁸⁸ Services are available in most permanent Family Court registries but are not yet funded to extend to all circuit court locations.²⁸⁹ Victoria Legal Aid advised that the FASS is funded for three years.²⁹⁰
- 4.213 The FASS includes:
- legal advice and support to assist clients to engage with family law court processes safely;
 - preparing notices of risk and applications to assist the Court to make evidence-based and safe decisions;
 - trauma-informed and high quality support services, delivered by appropriately qualified personnel, so that clients' non-legal issues, particularly where they elevate the risk of family violence, are identified and responded to alongside legal issues; and
 - assisting families to transition between, and manage matters across, the federal family law and state and territory family violence and child protection systems.²⁹¹

²⁸⁶ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Final Report, 2016, pp. 120-121, Recommendation 1, p. 12.

²⁸⁷ Attorney-General's Department, *Submission 89*, p. 5.

²⁸⁸ Senator the Hon. George Brandis QC, *Launch of the Family Advocacy and Support Services – Speech*, 17 May 2017, Parramatta, <<https://www.attorneygeneral.gov.au/Speeches/Pages/2017/SecondQuarter/Launch-of-the-Family-Advocacy-and-Support-Services.aspx>>, last viewed 3 November 2017.

²⁸⁹ VLA, *Submission 60*, p. 16; Legal Aid NSW, *Submission 90*, p. 5.

²⁹⁰ VLA, *Submission 60*, p. 16.

²⁹¹ NLA, *Submission 88*, p. 15; see also Legal Aid NSW, *Submission 90*, p. 7.

4.214 Victoria Legal Aid, who deliver the FASS in both the Melbourne and Dandenong registries, described the service:

Essentially, it is having the specialist family violence workers at the Court so that when a client comes to the family law courts, they have the ability to cater for not just their legal but also non-legal needs. There is a triage officer, an information referral officer, who will do that initial risk identification. Then the client will go to the non-legal support services as well as the duty lawyer service catering for their needs. So if safety planning is required, that can be done, and a full risk assessment, which looks at things like homelessness. It also links them up with important counselling services and drug and alcohol services.²⁹²

4.215 The Department advised that the FASS will undergo an evaluation at the end of the pilot in 2019 to assist the Australian Government to make future service delivery decisions.²⁹³

4.216 Despite being in its infancy, a number of stakeholders identified clear improvements to the safety of families affected by family violence as a result of the service.²⁹⁴ National Legal Aid noted that the main function of the FASS is to ‘enable improved risk identification at the family law courts, and risk assessment and safety planning to be undertaken’.²⁹⁵ The service is also assisting self-represented litigants to complete necessary documents including the Notice of Risk form.²⁹⁶

4.217 Further, Legal Aid NSW advised that through the FASS, safer arrangements or orders are being made.²⁹⁷ Legal Aid NSW provided a case study (see Box 4.1) to demonstrate the impact of the FASS on safety for families:

Box 4.6 Case study – Consent orders and Family Advocacy and Support Service

The following case study was presented to the Committee:

²⁹² Ms Gayathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 33.

²⁹³ Attorney-General’s Department, *Submission 89*, p. 5.

²⁹⁴ No To Violence–Men’s Referral Service (No To Violence), *Submission 82*, p. 9; NLA, *Submission 88*, p. 4; Legal Aid NSW, *Submission 90*, p. 15.

²⁹⁵ NLA, *Submission 88*, p. 4.

²⁹⁶ NLA, *Submission 88*, p. 4.

²⁹⁷ Legal Aid NSW, *Submission 90*, p. 15.

Amanda [not her real name] presented to the FASS duty lawyer the day before her matter was listed for final hearing. The case related to her two children, twins, aged 10. Amanda and her ex-husband, Tim [not his real name], were both self-represented.

‘Amanda reported a history of domestic violence perpetrated by Tim. She reported that he was physically violence, intimidating, threatening, and controlling towards her.

‘A family report had been prepared in the matter which recommended on one hand, that Tim spend time with the children for around our nights a fortnight. However, the report indicated that if the court was satisfied that there had been family violence in the relationships, the court would need to assess the level of risk to the children in making a determination about parenting arrangements.

‘Amanda had filed an Amending Initiating Application which proposed that Tim spend time with the children four nights each fortnight. Amanda told the FASS lawyer that she did not want to appear ‘hysterical’ and ‘unrealistic’ by limiting Tim’s time with the children. However, she had concerns about their safety in his care given his history of significant violence. Amanda said that because the violence was not ‘directed towards the children’, but rather towards her, she did not feel that she could suggest that the children were at risk of harm.

‘The FASS lawyer spent time with Amanda advising her about:

- the way that the court considers family violence, including the exposure of children to family violence;
- the impacts of family violence on children, even when those children are not direct subject of the physical abuse;
- the role of the family consultant in providing expert evidence to the court about risks to children and effects of family violence;
- the option of changing her application to ensure that the children were safe during their time with Tim, including the possibility of supervision of Tim’s time, or requiring Tim to complete courses or engage in therapy to address his behaviour;
- how to use police records that Amanda had subpoenaed (which supported Amanda’s allegations of serious family violence);
- ways to ask the family consultant about recommendations regarding safety measures for the children, in the even the court found that the

family violence had occurred;

- the measures which might be available to Amanda when giving evidence, given that she would be cross-examined by Time directly, including intervention by the judge to limit harassing questions, and the possibility of giving evidence remotely;
- procedural advice about cross-examination and submissions; and
- the considerations for the court when determining what would be in the best interests of the children.

‘The FASS lawyer also referred Amanda to the FASS social support services, including the new safe room, which would be available for her during the hearing. Amanda was very relieved that those supports were available to her. Amanda was encouraged to return to the duty lawyer for further assistance during the course of the hearing as required.’²⁹⁸

4.218 Subject to a positive evaluation of the FASS, a number of stakeholders recommended the expansion of the program to provide early legal advice and non-legal support services to families at risk in all family law court locations.²⁹⁹

4.219 No To Violence/Men’s Referral Service and Family and Relationships Services Australia recommended increasing the scope and capacity of the FASS, as initially recommended by the Family Law Council.³⁰⁰

4.220 The Family Law Council’s 2016 report discussed an independent family safety service within the non-government sector that could support the family courts and legal practitioners by providing expert family violence-based risk assessments and safety planning where risks factors could be identified.³⁰¹ In its conclusions and recommendations, the Council discussed such a proposal, stating:

Such an agency could be tasked with providing a range of services for client families and family law system professionals, including the courts. Council envisages this including the conduct of risk assessments for clients who are referred to the service by lawyers when risk factors have been identified ... as well as parties who are referred by the courts following identification of risk

²⁹⁸ Legal Aid NSW, *Submission 90*, pp. 19-20.

²⁹⁹ VLA, *Submission 60*, p. 9; NLA, *Submission 88*, p. 3; Legal Aid NSW, *Submission 90*, p. 5.

³⁰⁰ FRSA, *Submission 80*, p. 14; No To Violence, *Submission 82*, pp. 9-10.

³⁰¹ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems – Final Report, 2016*, p. 37.

factors in the Notice of Risk. A dedicated family safety service could also effect referrals to and liaison with relevant services, such as parenting courses and men's behaviour change programs, where the Court orders a person's participation in these programs.³⁰²

4.221 The Council's report investigated whether such an agency should be modelled on the United Kingdom's Children and Family Court Advisory Service (CAFCASS), a non-government organisation with statutory responsibility for child welfare and providing advice to the family courts in family law proceedings. Referring to CAFCASS, the Council commented:

Like [CAFCASS] in the United Kingdom, a family safety service could also be used to monitor a client's engagement with such services and provide assessment reports to the court. Ideally a family safety service would provide a case worker or support person for the child, and be able to continue working with a family following court proceedings.³⁰³

4.222 The Council was of the view that a family safety service could be co-located within Family Relationship Centres with out-posted services at the courts.³⁰⁴

Committee comment

4.223 To better support and protect families affected by family violence, the family law system must be accessible, equitable, responsive and prioritise safety. This vision has guided the Committee's recommendations for reform.

4.224 Although still in its infancy, the development of the FASS is a welcome addition in the family law system. Originally a broader recommendation of the Family Law Council, the FASS is providing significant improvements in the family law system, in line with the vision as set out by this Committee.

4.225 It is encouraging that evidence received indicates that the FASS is improving safety and assisting families to navigate complex and fragmented jurisdictions. The Committee welcomes these positive indications and recommends that the Australian Government considers extending the FASS program to a greater number of locations including in rural and regional

³⁰² Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Final Report, 2016, pp. 120-121.

³⁰³ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Final Report, 2016, pp. 120-121.

³⁰⁴ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Final Report, 2016, pp. 120-121.

Australia. The Committee is of the view that the pilot of the FASS is a first step towards the broader recommendation of the Family Law Council and as currently operates in the United Kingdom. In making these preliminary comments, the Committee will refer back to the FASS in subsequent chapters of this report.

Recommendation 1

4.226 The Committee recommends that the Australian Government considers extending the Family Advocacy and Support Services program, subject to a positive evaluation, to a greater number of locations including in rural and regional Australia.

4.227 The Committee is also concerned by the lack of access to justice where a conflict between law firms arises which can frequently occur in regional areas, as raised in evidence to the inquiry in Alice Springs. The Committee would like to see that there are sufficient legal resources and advice available under such circumstances, which may assist parties to resolve matters out of court.

A new, nationally-consistent risk assessment tool

4.228 First and foremost, the family law system requires a nationally consistent, multi-method, multi-informant, culturally sensitive risk assessment tool. The Committee's is not the first review to come to such a conclusion. As the Coroner concluded in the Inquest into the Death of Luke Batty, the absence of a common and consistently applied risk assessment tool can lead to devastating outcomes for families.

4.229 The tool should be multi method by drawing from a range of existing reports and employ a range of different methodologies in collating that information. Equally, the tool should be multi informant so that a range of persons (including teachers, doctors and other persons associated with the family) may be consulted in the holistic assessment of the risk of family violence.

4.230 While the Committee notes the commitments of all Australian federal, state and territory governments to develop a set of nationally-agreed principles for risk assessment through Council of Australian Governments, the Committee is of the view that this is alone is not sufficient. As recommended by both the (federal) Family Law Council report and the (state-based) Victorian Royal Commission on Family Violence, a consistent risk

assessment tool is required for all jurisdictions and all professions working with families affected by family violence.

- 4.231 The Committee adds its voice to those previous recommendations, for a nationally consistent risk assessment tool—not principles—for use across all professions. The Committee is of the view that this is critical to its vision for an accessible, equitable and responsive family law system. As noted throughout this report, families affected by violence have to navigate through a complex and fragmented legal and non-legal system to find appropriate support and protection from violence. A consistently-applied risk assessment tool is key to addressing the fragmentation of Australia's legal system and its shared responsibilities with non-legal support services.

Recommendation 2

- 4.232 The Committee recommends that the Australian Government progresses, through the Council of Australian Governments, the development of a national family violence risk assessment tool. The tool must be nationally consistent, multi-method, multi-informant and culturally sensitive and be adopted to operate across sectors, between jurisdictions and among all professionals working within the family law system.**

Improved risk-screening for family dispute resolution

- 4.233 The Committee is of the view that, once developed, the national family violence risk assessment tool should also provide assistance to family dispute resolution practitioners providing improved screening of families participating in dispute resolution.
- 4.234 Improvements in family violence risk screening are required of family dispute resolution practitioners. If a family is not appropriately screened for family violence, it is possible that the process of family dispute resolution can either continue abuse and coercion, result in unsafe agreements for families, or both. This is no doubt challenging work for family dispute resolution practitioners.
- 4.235 However, an improved tool that assists practitioners to more effectively screen families participating in family dispute resolution, would undoubtedly assist in that difficult work. The Committee notes that this was also a recommendation of the ALRC/NSWLRC report in 2010.

Risk assessment upon filing applications with the Court

- 4.236 The Committee is also of the view that the national family violence risk assessment tool should also be used at family court registries upon the filing of applications to the court. It is concerning that a court may not be provided with the necessary information on the history of family violence or the risk of future violence prior to making interim or consent orders.
- 4.237 The risk assessment process must be embedded within the court registry and the Committee is of the view that it be conducted by a third-party provider. The third-party provider must be an appropriately qualified family violence specialist and use the new national family violence risk assessment tool as recommended by this report.
- 4.238 Significantly, the Committee does not view that this risk assessment process would replace judicial decision-making. Rather, the Committee identifies that the risk assessment could aid the court's management of any particular case and dynamic risk environments to appropriately triage matters before the court.
- 4.239 The Committee makes recommendations regarding early determination of family violence allegations and a process of case management and triage below.

Recommendation 3

- 4.240 The Committee recommends that the Australian Government introduces to the Parliament amendments to the *Family Law Act 1975 (Cth)* to require a risk assessment for family violence be undertaken upon a matter being filed at a registry of the Family Court of Australia or the Federal Circuit Court of Australia, using the national family violence risk assessment tool. The risk assessment should utilise the national family violence risk assessment tool and be undertaken by an appropriately trained family violence specialist provider.**

Legally-assisted family dispute resolution

- 4.241 The Committee is of the view that legally-assisted family dispute resolution should be made available to families affected by family violence where appropriate. The Committee notes the concerns of some inquiry participants that the power imbalances between parties that result from family violence, can make family dispute resolution more challenging.
- 4.242 However, the Committee received convincing evidence that where these power imbalances are appropriately addressed—for example, through

structural separation such as that provided through shuttle mediation—the process can be an empowering one for families.

- 4.243 The Committee supports the Australian Government’s recent commitment to piloting a new type of legally-assisted family dispute resolution. The Committee eagerly awaits an evaluation of that pilot.
- 4.244 Opening up family dispute resolution to families affected by family violence will improve the accessibility and fairness of the family law system. At present, almost three-quarters of all families that present for family dispute resolution are issued with s 60I certificates for the matter to proceed to court, yet only half ever commence proceedings in the court. This may be for a number of complex reasons, but evidence to the inquiry suggests that many families simply cannot afford to go to court.
- 4.245 As such, the Committee is of the view that legally-assisted family dispute resolution will assist with access to justice, and increase the number of families who resolve their disputes through using the family law system to provide that support and protection.

Recommendation 4

- 4.246 The Committee recommends, subject to a positive evaluation of the recently announced legally-assisted family dispute resolution pilot, the Australian Government seeks ways to encourage more legally-assisted family dispute resolution, which may include extending the pilot program.**

Case management and triage

- 4.247 The family law system must ensure that urgent cases or families at greatest risk are appropriately triaged once the matter enters court. The Committee is of the view that, in the context of long court lists and a stretched court system, triage is vital to ensure that families who are experiencing family violence or at risk of family violence, are prioritised by the family courts. Although all family law matters are important, it is fundamental that those at greatest risk are afforded urgent attention so that the family law system can provide the requisite support and protection to those in genuine need.
- 4.248 Notwithstanding the very significant caseload, the Committee is concerned that there has not been appropriate case management and triaging of family violence matters by the federal family courts which is particularly important when matters concern parents and children genuinely at risk. This is made

more complex for families when different rules when different rules apply, depending on in which court an application is filed.

4.249 The Committee received substantial evidence that triaging of matters through a single point of entry into the federal family courts is necessary.

4.250 The Committee is pleased that this issue has recently been recognised by the new Chief Judge of the Federal Circuit Court. In a speech at a recent ceremonial sitting of the Federal Circuit Court on 29 November 2017, that was provided in correspondence to the Committee, Justice William Alstergren recently stated:

There is no doubt that the Court faces challenges. It is, for example, untenable for a single judge of the Federal Circuit Court to have 500 cases in her or his docket at any one time. That results in, among other things, unacceptable delays in getting cases heard, which is inconsistent with the values and aims of this, or for that matter, any court.

Change is needed, and as many of you know, the Court is in the process of embarking on a number of initiatives to make an immediate difference, including:

- Major Call Overs in all registries;
- Ordering cases to mediation or ADR sooner, not later;
- The establishment of a number of case management pilots for new work and
- The establishment of a working group to examine how best to use registrars and judicial mediation.

The Court is also working on establishing a series of divisions in general federal law work to emulate the Federal Court. The aim of these steps is to reduce the docket sizes to something like 100 cases per judge and significantly reduce delays.

I am also working with Chief Justice Pascoe to create a single port of entry in both Courts for all Family Law cases and the harmonisation of the rules of both Courts.

In these endeavours, I look forward to the support and cooperation of the profession, particularly the Bars. The Victorian Bar and Victorian Legal Aid have been extremely helpful in the last week with over 280 cases referred to alternative dispute resolution, some on a pro bono basis.

4.251 The Committee recognises that too often cases in the federal family courts are subject to ongoing delays and obstruction. The Committee welcomes

these commitments of the new Chief Judge and makes recommendations in this report which reflects some of these initiatives.

- 4.252 The Committee is also of the view that there should be improved referral pathways from one jurisdiction to another. Regardless of what gateway a family enters the law system seeking support and protection—whether that be through state and territory magistrates courts or the federal family courts—it is imperative that referrals between jurisdictions provide an integrated and client-centred response.
- 4.253 A client-centred case management system must therefore be aware of the historical and current dynamics of families navigating the family law system. Significantly, this must also include being aware of, and appropriately responding to, instances of abuse of process and perjury. The Committee is concerned that there is inconsistent and inadequate application of existing penalties and cost orders. The Committee also considers that a stronger regime of penalties and cost orders is required to appropriately address abuse of process. Courts must have available to them appropriate disincentives to reduce the incidence of abuse of process and perjury.

Recommendation 5

- 4.254 **The Committee recommends that the Attorney-General considers how the Family Court of Australia and the Federal Circuit Court of Australia can improve case management of family law matters involving family violence issues, including:**
- **the adoption of a single point of entry to the federal family law courts so that applications, depending on the type of application and its complexity, are appropriately triaged, and actively case managed to their resolution in an expedited time-frame;**
 - **the greater use of mediation or alternative dispute resolution by the federal family courts during proceedings to encourage earlier resolution of matters;**
 - **the implementation of more uniform rules and procedures in the two federal family courts to reduce unnecessary complexity and confusion for families;**

- **the establishment of formal and expedited referral pathways between state and territory magistrates courts and the federal family courts; and**
- **the development of a stronger regime of penalties including cost orders to respond to abuse of process, perjury and non-compliance with court orders.**

Improved information sharing

- 4.255 To ensure that the family law system is integrated and responsive to changing risk dynamics, it is imperative that a court has up to date information about matters before it.
- 4.256 The Committee acknowledges the commitments of all Australian federal, state and territory governments to develop an information sharing system as part of the National Domestic Violence Order Scheme, which will be operational in 2019. The Committee is of the view however, as has been recommended by successive inquiries and reviews, that the information sharing system must also include family law orders and child protection orders.
- 4.257 Access to family violence orders, family law orders (including orders for personal protection) and child protection orders would allow courts in any jurisdiction to be aware of proceedings in other jurisdictions, and help ensure consistency in the court's determinations. The Committee is of the view that this is paramount to prioritising the safety of families and ensuring an integrated, responsive family law system.

Recommendation 6

- 4.258 The Committee recommends that the Attorney-General progresses through the Council of Australian Governments an expanded information sharing platform as part of the National Domestic Violence Order Scheme to include orders issued under the *Family Law Act 1975* (Cth) and orders issued under state and territory child protection legislation.**

Early determination of family violence allegations

- 4.259 The Committee is concerned that there can be years between family violence allegations being made, and the Court making a finding on those allegations. An early determination of family violence allegations can, if decided in the affirmative, be incredibly important for the court's subsequent consideration

of other matters, particularly parenting matters. Equally, however, an early determination is important where false allegations have been made against a family member, causing undue distress within that family and adding further to an already heavy workload for the courts. The Committee also believes that a family law court should be able to refer to findings and evidence presented in other courts where the standard of proof is higher.

- 4.260 The Committee is of the view that early determination of family violence allegations would ensure a more responsive, fairer and safer family law system.

Recommendation 7

- 4.261 The Committee recommends the Australian Government introduces to the Parliament amendments to the *Family Law Act 1975 (Cth)* to require a relevant court to determine family violence allegations at the earliest practicable opportunity after filing proceedings, such as by way of an urgent preliminary hearing and, where appropriate, refer to findings made, and evidence presented, in other courts.**

Recommendation 8

- 4.262 The Committee recommends that abuse of process in the context of family law proceedings be identified in the list of example behaviours as set out in section 4AB(2) of the *Family Law Act 1975 (Cth)*.**

- 4.263 The Committee was also concerned by reports of medical records being the subject of subpoenas. These records, and the discussions underpinning them, are critical for the long-term recovery of families affected by violence. It is vital that those families can proceed with greater confidence that medical records will not be inappropriately used in legal proceedings.

Recommendation 9

- 4.264 The Committee recommends that the Attorney-General develops stronger restrictions in relation to access by other parties to medical records in family law proceedings.**

Role of state and territory magistrates courts

- 4.265 Leveraging the capacity of state and territory magistrates courts to determine adjacent family law matters when a family seeks a family violence order has been noted in a number of reviews and commission reports to

date. As the federal courts are constitutionally barred from exercising a state court's jurisdiction, the opportunity for a simplified legal process lies with the state and territory courts.

- 4.266 The Committee is of the view that, especially where a state or territory government establishes a specialist family violence court, it is important that magistrates appointed to that court have the necessary skills, expertise and resources to exercise family law jurisdiction. When conducting a site inspection at the Specialist Family Violence Division of the Victorian Magistrates' Court at Heidelberg, the Committee identified the significant opportunity that such courts can provide to families in crisis. The Committee was encouraged by the co-location of legal and non-legal support services at the court, and the physical design of the Court itself to be able to respond to the very real risks that families face when seeking the protection of the court.
- 4.267 The Committee notes that the Attorney-General has released an exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017 which, among other things, seeks to encourage state and territory courts to exercise their family law jurisdiction.
- 4.268 The Committee welcomes the Government's commitment to addressing some of the structural impediments to integrating family law jurisdiction within the regular practice of state and territory courts. However, the Committee recognises that structural reform will not be enough to achieve the desired outcome, as expressed by this report and so many previously.
- 4.269 To address this, the Committee recommends that the Attorney-General work through COAG to achieve resourcing agreements with state and territory counterparts. In Chapter 8, the Committee makes further comments and recommendations on developing the appropriate skills and expertise within state and territory courts.

Recommendation 10

- 4.270 The Committee recommends that the Attorney-General works with state and territory counterparts through the Council of Australian Governments to reach agreements (such as in relation to resources, education and court infrastructure) to encourage state and territory magistrates to exercise family law jurisdiction, particularly in specialist family violence courts and courts which deal with a high number of family violence matters.**
- 4.271 The Committee also identifies an opportunity for a trial in one or more specialist family violence courts to enable all family law issues in family

violence cases to be determined by the one court. This should also include expedited pathways for breach and enforcement proceedings of both orders made under state and territory legislation as well as family law orders.

Recommendation 11

4.272 The Committee recommends that the Attorney-General works with state and territory counterparts through the Council of Australian Governments to establish a trial in one or more specialist state or territory family violence courts (including reaching agreement in relation to resources, education and court infrastructure) enabling family law issues in family violence cases to be determined by the one court, including expedited pathways for breach and enforcement proceedings. One of the trial courts should ideally be located in an area of high Indigenous population.

Direct cross-examination

4.273 Evidence to the inquiry overwhelmingly supported addressing the capacity for a perpetrator of family violence to cross-examine a victim of that violence. The Committee is deeply concerned that the Court has not more actively used its existing powers to regulate this practice.

4.274 The Committee welcomes the release, during the present inquiry, of an exposure draft of the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 which seeks to, among other things, introduce a legislative ban to prevent an unrepresented party from directly cross-examining, or being cross-examined by, another party if there is an allegation of family violence. The Committee strongly encourages the Attorney-General to introduce the legislation into the Parliament for its urgent passage.

Recommendation 12

4.275 The Committee recommends the Attorney-General introduces the Family Law Amendment (Family Violence and Cross-examination of the Parties) Bill 2017 into the Parliament for its urgent consideration such that perpetrators of family violence will be prohibited from cross examining the other party including in relation to the qualifications and funding of those appointed to undertake such cross examination.

5. Property division and financial recovery

Introduction

5.1 Relationship breakdown is well recognised as a contributing cause of poverty in Australia,¹ and a lack of equitable access to financial assets can be ‘a major barrier’ to the recovery of families affected by violence.² Family violence is the most common factor contributing to homelessness among women and their children.³ Indeed, a property settlement can bring ‘huge material relief’ to families in financial hardship and is crucial to preventing entrenched poverty following family violence.⁴

¹ For example: Pru Goward, Human Rights and Equal Opportunity Commission and Sex Discrimination Unit, *Striking the Balance: Women, Men, Work and Family: Discussion Paper 2005* (Human Rights and Equal Opportunity Commission, 2005), p. 54; Rosalie McLachlan, *Deep and Persistent Disadvantage in Australia: Productivity Commission Staff Working Paper* (Productivity Commission, 2013), p. 141; David de Vaus, Matthew Gray, Lixia Qu and David Stanton, ‘The Economic Consequences of Divorce in Australia’ (2014) *International Journal of Law, Policy and The Family*, p. 28; Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women’s Legal Service Victoria, 2015.

² Legal Aid NSW, *Submission 90*, p. 25.

³ Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women’s Legal Service Victoria, 2015, p. 8.

⁴ Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women’s Legal Service Victoria, 2015, p. 36; see also Family and Relationship Services Australia (FRSA), *Submission 80*, p. 16.

- 5.2 Yet seven in ten women who have left a violent relationship also leave property or assets behind.⁵ Men and women who leave the family home face financial difficulties. Property settlements can be exceptionally difficult to achieve following family violence, with as many as 90 per cent of women experiencing difficulty in obtaining a property settlement after family violence.⁶ When assets are divided, those who have experienced family violence are more likely to accept unfair property settlements: victims of violence are three times more likely to receive less than 40 per cent of the property.⁷
- 5.3 Although just, equitable, prompt and accessible property settlement is critical to preventing poverty, the process for obtaining a property settlement in the family law system is 'difficult, long and expensive'.⁸ Evidence to the inquiry suggests that the complexity and inaccessibility of the family law system can contribute to families' decisions not to pursue equitable property division matters. Women's Legal Services Australia (WLSA) advised that, particularly when asset pools are under \$100,000, families often walk away instead of pursuing a drawn out property settlement which might also provoke violence from their former partner.⁹ Similarly, Supriya Singh, Marg Liddell and Jasvinder Sidhu commented:

The financial/economic abuse and emotional costs of the legal system are so great that some of our participants chose to give up their property and child support entitlements. They are impoverished twice, first by the partner

⁵ Australian National Research Organisation for Women's Safety, *Horizon's Research Report – Violence against women in Australia: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey 2012*, Issue 1, October 2015; see also Australian Institute of Family Studies, *Submission 1*, p. 9; Centacare Brisbane, *Submission 22*, p. 3; Queensland Domestic Violence Services Network, *Submission 30*, p. 4; Good Shepherd Australia New Zealand, *Submission 58*, pp. 3-4; Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 73*, p. 12; Legal Aid NSW, *Submission 90*, p. 24.

⁶ Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women's Legal Service Victoria, 2015, p. 36.

⁷ Australian Institute of Family Studies, *Post-Separation Parenting, Property and Relationship Dynamics After Five Years*, 2014; see also Grania Sheehan and Bruce Smyth, 'Spousal violence and post-separation family law outcomes' (2000) 14(2) *Australian Journal of Family Law*, p. 102; Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women's Legal Service Victoria, 2015; Women's Legal Services Australia (WLSA), *Submission 6*, p. 34; Legal Aid NSW, *Submission 90*, p. 24; Relationships Australia, *Submission 55*, p. 14.

⁸ Legal Aid NSW, *Submission 90*, p. 25.

⁹ WLSA, *Submission 6*, p. 36.

exercising coercive control over finances, and secondly the court failing to take this reality into account.¹⁰

- 5.4 This chapter first examines the existing options and challenges for achieving a property settlement following separation after family violence. The chapter will then consider law reform proposals for family violence to be considered in all property settlements where family violence is present. Acknowledging the importance of a quick settlement, particularly where the asset pool is small, the chapter will review proposals for a new small property claims process. The chapter will then examine existing challenges in obtaining a superannuation splitting order and proposals for reform before considering how the *Family Law Act 1975* (Cth) (Family Law Act) might better approach joint debts between separating parties. Lastly, the chapter will examine procedural changes to ensure property settlements progress more expeditiously through the family law system.

Existing options and challenges for property settlement

- 5.5 As noted in Chapter 2, property settlement can be reached by informal agreement, written agreement (including a Binding Financial Agreement) or Court Order (either by consent or as determined by a Judge). All three will be discussed in this chapter. Research by the Australian Institute of Family Studies found that only seven per cent of separated parties resolved their property settlement by a judicial determination, with the remainder of settlements being achieved through formal or informal negotiation between the parties.¹¹
- 5.6 Significantly however, family violence creates a substantial power imbalance between the parties that disadvantages the victim of violence when negotiating property settlements.¹² Although consent orders are often viewed as an attractive option to settle property matters without the need for litigation, in matters where one party has experienced family violence by the other, consent orders can be used as ‘a tool to further perpetrate and

¹⁰ Supriya Singh, Marg Liddell and Jasvinder Sidhu, *Submission 65*, p. 5.

¹¹ Australian Institute of Family Studies, *Post-Separation Parenting, Property and Relationship Dynamics After Five Years*, 2014; see also Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women’s Legal Service Victoria, 2015.

¹² Grania R Sheehan and Bruce Smyth, ‘Spousal Violence and Post-Separation Financial Outcomes’, 2000, Volume 14(2) *Australian Family Law Journal* 102, p. 11; see also WLSA, *Submission 6*, p. 34.

entrench family violence'.¹³ This can lead to the party affected by family violence to consent to unfair property settlements.¹⁴ Consent orders for both property division and parenting matters are discussed in depth in Chapter 4.

- 5.7 In addition, evidence to the inquiry suggests that property settlement negotiations are often used as another opportunity for continued control and coercion. The Queensland Domestic Violence Services Network explained:

The perpetrator can draw out property settlement for years, or will hide or dispose of assets in this time. During this time a victim cannot sell, occupy or even rent out a property that is jointly owned. Lack of access to financial assets often for extended periods of time needs to be considered by the family law system when making property division orders, including prioritising the finalisation of property settlements in order to do this.¹⁵

- 5.8 Similarly, Good Shepherd Australia New Zealand stated that property settlement negotiations can be used as a continuing form of abuse:

Our research identified a variety of ways property settlements were used as a form of abuse. Examples included abusers intentionally delaying settlement in order to 'negotiate' inequitable settlement amounts; abusers drawing out property settlement to financially exhaust their partners; and abusers hiding information in order to effect inequitable property settlements for victim/survivors.¹⁶

- 5.9 The failure of an abusive partner to provide appropriate or complete financial disclosure prevents the matter from reaching a timely resolution. The Women's Legal Service Victoria comments that during these periods of delay, it is 'common for an abuser to remain in the home, fail to meet outgoings and continue to increase debt either by non-payment or continued spending'. The Service explains that there is little incentive for the perpetrator to provide financial disclosure in property settlement negotiations:

There is currently little disincentive for an abusive ex-partner who continues to refuse to provide relevant financial information or otherwise delay the process. This failure to provide the information needed to finalise a property settlement is more upsetting for women when they are asked themselves to comply with onerous requests for information from the other party. In some

¹³ Eastern Community Legal Centre, *Submission 91*, p. 10.

¹⁴ National Family Violence Prevention Legal Services Forum (NFVPLSF), *Submission 78*, p. 19.

¹⁵ Queensland Domestic Violence Services Network, *Submission 30*, p. 5.

¹⁶ Good Shepherd Australia New Zealand, *Submission 58*, p. 3.

cases, the length of proceedings was exacerbated by an abusive ex-partner failing to attend Court dates, or attending and requesting adjournments.¹⁷

- 5.10 Evidence to the inquiry advocates for the role of legal representation in addressing abuse of process and coercion into consent orders during property settlement negotiations.¹⁸ However, Victoria Legal Aid acknowledged that this is not widely available:

Currently without a lawyer's assistance, it is extremely rare to obtain a property settlement in the family law system. Legal aid is very limited for matters involving property, and private representation is prohibitively expensive for most.¹⁹

- 5.11 When matters do proceed to court, delays in finalising property settlements, either through long Court lists or through legal tactics employed by the perpetrator, can have 'serious implications' for families living in financial hardship, and can result in those families getting more deeply into debt while they are waiting for a settlement.²⁰

Box 5.1 Property Settlement

The following is a selection of responses to the Committee's questionnaire:

'Family violence was never considered as part of divorce or property settlement. If the option was there to at least have it recorded, even if it was not a factor of consideration, I would have done so'.

— Respondent from South Australia

'Family violence is not taken into account at all in the family court proceedings for property settlement. I have two kids, and apparently need to consider myself 'lucky' to get [a] 50/50 split'.

— Respondent from Western Australia

¹⁷ Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women's Legal Service Victoria, 2015, pp. 39-40; see also Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 4.

¹⁸ Victoria Legal Aid (VLA), *Submission 60*, p. 24; Hume Riverina Community Legal Service, *Submission 76*, p. 7.

¹⁹ VLA, *Submission 60*, p. 24.

²⁰ Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women's Legal Service Victoria, 2015, p. 39; see also WLSA, *Submission 6*, p. 36.

‘I wasn’t satisfied that the domestic violence was considered at all. I struggled severely financially and couldn’t understand why the property settlement was not prioritised when I was telling the Court, I was homeless (living with my parents), because of him [and the] domestic violence. I was very upset that cash was awarded to him, but I got funds put in my super’.

—*Respondent from Queensland*

‘I have been advised that it [family violence] is unlikely to be taken into account for our property settlement. It is likely to hold more weight if we go to court regarding custody of the children. In my opinion it should be taken into account for both. The reason we are in court is because he is still perpetuating financial abuse over me and my children, this is not the only abuse that continues despite our divorce. Being told that the abuse you suffered will not count in the eyes of the law is devastating’.

—*Respondent from South Australia*

5.12 Women’s Legal Service Victoria advocates that victims who are unable to reach an agreement with an abusive ex-partner ‘should not be precluded from receiving the benefits a property settlement can bring’. For that reason, the Service advocates easy access to court-based property settlements.²¹ The remainder of this chapter will consider options for effective and equitable court-based property settlements.

Considering family violence in property division

5.13 The Family Law Act sets out the contributions the Court must consider in determining the division of property, including financial, property and family welfare contributions.²² The Court may also take into account additional factors when deciding property division (commonly referred to

²¹ Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women’s Legal Service Victoria, 2015, p. 36.

²² *Family Law Act 1975* (Cth), s 79(4) and s 90SM(4).

The contributions include: (a) the financial contributions made, (b) contributions other than financial contributions made to the acquisition, conservation or improvement of the property; and (c) contributions to the welfare of the family, including any contribution made in the capacity of homemaker or parent.

as ‘future needs factors’), including the age and health of the parties, their income and assets, and whether they have care for children.²³

- 5.14 However, the Family Law Act does not currently contain an explicit reference to the relevance of family violence in deciding property settlements.²⁴ Currently, this rests in common law, as established in *Kennon v Kennon* (1997).²⁵ In that case, the Full Court of the Family Court held:

Put shortly, our view is that where there is **a course of violent conduct** by one party towards the other during the marriage which is demonstrated to have had **a significant adverse impact upon that party’s contributions** to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties’ respective contributions ... We prefer this approach to the concept of ‘negative contributions’.²⁶

- 5.15 Known as the ‘*Kennon* adjustment’, a Court may consider therefore:

- whether family violence impacted on the victim’s contributions to the relationship; and
- the extent to which family violence has created future needs as defined under the relevant section of the Family Law Act.²⁷

- 5.16 The requirements of a course of violent conduct and significant adverse impact have had ‘a significantly restrictive consequence on recognising the role of family violence in property proceedings’.²⁸ Former Justice of the Family Court, Professor the Hon. Nahum Mushin AM, commented:

While our understanding of family violence and its significance have increased exponentially since *Kennon*, the law has not kept pace with those developments ... It discounts the actuality that one incident can, and often does, change a victim for the rest of their life. I submit that those restrictions should be removed and it be open to the Courts to assess its significance on a

²³ *Family Law Act 1975* (Cth), s 75(2).

²⁴ WLSA, *Submission 6*, p. 34; Queensland Law Society, *Submission 38*, p. 5; Legal Aid NSW, *Submission 90*, p. 26.

²⁵ *Marriage of Kennon* (1997) 22 Fam LR 1.

²⁶ *Kennon v Kennon*, (1997) FLC 92-757, p. 84, 294.

²⁷ *Marriage of Kennon* (1997) 22 Fam LR 1, 24.

²⁸ The Hon. Professor Nahum Mushin AM, *Submission 123*, p. 2.

case by case basis without restriction in accordance with the discretionary requirement.²⁹

5.17 WLSA also discussed the restrictions of the *Kennon* adjustment, explaining:

When considering a *Kennon* adjustment, family violence is only relevant insofar as it can be proved that it has had a financial impact on the parties. Therefore, victims of violence may be able to show that violence has occurred but fail to show how it affected their contributions ... While physical violence and its effects may be relatively easy to prove, proving intangible violence such as emotional violence or controlling behaviour, and its financial consequences, is more difficult.³⁰

5.18 Since the *Kennon* decision, where the Court has accepted that violence had occurred in the relationship, an adjustment has only been made in 42 per cent of property settlements, with the average adjustment being 7.2 per cent.³¹ The Law Council of Australia advised that many *Kennon* adjustments fail:

... not because clients and lawyers are not cognisant of the relevance of family violence but rather, for reason of lack of admissible evidence and the inability to adduce evidence that establishes there is a causal link between the acts of family violence and the nature and extent of, and circumstances in which, a party has made their contributions.³²

5.19 Recognising the impact of family violence on a relationship, the Australian Law Reform Commission first recommended legislative reform in a 1994 report.³³ The recommended reform would have directed the Family Court to take into account family violence in property, future needs assessments, and spousal maintenance proceedings.

5.20 Subsequent to the ALRC 1994 recommendation, the Family Law Council provided written advice to the Commonwealth Attorney-General in 2001

²⁹ The Hon. Professor Nahum Mushin AM, *Submission 123*, p. 2.

³⁰ WLSA, *Submission 6*, p. 35; see also Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women's Legal Service Victoria, 2015, p. 41.

³¹ Patricia Easteal, Catherine Warden and Lisa Young, 'The *Kennon* "Factor": Issues of Indeterminacy and floodgates.(Australia)' (2014) 28(1) *Australian Journal of Family Law* 1, p. 11; see also WLSA, *Submission 6*, p. 35.

³² Law Council of Australia, *Submission 85*, p. 29.

³³ Australian Law Reform Commission, *Equality before the Law: Justice for Women*, ALRC Report 68 (Part 1), 1994, <<https://www.alrc.gov.au/report-69-part-1>>; see also Law Council of Australia, *Submission 85*, p. 27.

commenting that the *Kennon* adjustment created uncertainties in the law. The Council recommended legislative amendment to clarify the relevance of violence in resolving property divisions, arguing that the Court should consider:

- the impact of the violence on the victim; and
- the ‘negative contribution’ made by the perpetrator through being violent.³⁴

5.21 The ALRC again considered the issue in 2010, recommending that the provisions of the Family Law Act relating to property adjustment be amended to refer expressly to the impact of family violence on past contributions and on future needs with respect to spousal maintenance assessments.³⁵

5.22 A large number of submissions supported these successive recommendations that:

- the *Kennon* adjustment be codified in the Family Law Act;³⁶
- the Court consider the ‘negative contribution’ made by the perpetrator through family violence (including the destruction of property);³⁷ and
- family violence be a consideration in the future needs assessment.³⁸

5.23 However, For Kids Sake cautioned against linking family violence and property settlement, commenting that the *Kennon* adjustment should not be

³⁴ Family Law Council, ‘Letter of Advice: Violence and Property Proceedings’, 14 August 2001, <<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Violence%20and%20Property%20Proceedings.pdf>>, last accessed 22 September 2017.

³⁵ Australian Law Reform Commission, *Family Violence: Improving Legal Frameworks*, 22 June 2010, <<https://www.alrc.gov.au/family-violence-improving-legal-frameworks-cp-1>>, last accessed 6 December 2017; see also Law Council of Australia, *Submission 85*, pp. 27-28.

³⁶ WLSA, *Submission 6*, p. 35; InTouch Multicultural Centre Against Family Violence (InTouch), *Submission 13.1*, pp. 3-4; Child Protection Party, *Submission 50*, p. 4; VLA, *Submission 60*, p. 29; Gippsland Community Legal Centre, *Submission 66*, p. 7; The Deli Women and Children’s Centre, *Submission 67*, p. 6; Hume Riverina Community Legal Service, *Submission 76*, pp. 7-8; National Legal Aid (NLA), *Submission 88*, p. 13; Legal Aid NSW, *Submission 90*, pp. 25-26; Eastern Community Legal Centre, *Submission 91*, pp. 12-13; Professor Belinda Fehlberg, *Submission 106*, p. 3; Dr Renata Alexander, *Submission 108*, p. 3.

³⁷ WLSA, *Submission 6*, p. 35; InTouch, *Submission 13.1*, pp. 3-4; Child Protection Party, *Submission 50*, p. 4; VLA, *Submission 60*, p. 29; Gippsland Community Legal Centre, *Submission 66*, p. 7; Hume Riverina Community Legal Service, *Submission 76*, pp. 7-8; Legal Aid NSW, *Submission 90*, pp. 25-26; Dr Renata Alexander, *Submission 108*, p. 3.

³⁸ Legal Aid NSW, *Submission 90*, pp. 27-28; Eastern Community Legal Centre, *Submission 91*, p. 13.

extended to all cases as it ‘risks returning the system to a fault-based divorce court—a system we abandoned for good reason’.³⁹ The organisation instead advocated the use of other mechanisms including victims of crimes compensation.⁴⁰

- 5.24 Whilst the Law Council of Australia did not wish to support an amendment to the Family Law Act before viewing the specific proposal,⁴¹ it stated that such an amendment ‘would convey a powerful social and community message’.⁴²

A new small property claims process

- 5.25 The procedure to obtain a court-ordered property settlement is the same regardless of the size of the asset pool. That is, the same procedure must be followed for a \$12,000 superannuation settlement as for a \$1.2 million property settlement.⁴³ The complex requirements to commence proceedings appear to deter families from using the family law system to resolve small property claims in particular.
- 5.26 According to the Productivity Commission, parties with asset pools under \$40,000 (low asset pool range) and between \$40,000 and \$139,000 (low-medium range) were less likely to use lawyers to help them to resolve their family law financial dispute than those with more assets, because of the high cost of legal representation.⁴⁴ Further, parties in the low and low to medium asset pool range are much less likely to use Family Dispute Resolution (FDR) or court services to resolve their dispute than those with more assets.
- 5.27 Reflecting upon these statistics, the Castan Centre for Human Rights Law commented that ‘it is much less likely that an agreement will be made to divide property’, and particularly in family violence matters, it ‘raises

³⁹ For Kids Sake, *Submission 29*, p. 15; see also Mr Richindera Singh, *Submission 102*, pp. 4-5.

⁴⁰ For Kids Sake, *Submission 29*, p. 15; see also Mr Richindera Singh, *Submission 102*, pp. 4-5.

⁴¹ Law Council of Australia, *Submission 85*, p. 27.

⁴² Law Council of Australia, *Submission 85*, p. 28.

⁴³ Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women’s Legal Service Victoria, 2015, p. 39.

⁴⁴ Productivity Commission, *Access to Justice Arrangements Inquiry Report* (Commonwealth of Australia, No 72, 2014) Volume 2, pp. 871-2; see also Monash University-Castan Centre for Human Rights Law (Castan Centre for Human Rights Law), *Submission 57*, p. 7.

questions about the appropriateness of agreements or outcomes arrived at in these cases'.⁴⁵

- 5.28 To encourage use of the family law system, participants in the inquiry were in broad agreement that a separate process should be developed for small claim property matters,⁴⁶ which would both relieve pressure on the Court as well as providing families affected by family violence with much needed financial relief and independence.⁴⁷
- 5.29 WLSA recommended an early resolution of small property disputes under \$100,000 through a case management process upon application to the court, rather than a pre-filing requirement.⁴⁸ Women's Legal Service Victoria commented that a case management process, as opposed to a pre-filing requirement, is preferable in order to encourage property settlements 'rather than creating another barrier'.⁴⁹
- 5.30 The Magistrates' Court of Victoria similarly advocated for a small claims environment:

... less complex matters [might] be dealt with by adopting the processes involved in other speedy, low-cost, small claims environments but which are embedded with protocols which properly recognise the dynamics of family violence and the safety risks inherent in any negotiation so as not to aggravate the risks to the family.⁵⁰

⁴⁵ Castan Centre for Human Rights Law, *Submission 57*, p. 7.

⁴⁶ Northern Integrated Family Violence Services, *Submission 11*, p. 2; Micah Projects Inc, *Submission 24*, p. 5; People with Disability Australia, *Submission 25*, p. 2; Public Health Association of Australia, *Submission 27*, p. 4; Baptist Care Australia, *Submission 28*, p. 1; Sexual Assault Support Service, *Submission 32*, p. 3; Springvale Monash Legal Service, *Submission 47*, p. 7; Domestic Violence NSW, *Submission 48*, p. 6; Good Shepherd Australia and New Zealand, *Submission 58*, p. 6; VLA, *Submission 60*, pp. 28-29; NFVPLSF, *Submission 78*, p. 2; Women's Legal Service Queensland, *Submission 81*, p. 27; National Association of Community Legal Centres, *Submission 115*, p. 2.

⁴⁷ Ms Helen Matthews, Director, Legal and Policy, Women's Legal Service Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 22; VLA, *Submission 60*, p. 28.

⁴⁸ WLSA, *Submission 6*, p. 36.

⁴⁹ Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women's Legal Service Victoria, 2015, pp. 39-40.

⁵⁰ Magistrates' Court of Victoria, *Submission 56*, p. 5.

- 5.31 Drawing upon the 2015 *Stepping Stones Report*,⁵¹ Victoria Legal Aid (VLA) proposed a new simplified case management process within the Federal Circuit Court for small claim property divisions, with eligibility determined by the potential share of the total property pool and not the total pool itself.⁵² VLA explained:
- Parties could ... apply using a single, tick-a-box style form which is written in plain English and designed to make it as easy as possible for the parties to provide the judicial officer with the information needed to make a property settlement decision without affidavits or other complex legal documents or legal assistance. Decisions in this list could be delegated to a judicial registrar, could be made in accordance with the current legislative framework and could be appealable in the usual way.⁵³
- 5.32 Where families are also litigating parenting matters, VLA was of the view that these could be dealt with concurrently but separately. It noted however that in some cases, it would be appropriate to adjourn the property decision until after the determination of parenting matters, or the Court hear matters concurrently as is existing practice.⁵⁴
- 5.33 This proposal was supported by a number of participants including Legal Aid NSW and National Legal Aid.⁵⁵
- 5.34 Some organisations discussed the use of FDR and legally-assisted mediation in property settlements.⁵⁶ The requirement to attend FDR applies only in parenting matters, and is not a requirement to accessing the courts for property division.
- 5.35 Family Relationship Centres are not funded to provide FDR in property division matters, although some Centres do offer mediation services on a fee-for-service basis.⁵⁷ According to Family and Relationship Services

⁵¹ Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women's Legal Service Victoria, 2015.

⁵² VLA, *Submission 60*, p. 28.

⁵³ VLA, *Submission 60*, p. 28.

⁵⁴ VLA, *Submission 60*, p. 28.

⁵⁵ NLA, *Submission 88*, p. 11; Legal Aid NSW, *Submission 90*, p. 28.

⁵⁶ Divorce Partners, *Submission 20*, p. 3; Hume Riverina Community Legal Service, *Submission 76*, p. 8; FRSA, *Submission 80*, pp. 16-17; NLA, *Submission 88*, pp. 12-13; see also Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women's Legal Service Victoria, 2015, pp. 39-40.

⁵⁷ FRSA, *Submission 80*, p. 16.

Australia, centres providing mediation services in property matters have seen an increase in the number of families wanting to access mediation for these types of disputes.⁵⁸

- 5.36 National Legal Aid advised that Legal Aid Queensland (LAQ) has been providing arbitration services in family property law matters since 2001:

LAQ's arbitration program deals with property applications where the 'net pool' falls within the range of the assets test for obtaining a grant of aid. Both parties must be legally represented throughout the process and matters are only arbitrated by legal practitioners who meet the requirements as set out in the *Family Law Act 1975*. It is a process run 'on the papers' which assists to ameliorate power imbalance but which enables full discovery to occur through sworn material identifying assets and liabilities and quantifying value. It is a relatively quick and inexpensive process and which assists parties who cannot resolve their property division through mediation due to a lack of disclosure or agreement about value of assets. It is a consensual process and there is some diminution of numbers due to this often as a result of financial abuse and other forms of family violence.⁵⁹

- 5.37 National Legal Aid agreed that, as a matter of principle, 'there should be compulsory dispute resolution for property matters', though noted that the 'present lack of ability to ensure full and proper disclosure about proprietary matters' is a 'significant consideration in developing any requirement'.⁶⁰

Division of superannuation

- 5.38 Superannuation is one of the most significant assets for Australian families, and is recognised by the Family Law Act as a relationship asset. However, many families affected by violence face delays caused by the failure of a former partner to make full financial disclosure about these assets.⁶¹ Parties to family law proceedings are required to make full and frank disclosure of their financial assets.⁶² If a party engaged with the court process fails to make full and frank disclosure, the Court can exercise its discretion in a way that is adverse to that person, including by imposing penalties.

⁵⁸ FRSA, *Submission 80*, pp. 16-17.

⁵⁹ NLA, *Submission 88*, pp. 12-13.

⁶⁰ NLA, *Submission 88*, p. 12.

⁶¹ Women's Legal Services Australia, *Submission 6.1*, p. 2

⁶² *Federal Circuit Court Rules 2001* (Cth) r 24.03(1)(a); *Family Law Rules 2004* (Cth) r 13.04; see also Women's Legal Services Australia, *Submission 6.1*, p. 3

- 5.39 Despite this obligation, WLSA identified difficulties in obtaining a superannuation splitting order as part of a family law property settlement. It noted problems discovering the name of the superannuation fund of former spouses as well as the cost and complexity of the process.⁶³ WLSA advised that the current process for obtaining a superannuation splitting order as part of a property settlement involves the following steps:
- the name of the superannuation fund of a former partner is obtained, usually through financial disclosure;
 - an application is made to the fund requesting information about the balance of the fund account, which may involve some cost to the applying party;
 - orders are drafted and sent to the super fund to provide ‘procedural fairness’ to the fund; and
 - if the fund approves the orders to be provided to the Court to make final orders.⁶⁴
- 5.40 Where a party fails to provide details of their superannuation fund in financial disclosure, the other party faces a number of challenges obtaining that information. WLSA commented that there are limited options currently available to find a former partner’s superannuation fund and there is ‘no guarantee of having the complete picture of all superannuation interests held by the former spouse’. WLSA also stated that there are costs associated with searching such information which can include lengthy administrative and court processes.⁶⁵
- 5.41 WLSA recommended a new administrative mechanism to obtain superannuation information as it would improve the operation of the Family Law Act and close a ‘loophole which lets people hide their assets’.⁶⁶ It identified that the Australian Taxation Office—which holds the most complete records of superannuation accounts—as an existing single point from which to seek such information.
- 5.42 WLSA further identified legal complexities, procedural complexities and issues with multiple funds as barriers to equitable division of assets. For example, it noted that a party seeking an order to split a superannuation interest must provide procedural fairness to the superannuation fund. That

⁶³ Women’s Legal Services Australia, *Submission 6.1*, p. 1.

⁶⁴ Women’s Legal Services Australia, *Submission 6.1*, p. 3.

⁶⁵ Women’s Legal Services Australia, *Submission 6.1*, p. 3.

⁶⁶ Women’s Legal Services Australia, *Submission 6.1*, p. 4.

is, the party must provide the fund with the draft orders so that they can indicate any objections or foreshadow any problems they might have within complying with the orders. In practice however, funds ‘rarely object’ to the quantum of the split being sought and ‘have very limited practical interest in the substantive impact of orders’.⁶⁷

- 5.43 Further barriers may arise when a former partner has multiple funds with small balances. The Family Law (Superannuation) Regulations set out that superannuation interests of less than \$5,000 cannot be divided.⁶⁸ WLSA advised that to obtain a super split these funds need to be rolled into one account, and that a court order may be sought requiring a former partner to do so, however identifying this option is difficult without legal assistance.⁶⁹

Treatment of joint debt and liabilities

- 5.44 Property settlement is not only critical for the division of financial assets but also the division of joint debt and liabilities. As many as 43 per cent of women are seeking to resolve joint debts following separation from a violent partner, of which 25 per cent had a debt that was accrued by an abuse partner against their wishes, without their knowledge, without understanding or under duress.⁷⁰ Joint liabilities can also arise directly as a result of physical family violence, with long-term impacts:

I think for a lot of our clients it is more getting out of joint debt that is the priority rather than accessing property ... A lot of our clients are in public housing. They may have fines or debts related to property damage caused by the perpetrator. There may have been property damage as a part of family violence or as a part of threats. She is fined for them and then unable to get into another house or is evicted because of that debt.⁷¹

- 5.45 While secured debts are usually deducted from the total asset pool and the remaining net assets divided between the parties, in the case of joint unsecured debt, typically both parties will remain jointly and severally

⁶⁷ Women’s Legal Services Australia, *Submission 6.1*, p. 5.

⁶⁸ *Family Law (Superannuation) Regulations 2001* (Cth) r 11(1A).

⁶⁹ Women’s Legal Services Australia, *Submission 6.1*, p. 5.

⁷⁰ Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women’s Legal Service Victoria, 2015, p. 16.

⁷¹ Ms Laura Vines, Manager, Strategy and Policy, Aboriginal Family Violence Prevention Legal Service Victoria, *Committee Hansard*, Melbourne, 24 July 2017, p. 37; see also Queensland Domestic Violence Services Network, *Submission 30*, p. 5.

liable. This means that the creditor can choose which party to pursue for the entirety of the debt.⁷²

- 5.46 WLSA commented that this can be ‘an untenable situation’ for families attempting to cut ties with a perpetrator:

Abuse is thus perpetuated through the medium of this lingering debt and the real threat to women’s credit ratings, which impedes on their economic recovery.⁷³

- 5.47 The Family Law Act permits the Court to make an order directing a creditor to substitute one party for both parties in relation to the debt owed, or sever the debt and apportion it in different amounts between the parties. However, the Court may only make such orders if it is not foreseeable that the order would result in the debt not being paid in full, and it is just and equitable to do so.⁷⁴

- 5.48 The *Stepping Stones Report* found that although the family law system is routinely employed to divide the remaining property of the parties,

... it is not routinely used to divide the remaining debt between the parties (where there is a net negative asset pool). A property settlement apportioning debt between the parties is, in many cases, unavailable because of the position taken by banks, refusing to split joint unsecured debts.⁷⁵

- 5.49 The Report recommended that the Court promote the use of remedies such as orders that split or transfer unsecured joint debts, commenting that ‘access to this remedy is likely to provide huge relief to women in financial hardship who are unable to service joint debts’.⁷⁶

Procedural changes to support reform

Greater use of state courts’ powers to determine property settlements

⁷² WLSA, *Submission 6*, p. 37.

⁷³ WLSA, *Submission 6*, p. 37.

⁷⁴ *Family Law Act 1975* (Cth), s 90AE(a); see also WLSA, *Submission 6*, p. 37.

⁷⁵ Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women’s Legal Service Victoria, 2015, pp. 44-45.

⁷⁶ Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women’s Legal Service Victoria, 2015, pp. 44-45.

- 5.50 As discussed in Chapter 4, a large number of submissions recommended the greater use of family law jurisdiction by state and territory magistrates courts. With respect to property division, family violence proceedings in state and territory magistrates courts ‘provide an accessible and safe forum for financially disadvantaged victims of family violence to resolve personal property disputes quickly’.⁷⁷
- 5.51 However, in respect of property division, the jurisdiction of state and territory magistrates’ courts is limited by the Family Law Act to determining contested family law property disputes where the total value of property is under \$20,000.⁷⁸ This amount has been increased only once, from \$1,000 to \$20,000 in 1988.⁷⁹
- 5.52 In 2016, both the Victorian Royal Commission into Family Violence and the Family Law Council recommended that the jurisdictional limit on state and territory magistrates courts hearing family law property disputes be increased.⁸⁰ This was supported by the Castan Centre for Human Rights Law, Gippsland Community Legal Service, National Legal Aid, and Legal Aid NSW.⁸¹
- 5.53 In December 2016, the Attorney-General’s Department released an exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017.⁸² The Bill would remove the \$20,000 limit from the Family Law Act, instead providing for a new limit to be set in regulations. At the time of writing, the bill is yet to be introduced into Parliament.

⁷⁷ Gippsland Community Legal Service, *Submission 66*, p. 7.

⁷⁸ *Family Law Act 1975* (Cth), s 46(1); see also Castan Centre for Human Rights Law, *Submission 57*, pp. 7-8; NLA, *Submission 88*, p. 12.

⁷⁹ Victorian Royal Commission into Family Violence, *Report and Recommendations*, Volume IV, 2016, p. 212.

⁸⁰ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* – Final Report, 2016, Recommendation 15-2, p. 146; Victorian Royal Commission into Family Violence, *Report and Recommendations*, Volume IV, 2016, Recommendation 131, pp. 212, 217.

⁸¹ Castan Centre for Human Rights Law, *Submission 57*, pp. 7-8; Gippsland Community Legal Service, *Submission 66*, p. 12; NLA, *Submission 88*, p. 12; Legal Aid NSW, *Submission 90*, pp. 27-28.

⁸² Attorney-General’s Department, Exposure Draft - Family Law Amendment (Family Violence and Other Measures) Bill 2017, <<https://www.ag.gov.au/Consultations/Documents/amendments-family-law-act-respond-to-family-violence/Family-Law-Amendment-Bill-2017-Exposure-draft.pdf>>, last accessed 6 December 2017.

- 5.54 The Public Consultation Paper advises that the amendment would, 'allow the monetary limit to be increased to a more appropriate amount, and to be updated in the future as necessary'. It was intended that a new limit would be settled in consultation with the states and territories and other stakeholders.⁸³
- 5.55 The Castan Centre for Human Rights Law supported the bill, commenting that that the amount set in the regulations would need to mirror the upper financial jurisdictional limit on civil dispute able to be heard by state and territory magistrates courts.⁸⁴ In Victoria, this is currently \$100,000.⁸⁵
- 5.56 The Magistrates' Court of Victoria advised however that family law property matters 'may well be too complex and highly contentious to hear ... unless consideration is given to simplifying the current decision-making environment'. The Court stated it will require further resources to exercise any expanded jurisdiction.⁸⁶

Extension of safeguard procedures to property matters

- 5.57 The Family Law Act provides that in parenting matters, the Court is to conduct proceedings in a way that will safeguard the parties against family violence. These protections are not applicable in financial proceedings.
- 5.58 Legal Aid NSW recommended the extension of sections 69ZN and 69ZX to apply to financial proceedings where allegations (or findings) of family violence have been made. Legal Aid NSW commented:
- ... victims of family violence who are party to financial proceedings require equal protection from the potentially re-traumatising experience of being cross-examined by a perpetrator of violence.⁸⁷

Committee comment

⁸³ Attorney-General's Department, *Public Consultation Paper – Amendments to the Family Law Act 1975 to respond to family violence*, December 2016, p. 11, <<https://www.ag.gov.au/Consultations/Documents/amendments-family-law-act-respond-to-family-violence/Exposure-draft-on-family-violence-amendments-consultation-paper.docx>>, last accessed 6 December 2017.

⁸⁴ Castan Centre for Human Rights Law, *Submission 57*, p. 8.

⁸⁵ *Magistrates' Court Act 1989* (Vic), s 3(1).

⁸⁶ Magistrates' Court of Victoria, *Submission 56*, p. 5.

⁸⁷ Legal Aid NSW, *Submission 90*, p. 24.

- 5.59 Families affected by family violence often need the family law system to re-gain their share of assets in their ongoing recovery from deeply traumatic events. Families are at increased risk of violence if they cannot achieve financial independence from their perpetrator.
- 5.60 As reflected throughout this report, the Committee is of the strong view that the family law system must be accessible, equitable, responsive and prioritise the safety of families. At present, the family law system is failing to deliver against these principles with respect to property division, thereby impairing the financial recovery of families following violence.
- 5.61 Obtaining a just and equitable property settlement is complex, costly and uncertain, discouraging many families from using the family law system to seek legitimate resolutions. The jurisdictional fragmentation discussed in earlier chapters prevents seamless and integrated resolutions. Without legal assistance, the system is inaccessible to most to resolve property matters.
- 5.62 Evidence received by the Committee indicates that property division following family violence is rarely fair: victims of violence are more likely to receive a smaller share of the property settlement, and seven out of 10 women who have left a violent relationship also leave property or assets behind.⁸⁸
- 5.63 The proportion of parties seeking to resolve disputes outside the family law system demonstrates that the family law system is neither effective nor responsive to the dynamics of family violence, particularly when determining property disputes. Collectively, these factors are crippling the financial independence of families leaving violent relationships, and thereby reducing the safety of these families. The Committee's recommendations seek to address these current deficiencies.

Family violence in property division

- 5.64 The Committee is of the view that the impact of family violence, as defined in the Family Law Act, should be considered by the Court in property division. Evidence to the inquiry identified difficulties in discerning useful precedential authority with respect to property division.

⁸⁸ Australian National Research Organisation for Women's Safety, *Horizon's Research Report – Violence against women in Australia: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey 2012*, Issue 1, October 2015; see also Queensland Domestic Violence Services Network, *Submission 30*, p. 4; Good Shepherd Australia New Zealand, *Submission 58*, pp. 3-4; Legal Aid NSW, *Submission 90*, p. 24.

- 5.65 As noted at the beginning of this chapter, relationship breakdown is well recognised as a contributing cause of poverty in Australia, and a lack of equitable access to financial assets can be a significant barrier to the recovery of families affected by violence. The Committee was particularly concerned by evidence that the majority of women leaving violent relationships leave assets or property behind that would otherwise assist them in the recovery after violence.
- 5.66 Amending the Family Law Act to enable the impact of family violence to be taken into account in the Court's consideration of both parties' contributions and their future needs, would not only address the difficulties of discerning useful precedential authority but also the significant evidentiary limitations identified in evidence to the inquiry.

Recommendation 13

- 5.67 **The Committee recommends that the Australian Government introduces to the Parliament amendments to the *Family Law Act 1975 (Cth)* to enable:**
- **the impact of family violence to be taken into account in the Court's consideration of both parties' contributions; and**
 - **the impact of family violence to be specifically taken into account in the Court's consideration of a party's future needs.**

Small claim property matters

- 5.68 A family law system that applies the same processes and evidentiary burdens on litigants regardless of whether a property pool is \$10,000 or \$10 million, is not an accessible system. An equitable and timely division of a small property pool can provide significant financial relief to a family following separation.
- 5.69 The accessibility of the family law system should never present families with any additional barriers in its design or delivery. To achieve an accessible and equitable family law system, the Committee recommends that the Family Law Act be amended to include a requirement for an early resolution process in small claim property matters, including a case management

process upon application to the Court for a property settlement, rather than a pre-filing requirement.⁸⁹

- 5.70 The Committee is of the view that such a process would provide families in crisis with greater certainty and more expeditious resolution.

Recommendation 14

- 5.71 The Committee recommends that the Australian Government introduces to the Parliament amendments to the *Family Law Act 1975 (Cth)* to include a requirement for an early resolution process for small claim property matters. This process should involve a case management process upon application to the Court for a property settlement, rather than a pre-filing requirement, which will provide greater certainty and more expeditious resolution.**

Division of superannuation

- 5.72 The Committee is concerned about evidence to the inquiry which highlighted significant hurdles that families may face when seeking equitable division of assets. For families recovering from family violence, equitable division of relationship assets is critical to their recovery and stability following relationship breakdown, avoiding homelessness and greater independence.
- 5.73 The Committee agrees with WLSA that change is required to provide parties with the ability to independently access the superannuation details of their former partner when that information is not properly disclosed.

Recommendation 15

- 5.74 The Committee recommends that the Attorney General:**
- **develops an administrative mechanism to enable swift identification of superannuation assets by parties to family law proceedings, leveraging information held by the Australian Taxation Office; and**
 - **amends the *Family Law Act 1975 (Cth)* and relevant regulations to reduce the procedural and substantive complexity associated with**

⁸⁹ Emma Smallwood, *Stepping Stones: Legal Barriers to Economic Equality After Family Violence*, Women's Legal Service Victoria, 2015, p. 11.

superannuation splitting orders, including by simplifying forms required to be submitted to superannuation funds.

Treatment of unsecured joint debt and shared liability

- 5.75 Although not discussed widely in evidence to the inquiry, the Committee is of the view that the treatment of unsecured joint debt needs to be further considered by the Australian Government.
- 5.76 The Committee is concerned that a family affected by family violence may be in an untenable situation where they cannot be financial independent of a perpetrator. This situation can be exacerbated when the perpetrator either coerced their former partner into an unsecured joint liability, or did so without their former partner's knowledge.
- 5.77 The treatment of joint debt broadly can also arise in insurance claims where only one party to a joint policy is at fault. For example, the Committee was privately advised of one instance where a violent ex-partner was convicted of arson following a fire at the family's home. As one of the policy holders committed arson, the family's home and contents insurance policy was initially voided by the insurance company.
- 5.78 The Committee notes that the Family Law Act permits the Court to make an order directing a creditor to substitute one party for both parties in relation to the debt owed, or sever the debt and apportion it in different amounts between the parties. However, the Court is currently limited in making such orders and may only do so if it is not foreseeable that the order would result in the debt not being paid in full, and it is just and equitable to do so.
- 5.79 The Committee is particularly concerned that in cases where the Court cannot make such orders, due to the limitations imposed by the Act, that families who are seeking to both emotionally and financially recover from family violence are facing significant additional impediments. The Committee did not receive sufficient evidence that would allow it to make a recommendation for a specific amendment to the Family Law Act. Rather, the Committee recommends that this issue is given further consideration by the Australian Government.

Recommendation 16

- 5.80 The Committee recommends that the Attorney-General's Department considers options for legislative amendment to the *Family Law Act 1975* (Cth) to enable the federal family courts to make greater use of court**

orders for the split or transfer of unsecured joint debt and shared liabilities following the separation of families, particularly those affected by family violence.

Procedural changes to support reform

- 5.81 To support these broader reforms, procedural changes are also required. As recommended in Chapter 4, the Committee reiterates the opportunity provided by state and territory magistrates exercising jurisdiction under the Family Law Act to provide prompt and effective resolutions to family law matters. As recognised in this chapter and previously, the state and territory magistrates courts face a monetary limit on the property disputes they can determine.
- 5.82 The Committee notes the release of the exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017, which includes proposals to remove the \$20,000 limit from the Family Law Act, and providing for a new limit to be set in regulations. Along with its previous recommendations with regards to resourcing and training, the Committee is of the view that the passage of this legislative amendment will provide greater certainty and a more expeditious resolution of property disputes.

Recommendation 17

- 5.83 **The Committee recommends that the jurisdictional limit on state and territory magistrates' courts hearing family law property disputes be increased and that the Attorney-General introduces to the Parliament the Family Law Amendment (Family Violence and Other Measures Bill 2017) to give effect to the increase.**
- 5.84 Families who have experienced violence and are parties to property division matters, also require protection from the potentially re-traumatising experience of being cross-examined by a perpetrator of violence, such as those afforded during parenting matters.⁹⁰
- 5.85 The Committee therefore recommends extending the safeguards established in section 69ZN and section 69ZX of the Family Law Act that apply during parenting matters to property division matters that require the Court to

⁹⁰ Legal Aid NSW, *Submission 90*, p. 23.

conduct proceedings in a way that will safeguard the parties against family violence.

Recommendation 18

5.86 The Committee recommends that the *Family Law Act 1975 (Cth)* be amended to extend sections 69ZN and 69ZX, which requires the Court to conduct proceedings in a way which safeguards the parties against family violence in parenting matters, to apply in property division matters.

6. Matters involving children

- 6.1 More than half the parenting cases that proceed to the Court involve allegations of family violence.¹ A recent study in 2015 found that in more than 83 per cent of matters involving allegations of family violence or child abuse, parental responsibility is shared between parents for the care of that child.² For judicially-determined arrangements, 40 per cent of parents share ongoing parental responsibility despite allegations family violence or child abuse.³
- 6.2 The capacity of the family law system to respond to instances of family violence has been canvassed in Chapters 3 and 4. However, with respect to family violence matters involving children, evidence to the inquiry suggests that the family law system is ‘in crisis’ and is ‘failing’ to protect children.⁴
- 6.3 As noted earlier in this report, a victim of family violence will be required to demonstrate that they will act protectively of their children under state law, yet ‘acting proactively’ under the federal family law may demonstrate an attitude deemed ‘incompatible with the primary consideration of the child of having a meaningful relationship with both parents’.⁵ Legislative reforms introduced in 2012 sought to address this conflict by prioritising a child’s

¹ Professor Richard Chisholm, *Family Courts Violence Review*, 2009, p. 4.

² Australian Institute of Family Studies, *Evaluation of the 2012 family violence amendments: responding to family violence*, 2015, p. 66; see also Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, pp. 4-5.

³ Australian Institute of Family Studies, *Evaluation of the 2012 family violence amendments: responding to family violence*, 2015, p. 66.

⁴ Mrs Hetty Johnston AM, Founder and Executive Chair, Bravehearts Foundation Ltd, *Committee Hansard*, Melbourne, 24 July 2017, p. 1.

⁵ Queensland Law Society, *Submission 38*, p. 3.

safety from harm by directing the Court to give greater weight to the need to protect a child from harm. Significantly, however, a recent evaluation of those amendments has found that they have ‘largely not achieved the objective of improving safety [of children]’.⁶

- 6.4 Importantly, the Committee was told that the family law system can play a role in preventing the unnecessary removal of children by child protection departments.⁷ The Aboriginal Family Violence Prevention and Legal Services Victoria explained:

I think it can be incredibly important for clients to look at the safety of the family and make arrangements before matters escalate to the point of a child protection intervention ... [W]ith the right supports, the family law system could be used to make other safe arrangements—to facilitate a safe separation from the violent partner, if necessary, and perhaps to facilitate an agreement about the children living with grandparents or a different family member, whether permanently or temporarily, while the family violence situation is resolved ... There would be better agencies for families to avoid escalating down the road of child removal and out-of-home care.⁸

- 6.5 This can also be critical for families with parents or children with disabilities who are affected by family violence, where there is often greater involvement by child protection departments.⁹
- 6.6 Yet, where the family law system cannot provide sufficient protection or support to families affected by violence, families may seek informal arrangement including ‘supervising the perpetrator’s time with the children themselves’.¹⁰ The lack of responsiveness of the family law system to family violence can expose both parents and children to ever increasing risks of harm following separation.

⁶ Australian Institute of Family Studies, *Evaluation of the 2012 family violence amendments: responding to family violence*, 2015; see also, Queensland Law Society, *Submission 38*, p. 3.

⁷ Ms Laura Vines, Manager, Strategy and Policy, Aboriginal Family Violence Prevention and Legal Services Victoria, *Committee Hansard*, Melbourne, 24 July 2017, p. 28; Ms Biljana Milosevic, Director, Jannawi Family Centre, *Committee Hansard*, Sydney, 31 July 2017, p. 51.

⁸ Ms Laura Vines, Manager, Strategy and Policy, Aboriginal Family Violence Prevention and Legal Services Victoria, *Committee Hansard*, Melbourne, 24 July 2017, p. 28.

⁹ Ms Paulina Gutierrez, Individual Advocate, People with Disability Australia, *Committee Hansard*, Sydney, 31 July 2017, p. 41; Mrs Leonie Hazelton, Individual Advocate, People with Disability Australia, *Committee Hansard*, Sydney, 31 July 2017, p. 41.

¹⁰ Hume Riverina Community Legal Service, *Submission 76*, p. 5.

- 6.7 This chapter addresses the impact of family violence on children and prioritising the safety of children and the rights of parents to maintain contact with their children. It extends the discussion from Chapter 4 regarding improving the information available to the Court, focussing on the integration of child protection agencies and the role of family consultants in preparing family reports.
- 6.8 This chapter then considers proposals for incorporating children's perspectives in court processes, examining the role of independent children's lawyers in proceedings. Lastly, this chapter will discuss the evidence received for the ongoing safety review of court orders as they relate to children.

Recognising the impact of family violence on children

- 6.9 As noted in Chapter 3, inconsistent orders issued by different jurisdictions can result in unsafe and traumatic experiences for parents and children.¹¹ If a family obtains an intervention order under state and territory legislation, that order may contain an exception to permit contact for the purpose of family law matters.
- 6.10 As a result of such orders, families affected by family violence are 'often placed in a double-bind with child protection authorities requiring them to minimise the contact of their children with a violence ex-partner, while the family law system requires them to facilitate such contact'.¹²
- 6.11 Similarly, Jannawi Family Centre commented that children are 'fairly invisible' in the family law system.¹³ The Centre also explained how ongoing contact with perpetrators can cause continued trauma:

When children do have contact it creates ongoing trauma. There are usually incidents during contact changeovers, and they will disclose harm in

¹¹ Productivity Commission, *Access to Justice Arrangements Inquiry Report*, Report No 72, Vol II, p. 865; see also Monash University – Castan Centre for Human Rights Law (Castan Centre for Human Rights Law), *Submission 57*, p. 3.

¹² Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 73*, p. 6.

¹³ Ms Biljana Milosevic, Director, Jannawi Family Centre, *Committee Hansard*, Sydney, 31 July 2017, pp. 49-50.

returning, to then have to be forced to go back the week after and the week after because a court order states that there is fortnightly contact.¹⁴

- 6.12 A number of participants identified that the ability for such orders to be made indicates a lack of understanding about how family violence affects children,¹⁵ and how ongoing contact with perpetrators can cause continued trauma.¹⁶ Statewide Children’s Resource Program commented:

For many years it was believed that children could just bounce back from adversity. We know that this is not the case. Children have a unique experience of family violence and this experience is very different from that of adults. Family violence has harmful, immediate and long-term effects on children. Children who experience violence have significant trauma responses. In fact the severity of the impact of family violence on children is similar regardless of whether they witness the violence or experience the violence directly.¹⁷

- 6.13 Evidence to the inquiry also noted that even where family violence is not directed at children, the impact of observing violence on another family member can be deeply traumatic.¹⁸ Some participants stated that abuse of a parent is also abuse of a child.¹⁹ For example, the Australian Childhood Foundation advised that children suffer a range of emotional, behavioural and developmental problems from family violence and that:

¹⁴ Ms Biljana Milosevic, Director, Jannawi Family Centre, *Committee Hansard*, Sydney, 31 July 2017, p. 51.

¹⁵ Statewide Children’s Resource Program, *Submission 3*, p. 1; Women’s Council for Domestic and Family Violence Services, *Submission 7*, p. 2; Australian Childhood Foundation, *Submission 19*, p. 3; Domestic Violence Crisis Service, *Submission 29*, pp. 4-5; ACT Human Rights Commission, *Submission 33*, pp. 5-6; Jannawi Family Centre, *Submission 51*, p. 6; Royal Australian and New Zealand College of Psychiatrists (RANZCP), *Submission 69*, p. 3; ANROWS, *Submission 73*, p. 6; For Kids Sake, *Submission 79*, p. 19; Ms Biljana Milosevic, Director, Jannawi Family Centre, *Committee Hansard*, Sydney, 31 July 2017, pp. 49-50.

¹⁶ Statewide Children’s Resource Program, *Submission 3*, p. 1; ANROWS, *Submission 73*, p. 6; Ms Biljana Milosevic, Director, Jannawi Family Centre, *Committee Hansard*, Sydney, 31 July 2017, p. 51.

¹⁷ Statewide Children’s Resource Program, *Submission 3*, p. 1.

¹⁸ Australian Childhood Foundation, *Submission 19*, p. 3; ACT Human Rights Commission, *Submission 33*, pp. 5-6; RANZCP, *Submission 69*, p. 3.

¹⁹ Junction Australia, *Submission 23*, p. 3; ACT Human Rights Commission, *Submission 33*, p. 2; Safe Steps Family Violence Response Centre (Safe Steps), *Submission 34*, p. 13; Jannawi Family Centre, *Submission 51*, p. 6; Relationships Australia, *Submission 55.1*, p. 5; RANZCP, *Submission 69*, p. 5.

Children are never merely observers or bystanders in circumstances where one of the parents is violent toward the other. They are always harmed. To what degree and in what ways is the task of the Court to understand and respond appropriately to. It is the duty of those making decisions on behalf of this most vulnerable group to be as informed as they possible can.²⁰

- 6.14 The ACT Human Rights Commission provided similar evidence, stating that children are ‘not passive or silent observers to violence occurring in their families’ and that the impact of family violence is long-lasting.²¹ The Commission recommended reform that is child-centric, placing the needs, safety and rights of the child at the centre of decision-making.²² To do so requires improving the information available to the Court.²³
- 6.15 Prioritising children’s safety, particularly ahead of other considerations including the rights of a perpetrator parent to have contact with a child, was broadly supported by participants.²⁴ This is discussed further in the following section.

Prioritising children’s safety

- 6.16 As noted in Chapter 2, when determining a child’s best interests, the Court must give primary consideration to the child’s relationship with parents, and the protection of the child.²⁵
- 6.17 After amendments introduced in 2012, the Court is now to give greater weight to the safety of the child over the benefit of a relationship with both parents.²⁶ In determining the best interests of the children, the Court may

²⁰ Australian Childhood Foundation, *Submission 19*, p. 5.

²¹ ACT Human Rights Commission, *Submission 33*, pp. 5-6.

²² ACT Human Rights Commission, *Submission 33*, pp. 5-6.

²³ ACT Human Rights Commission, *Submission 33*, pp. 6-7.

²⁴ Statewide Children’s Resource Program, *Submission 3*, p. 1; Women Everywhere Advocating Violence Elimination, *Submission 16*, p. 6; Junction Australia, *Submission 23*, p. 3; Micah Projects, *Submission 24*, p. 3; Baptist Care Australia, *Submission 28*, p. 4; ACT Human Rights Commission, *Submission 33*, p. 1; Sole Parent Alliance, *Submission 40*, p. 4; Jannawi Family Centre, *Submission 51*, p. 4; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 2; Bravehearts, *Submission 84*, p. 5; Justice for Children, *Submission 118*, p. 2; Alice Springs Women’s Shelter, *Submission 121*, p. 2.

²⁵ *Family Law Act 1975* (Cth), s 60CC.

²⁶ *Family Law Act 1975* (Cth), s 60CC(2A).

also consider a number of additional matters including the presence of family violence.²⁷

- 6.18 Despite this, a significant number of stakeholders were of the view that the family law system prioritises the rights of parents to have a meaningful relationship with the child above the child's right to be safe,²⁸ and advocated that children's safety be given greater priority in the family law system.²⁹ Family and Relationship Services Australia explained:

While the rights of children to be safe are well known, 'rights' are not necessarily backed up with best practice. While the rights of the child to be safe trumps the rights of the parent to have access to children this is hardly ever born out in court orders; it is nearly always the rights of the parents to have a meaningful relationship with the child that is given precedence. Children sometimes must live with or spend time with a perpetrator of family and domestic violence. This can result in emotional insecurity, an environment not conducive to optimal social, emotional cognitive and even physical development. ... Where there is entrenched high levels of parental conflict, or where children have experience or are likely to be exposed to continuing family and domestic violence or child abuse, parent-child contact may be highly inappropriate and can have serious, long-lasting adverse effects on children.³⁰

- 6.19 Similarly, Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih advised that the language of 'meaningful

²⁷ *Family Law Act 1975 (Cth)*, s 60CC.

²⁸ Women Everywhere Advocating Violence Elimination, *Submission 16*, p. 6; Junction Australia, *Submission 23*, pp. 2-3; Micah Projects, *Submission 24*, p. 3; Jannawi Family Centre, *Submission 51*, p. 4; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 2; Family and Relationship Services Australia (FRSA), *Submission 80*, p. 12; Bravehearts, *Submission 84*, p. 5; Justice for Children, *Submission 118*, p. 2; Alice Springs Women's Shelter, *Submission 121*, p. 2; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, p. 6.

²⁹ Statewide Children's Resource Program, *Submission 3*, pp. 1, 3; National Child Protection Alliance, *Submission 5*, p. 6; Northern Integrated Family Violence Services, *Submission 11*, p. 2; Women Everywhere Advocating Violence Elimination, *Submission 16*, p. 6; Junction Australia, *Submission 23*, pp. 2-3; Micah Projects, *Submission 24*, p. 3; Baptist Care Australia, *Submission 28*, p. 4; ACT Human Rights Commission, *Submission 33*, p. 1; Sole Parent Alliance, *Submission 40*, p. 4; Council of Single Mothers and their Children Victoria, *Submission 42*, p. 6; Victims of Crime Assistance League NSW, *Submission 46*, p. 22; Jannawi Family Centre, *Submission 51*, p. 4; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 2; FRSA, *Submission 80*, p. 12; Bravehearts, *Submission 84*, p. 5.

³⁰ FRSA, *Submission 80*, p. 12.

relationships' between parents and children is 'sometimes given more importance than a history of family violence'. They concluded that this cultural understanding of the *Family Law Act 1975* (Cth) (Family Law Act) has led to family consultants 'looking for ways to continue to grow the post-separation relationship between the children and their parents, perhaps at the expense of fully considering issues of physical and emotional safety'.³¹ This 'prevailing and preferred philosophy ... plays a role in silencing information about family violence or diminishing its significance'.³²

Box 6.1 Prioritising children's safety

The following is a selection of responses to the Committee's questionnaire:

'When it's said that 'we are doing what is in the child's best interests' [it] is not correct. Children being forced back to the perpetrator is never in their best interest and more and more research shows this clearly'.

— *Respondent from Queensland*

'The system does not allow the Court to truly put a child's best interest first, due to the current interpretation of what is in a child's best interest'.

— *Respondent from Western Australia*

'Orders are not made in children's best interests, they are made in parents best interest. This is because parents have a voice and they have money'.

— *Respondent from Queensland*

'Decisions are made not in children's best interest. Safety is not first priority, rather access to both parents is most important, no matter how unsafe. Past violence [by] fathers and intervention orders are ignored'.

— *Respondent from Victoria*

'Children need to be protected from all types of abuse. The law needs to change to get rid of the equal shared care starting point. It doesn't reflect research ... It is not always in children's best interest to be spend [time]

³¹ Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, p. 6.

³² Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, p. 3.

overnight with both parents’.

—*Respondent from Queensland*

- 6.20 This approach in the application of the Family Law Act was reflected upon by Professor Richard Chisholm in 2009 in the Family Courts Violence Review.³³ In that review, Professor Chisholm recommended that the provisions for care arrangements for children be independent of the provisions of parental responsibility. This would return the Court’s focus to identifying arrangements that are in a child’s best interests.³⁴
- 6.21 The following section examines the link between parental responsibility and caring arrangements for children where there is a history or future risk of family violence.

Equal shared parental responsibility

- 6.22 The Family Law Act establishes a presumption of equal shared parental responsibility when making parenting orders:

When making a parenting order in relation to a child, the Court must apply a presumption that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child.³⁵

- 6.23 For both interim and final orders, the presumption may be rebutted by evidence that it would not be in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child.³⁶
- 6.24 However, the presumption relates solely to the allocation of parental responsibility for a child, and it does not provide for a presumption about the amount of time the child spends with each parent. Further, the Act provides that the presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in child abuse or family violence.³⁷

³³ Professor Richard Chisholm, *Family Courts Violence Review*, 2009.

³⁴ Professor Richard Chisholm, *Family Courts Violence Review*, 2009, Recommendation 3.3 and 3.4, pp. 132-134.

³⁵ *Family Law Act 1975* (Cth), s 61DA(1).

³⁶ *Family Law Act 1975* (Cth), s 61DA(4).

³⁷ *Family Law Act 1975* (Cth), s 61DA(2).

- 6.25 The Family Law Act also establishes that once an order for equal shared parental responsibility has been made, the Court must consider equal time or substantial and significant time arrangements if it is in the best interests of the child and it is workable.³⁸
- 6.26 As noted above, when determining a child's best interests, the Court must give primary consideration to:
- the benefit to the child of having a meaningful relationship with both of the child's parents; and
 - the need to protect the child from physical or psychological harm from being subject to, or exposed to, abuse, neglect or family violence.³⁹
- 6.27 The presumption of equal shared parental responsibility was first introduced in amendments to the Family Law Act in 2006. In 2009, the Australian Institute of Family Studies (AIFS) evaluated the effect of the 2006 amendments and again in 2015 when it reviewed reforms introduced in 2012. In both cases the AIFS found that the provisions were not achieving their intended outcomes.⁴⁰
- 6.28 In its 2009 evaluation, the AIFS found that even where both family violence and child abuse had been alleged in a case before the Court, over 75 per cent of these cases led to orders for equal shared parental responsibility, whether made by a judge or agreed to by the parties through consent orders.⁴¹ The AIFS findings are presented in Table 6.1 below.

Table 6.1 Parental responsibility outcomes by allegation of violence or child abuse, judicially determined and consent after proceedings cases, post-1 July 2006

³⁸ *Family Law Act 1975 (Cth)*, s 65DAA; see also Women's Legal Services Australia (WLSA), *Submission 6*, p. 21; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, p. 4.

³⁹ *Family Law Act 1975 (Cth)*, s 60CC.

⁴⁰ Australian Institute of Family Studies, *Executive summary: Evaluation of the 2006 family law reforms*, 2009, pp. 3-4; see also WLSA, *Submission 6*, pp. 21-22; Australian Institute of Family Studies, *Evaluation of the 2012 family violence amendments: responding to family violence*, 2015, pp. 24-25.

⁴¹ Australian Institute of Family Studies, *Executive summary: Evaluation of the 2006 family law reforms*, 2009, p. 190.

	Allegation of family violence or child abuse			No allegation
	Both	Family violence only	Child abuse only	
Shared parental responsibility	75.8%	79.6%	71.9%	89.8%
Sole to mother	14.0%	18.5%	18.0%	4.9%
Sole to father	4.0%	1.0%	4.4%	1.8%
Other	6.3%	0.9%	5.6%	3.4%
Number of children	140	152	129	395

Source: Australian Institute of Family Studies, *Evaluation of the 2006 family law reforms 2009*, p. 190.

6.29 The AIFS evaluation of the 2012 reforms concluded that although some improvements had been made, many parents continue to share ongoing parental responsibility for their children despite a history of family violence or child abuse (Table 6.2).

Table 6.2 Children in shared parental responsibility arrangements, by whether there were allegations of family violence and/or child abuse, pre- and post-2012 reforms

	Pre-2012 reform	Post-reform (%)
Both family violence and child abuse	72.3%	69.9%
Either family violence or child abuse	79.5%	83.7%
Neither family violence nor child abuse	89.9%	89.9%

Source: Australian Institute of Family Studies, *Evaluation of the 2012 family violence amendments: responding to family violence, 2015*, p. 66.

6.30 The most significant change occurred in respect of equal shared parental responsibility orders made by judges, which reduced from 51 per cent

pre-reform to 40 per cent post-reform.⁴² It is important to note however that few parenting matters proceed to a final hearing with a judicially determined order.⁴³

- 6.31 Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih stated that the AIFS findings suggest that ‘the exceptions [for family violence and child abuse] contained in the presumption [for equal shared parental responsibility] were not working as intended’.⁴⁴ In their view, the 2012 reforms had not made any substantial shift in the number of equal shared parental responsibility arrangements agreed to by consent in matters involving family violence, which according to the AIFS evaluation remained largely stable.⁴⁵
- 6.32 Evidence to the inquiry expressed significant concern about the operation of these sections of the Family Law Act.⁴⁶ Some stakeholders noted the family violence or child abuse exceptions to the presumption of equal shared parental responsibility, but advised the Committee that these have been rarely used by the Court.⁴⁷ The Victorian Southern Metropolitan Region Integrated Family Violence Executive noted:

The presumption of shared care and equal responsibility in the Family Court assumes there is a level of cooperation and respect between the parents and

⁴² Australian Institute of Family Studies, *Evaluation of the 2012 family violence amendments: responding to family violence*, 2015, p. 66; see also Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, p. 4.

⁴³ Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, p. 5.

⁴⁴ Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, p. 4.

⁴⁵ Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, p. 5.

⁴⁶ Northern Integrated Family Violence Services, *Submission 11*, p. 2; Micah Projects, *Submission 24*, p. 6; Baptist Care Australia, *Submission 28*, p. 4; Domestic Violence NSW, *Submission 48*, pp. 9, 12; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 1; ANROWS, *Submission 73*, p. 5; Women’s Legal Service Queensland, *Submission 81*, p. 16; Dr Renata Alexander, *Submission 108*, p. 3; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, pp. 3-4; Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 8.

⁴⁷ Queensland Law Society, *Submission 38*, p. 16; Dr Renata Alexander, *Submission 108*, p. 3; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, pp. 3-4.

the capacity to attend appropriately to the daily needs of children. Where there is family violence, this is inherently not possible.⁴⁸

- 6.33 Further, a significant number of stakeholders reported that there is misinterpretation of the presumption for equal shared parental responsibility as a presumption for equal shared time.⁴⁹ The Law Council of Australia stated that:

The term ‘equal shared parental responsibility’ is interpreted by people in the [family law] community as meaning ‘equal time’. It is not, but that is what they see—they see that word ‘equal’. And what we know, from the research, is that that leads some people to resolve parenting matters way before they come to court—these are people who are settling privately between themselves or with some form of mediation—by settling for arrangements which they think the law requires of them. The law does not require them, and they put children at risk.⁵⁰

- 6.34 Similarly, Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih further explained:

...the current provisions of the [*Family Law Act*] tend to impel both family law professionals and litigants (or pre-litigation parents) to encourage or agree to parenting orders for equal shared parental responsibility and post-separation shared care time (whether ‘equal’, ‘substantial and significant’ or simply quite a lot). This can mean that allegations about family violence are perceived as running counter to the prevailing and preferred philosophy ... The legislative connection between shared parental responsibility and the kind of time orders that have to be considered by judges, other professionals and parents is particularly influential regarding the practical outcomes for children and the

⁴⁸ Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission 52*, p. 1.

⁴⁹ Northern Integrated Family Violence Services, *Submission 11*, p. 2; Domestic Violence NSW, *Submission 48*, pp. 9, 12; Women’s Legal Service Queensland, *Submission 81*, p. 16; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, pp. 3-4; Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 8; Ms Rosie Batty, Private Capacity, *Committee Hansard*, Melbourne, 24 July 2017, p. 13; Ms Christine Craik, National Vice President, Australian Association of Social Workers, *Committee Hansard*, Melbourne, 24 July 2017, p. 49; Mr Ross Butler, Senior Manager, Family Dispute Resolution, Interrelate Limited, *Committee Hansard*, Sydney, 31 July 2017, p. 17.

⁵⁰ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 8.

way in which their actual post-separation parenting arrangements are structured.⁵¹

6.35 The ability for the provisions to be misinterpreted was first commented on by the AIFS in its evaluation of the 2006 amendments, finding:

A common misunderstanding is that equal shared parental responsibility allows for ‘equal’ shared care time, and that if there is shared parental responsibility then a court will order shared care time. This misunderstanding is due, at least in part, to the way in which the link between equal shared parental responsibility and time is expressed in the legislation... There was also concern that the complexity of the new provisions, together with the presumption of equal shared parental responsibility have to some extent, diverted attention from the primacy of the best interests of the child.⁵²

6.36 Noting these AIFS findings in both 2009 and 2015, Women’s Legal Services Australia recommended removing the language of equal shared parental responsibility to ‘shift culture and practice towards a greater focus of children’s needs and their safety’.⁵³ This recommendation was supported by a number of other participants in the inquiry.⁵⁴ Other participants recommended amending the best interests of the child test to assess the safety of the child from physical or psychological harm, rather than the safety of the child together with the benefit of having a meaningful relationship with both parents.⁵⁵

⁵¹ Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, p. 3.

⁵² Australian Institute of Family Studies, *Executive summary: Evaluation of the 2006 family law reforms*, 2009, pp. 3-4; see also WLSA, *Submission 6*, pp. 21-22.

⁵³ WLSA, *Submission 6*, pp. 22-23; see also WLSA, *Safety First in Family Law – a five step plan*, 2016.

⁵⁴ WLSA, *Submission 6*, p. 9; Northern Integrated Family Violence Services, *Submission 11*, p. 2; Micah Projects, *Submission 24*, p. 5; People with Disability Australia, *Submission 25*, p. 2; Public Health Association of Australia, *Submission 27*, p. 4; Baptist Care Australia, *Submission 28*, p. 4; Sexual Assault Support Service, *Submission 32*, p. 2; Domestic Violence NSW, *Submission 48*, p. 9, 12; The Deli Women and Children’s Centre (The Deli Centre), *Submission 67*, p. 5; Women’s Legal Service Queensland, *Submission 81*, p. 17; Northern Rivers Community Legal Centre, *Submission 83*, p. 3; National Association of Community Legal Centres, *Submission 115*, p. 2; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, p. 3.

⁵⁵ Bravehearts, *Submission 84*, p. 5.

- 6.37 Other participants made stronger recommendations, supporting the prohibition of contact between perpetrators and their children.⁵⁶ For example, Bravehearts commented: ‘In no circumstance should a person who has been convicted of child sexual offending, offending against a child, have custody of that child or live with that child. It is beyond belief’.⁵⁷
- 6.38 The Royal Australian and New Zealand College of Psychiatrists advocated for disallowing a child spending unsupervised time with a perpetrator of family violence ‘unless the Court is satisfied that such an arrangement could be safe and in the child’s best interests’.⁵⁸ ANROWS noted that this approach, whereby evidence must be presented to the Court that children will be safe, has already been adopted in New Zealand:
- ... prioritising children’s safety could require parents alleged or found to have perpetrated family violence to provide evidence to the Court that children can be safe under their care. A good example of this approach can be found in New Zealand where children are at the forefront of the decisions and allegations or findings of family violence are dealt with on the basis of a ‘rebuttable presumption’ that a parent who had used violence against a child or against the other parent, would not have the custody of, or unsupervised access to the child unless the Court could be satisfied that the child would be safe during visitation arrangements.⁵⁹
- 6.39 These recommendations were not supported by all participants in the inquiry. The Non-Custodial Parents Party recommended amending the Family Law Act so that the Court could give primary consideration the benefit to the child of having a meaningful relationship with both parents.⁶⁰ This would reverse the amendment made in 2012 that the Court is to prioritise the safety of children over the right to have a relationship with both parents.

Improving the information available to the courts

⁵⁶ RANZCP, *Submission 69*, p. 6; Mrs Hetty Johnston AM, Founder and Executive Chair, Bravehearts Foundation Ltd, *Committee Hansard*, Melbourne, 24 July 2017, p. 7.

⁵⁷ Mrs Hetty Johnston AM, Founder and Executive Chair, Bravehearts Foundation Ltd, *Committee Hansard*, Melbourne, 24 July 2017, p. 7.

⁵⁸ RANZCP, *Submission 69*, p. 6.

⁵⁹ ANROWS, *Submission 73*, p. 6.

⁶⁰ Non-Custodial Parents Party, *Submission 2*, pp. 1-2.

- 6.40 As noted in Chapter 4, there was broad recognition that the courts require expert evidence when making decisions about family law following instances of family violence.⁶¹ This was particularly borne out in evidence to the inquiry for matters involving children. As the family courts are neither forensic bodies nor have an independent investigatory capacity, the Court is reliant on expert information provided to it.⁶²
- 6.41 However, stakeholders indicated that the quality and availability of expert evidence to the Court for parenting matters requires significant improvement, identifying two specific areas:
- the integration of child protection agencies' investigations into family law proceedings; and
 - improving the quality and breadth of family reports.
- 6.42 Both are examined below.

Integration of child protection agencies' investigations

- 6.43 The majority of cases before the federal family courts involve family violence; family violence is at 'the centre of a family breakdown or dispute' and consequently, the family law system needs to 'prioritise the safety of children at the centre of these disputes.'⁶³
- 6.44 Often, child abuse or exposure to family violence perpetrated by one parent against the other is a core element in the cases considered by the family law courts. However because child protection falls under the responsibility of state and territory agencies, there is 'a risk that the safety of children is not addressed appropriately and early enough' in the family law system.⁶⁴
- 6.45 A number of sections in the Family Law Act are designed to bring child safety concerns to the attention of child protection departments, including provisions that require a Notice of Risk Form to be filed with the Court, known as a child risk form.⁶⁵ When a child risk form is filed, the registrar of

⁶¹ The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 7.

⁶² Women's Legal Service Queensland, *Submission 81*, p. 19.

⁶³ ANROWS, *Submission 73*, p. 5.

⁶⁴ ANROWS, *Submission 73*, p. 5.

⁶⁵ *Family Law Act 1975* (Cth), ss 67Z and 67ZBA.

the Court is required to notify the relevant state or territory child protection department.⁶⁶

- 6.46 Other court staff who may be aware, or have reasonable grounds for suspecting, that the child has been abused or is at risk of abuse are similarly obliged to notify the relevant child welfare authority.⁶⁷ However, 'only a small proportion of family court notifications to the child protection system become the subject of children's court proceedings',⁶⁸ with some evidence indicating that investigations occur in only 25 per cent of cases where a child risk form is provided to the state body.⁶⁹
- 6.47 Where a child protection department investigates following a notification from the Court, but decides not to initiate protective proceedings in the children's court, the family court may request the intervention in the family law proceedings of an officer from the child protection department.⁷⁰ However, the Court cannot compel the child protection department to intervene.⁷¹
- 6.48 Where the department has conducted an investigation, or has had previous involvement with the family, the Court may issue a subpoena requiring the child protection department to provide the Court with documents or information relating to that investigation or involvement.⁷² A lawyer for one of the parties may also issue a subpoena for the child protection department's file.⁷³
- 6.49 In the joint 2010 report, the Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC) identified an 'investigatory gap' caused by the lack of investigatory powers of the family courts to

⁶⁶ *Family Law Act 1975* (Cth), s 67ZA.

⁶⁷ *Family Law Act 1975* (Cth), s 67ZA.

⁶⁸ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* – Interim Report, 2015, p. 31.

⁶⁹ National Child Protection Alliance, *Submission 5*, p. 2; see also InTouch Multicultural Centre Against Family Violence (InTouch), *Submission 13*, p. 6.

⁷⁰ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* – Interim Report, 2015, p. 23.

⁷¹ *Family Law Act 1975* (Cth), s 91B. See for an example of a case where the child protection department intervened in the family law proceedings, *Marcus & Jeffries* [2012] FMCA 273.

⁷² *Family Law Act 1975* (Cth), s 69ZW.

⁷³ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* – Interim Report, 2015, p. 23.

provide independent investigations in cases where child abuse has been identified. The Commissions stated that children who are vulnerable in this gap are those who:

- are the subject of family law proceedings involving allegations of child abuse;
- state child protection authorities decide not to assist; or
- are not included in a program such as the Magellan case management program for cases involving serious child abuse.

For these children, there are allegations of abuse but there may be no agency to conduct an independent investigation of the allegations and to present evidence to the family courts.⁷⁴

6.50 Women’s Legal Service Queensland advised that an ‘investigatory gap’ can be created where child protection agencies are reluctant to investigate allegations when family law proceedings are afoot, commenting:

Unfortunately, it can leave very vulnerable children exposed to ongoing violence and abuse ... The Family Law Courts do not have an investigatory arm and this means without evidence, they will invariably maintain contact, including significant time arrangements.⁷⁵

6.51 Similarly, Springvale Monash Legal Service stated:

... the inability of the state and federal systems to work together ... is a huge efficiency issue ... [W]e have had two matters where, on the day of the trial, the child protection agency stepped in despite our advocating and trying to get them involved at an earlier stage. There are all sorts of reasons why that happens. But they are really debilitating efficiency issues that you have and need to be addressed. I know that we have been advocating for many years to find some coherence between child protection, an intervention for family violence and the family law.⁷⁶

6.52 Further, Legal Aid NSW advised that in its experience, the NSW Department of Family and Community Services ‘generally declines the Court’s invitation to intervene’.⁷⁷ InTouch Multicultural Centre Against

⁷⁴ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response – Final Report*, ALRC Report 114/NSWLRC Report 128, 2010, p. 911.

⁷⁵ Women’s Legal Service Queensland, *Submission 81*, p. 19.

⁷⁶ Ms Kristen Wallwork, Executive Director, Springvale Monash Legal Service Inc., *Committee Hansard*, Melbourne, 24 July 2017, pp. 30-31.

⁷⁷ Legal Aid NSW, *Submission 90*, p. 17; see also InTouch, *Submission 13*, p. 6.

Family Violence provided similar evidence, also commenting that even where child protection departments provide information, these reports ‘may still not meet the evidentiary requirements of the family law system’.⁷⁸

- 6.53 A number of participants in the inquiry advocated for improved integration of child protection agencies as a way to improve the information available to the Court when parenting matters involve family violence allegations.⁷⁹ For example, Legal Aid NSW commented that the involvement of those agencies in family law proceedings may be of assistance to the Court, as well as to families affected by family violence, recommending:

... any legislative or other measures that would allow judges exercising jurisdiction under the Family Law Act 1975 to also exercise child welfare powers (where appropriate), for example by allowing dual commissions so that in appropriate circumstances a child protection agency could be compelled to assist and intervene in family law proceedings.⁸⁰

- 6.54 InTouch recommended that relevant child welfare departments appear as *amicus curiae* (someone who is not a party to a case and is not solicited by a party, but who assists a court by offering information that bears on the case) in family law proceedings to provide information to the Court about investigations conducted by the department.⁸¹

- 6.55 Bravehearts was of the view that states and territories are the appropriate bodies to conduct such investigations but that the ‘current system is failing in large part because accurate investigation and risk assessment is not conducted nor relevant information ... provided or available in the Federal Courts’.⁸² Rather, Bravehearts recommended that where an allegation of family violence is made in family law proceedings, the case be automatically referred to the relevant child protection department for investigation, with a

⁷⁸ InTouch, *Submission 13*, p. 7.

⁷⁹ National Child Protection Alliance, *Submission 5*, p. 2; InTouch, *Submission 13*, p. 6; Cara House, *Submission 21*, p. 23; Centacare Brisbane, *Submission 22*, p. 5; Queensland Law Society, *Submission 38*, p. 2; Northern Rivers Community Legal Centre, *Submission 83*, p. 8; Bravehearts, *Submission 84*, p. 4; National Legal Aid (NLA), *Submission 88*, p. 9; Legal Aid NSW, *Submission 90*, p. 17; Mrs Hetty Johnston AM, Founder and Executive Chair, Bravehearts Foundation Ltd, *Committee Hansard*, Melbourne, 24 July 2017, pp. 5-6; Ms Kristen Wallwork, Executive Director, Springvale Monash Legal Service Inc., *Committee Hansard*, Melbourne, 24 July 2017, pp. 30-31.

⁸⁰ Legal Aid NSW, *Submission 90*, p. 17.

⁸¹ InTouch, *Submission 13*, p. 7.

⁸² Bravehearts, *Submission 84*, p. 4; see also Mrs Hetty Johnston AM, Founder and Executive Chair, Bravehearts Foundation Ltd, *Committee Hansard*, Melbourne, 24 July 2017, pp. 5-6.

report required to be provided back to the Court on the findings of that investigation.⁸³

- 6.56 The ALRC/NSWLRC Report made a similar recommendation that investigatory services in family law proceedings be provided by a new specialist section in state and territory child protection departments.⁸⁴ The Report identified the advantages of such an arrangements as including:
- drawing on existing child protection expertise;
 - providing a dedicated service responsive to the particular needs of Family Courts;
 - developing expertise within child protection agencies in the needs of Family Courts;
 - providing a resource of people familiar with both systems who can ‘translate’ between the systems and educate participants in both systems; and
 - providing a service that is not in competition with resources that need to be devoted to state child protection matters.⁸⁵
- 6.57 Women’s Legal Service Queensland supported the ALRC/NSWLRC recommendation, commenting that ‘serious consideration should be given to the establishment of such an agency as a matter of urgency’.⁸⁶
- 6.58 The Northern Rivers Community Legal Centre recommended ‘more extensive use’ of the Court’s subpoena power under section 69ZW in relation to child protection agencies, particularly where a party or both parties are self-represented. The Centre advocated this evidence being provided to the Court prior to the preparation of the family report.⁸⁷
- 6.59 National Legal Aid identified that the family courts vary their practice in respect of subpoenas under section 69ZW, commenting that the variation in

⁸³ Mrs Hetty Johnston AM, Founder and Executive Chair, Bravehearts Foundation Ltd, *Committee Hansard*, Melbourne, 24 July 2017, p. 6.

⁸⁴ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, Recommendation 19-1, p. 916.

⁸⁵ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 915; see also Women’s Legal Service Queensland, *Submission 81*, p. 19.

⁸⁶ Women’s Legal Service Queensland, *Submission 81*, p. 19.

⁸⁷ Northern Rivers Community Legal Centre, *Submission 83*, p. 8.

practice 'adds to the complexity for these authorities in respect of the provision of an appropriate and timely response'.⁸⁸ It explained:

For example, in relation to section 69ZW, in some jurisdictions a written report is expected with, as a consequence, preference being given to the issue of subpoena at an early stage; whilst in contrast, in WA the child protection authority is required to provide documents that are already in existence from a defined list which ensures a timely response.⁸⁹

6.60 National Legal Aid therefore recommended that where possible, the family courts adopt consistent processes when requesting information from child protection departments, particularly where done so by subpoena.⁹⁰

6.61 In the 2010 report, the ALRC/NSWLRC recommended a suite of changes to state and territory legislation to facilitate the provision of confidential information to the family courts, including that:

- state and territory child protection legislation should not prevent child protection agencies from disclosing to a federal family court relevant information about children involved in federal family court proceedings in appropriate circumstances;⁹¹
- the federal family courts and state and territory child protection agencies develop protocols for:
 - dealing with requests for documents and information under section 69ZW of the Family Law Act; and
 - responding to subpoenas issued by federal family courts;⁹²
- the federal family courts develop protocols with all state and territory child protection agencies for the exchange of information.⁹³

⁸⁸ NLA, *Submission 88*, p. 9.

⁸⁹ NLA, *Submission 88*, p. 9.

⁹⁰ NLA, *Submission 88*, p. 9.

⁹¹ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, Recommendation 30-4, p. 1416; see also Australian Law Reform Commission, *Submission 31*, p. 2.

⁹² Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, Recommendation 30-5, p. 1416; see also Australian Law Reform Commission, *Submission 31*, p. 2.

⁹³ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, Recommendation 30-17, p. 1449; see also Australian Law Reform Commission, *Submission 31*, p. 3.

- 6.62 The Committee is aware that recent amendments in New South Wales now enable the exchange of reports between the NSW Department of Family and Community Services and the federal family courts.⁹⁴
- 6.63 Two significant Family Law Council reports have examined the intersection of the family law system with child protection systems at the state and territory level.⁹⁵ In these reports, the Council concluded that the fragmented jurisdiction of the family law system, child protection and family violence protection orders ‘impedes the protection of children’.⁹⁶
- 6.64 With respect to the integration of child protection departments in family law proceedings, the Council recommended:
- amending the prohibition of publication provisions in state and territory child protection legislation to make it clear that these provisions do not prevent the production of reports prepared for children’s court proceedings in family law proceedings;⁹⁷
 - the co-location of state and territory child protection department practitioners in federal family court registries;⁹⁸ and
 - the development of protocols for the collaborative exchange of information between the family courts and child protection departments, police, and mental health services.⁹⁹

Magellan program

⁹⁴ *Children and Young Persons (Care and Protection) Act 1998 (NSW)*, Chapter 16A; see also Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System – Interim Report*, 2015, p. 99.

⁹⁵ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System – Interim Report*, 2015, and *Final Report*, 2016.

⁹⁶ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System – Interim Report*, 2015, p. 96.

⁹⁷ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System – Interim Report*, 2015, Recommendation 5, p. 106.

⁹⁸ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System – Interim Report*, 2015, Recommendation 5, p. 106.

⁹⁹ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System – Interim Report*, 2015, Recommendation 6, p. 107.

- 6.65 To some degree, the level of integration recommended in evidence to the inquiry discussed in the section above, is currently available for the most serious cases alleging child abuse before the Family Court.¹⁰⁰
- 6.66 The Magellan program operates as a dedicated pathway within the Family Court for cases of serious harm, providing a co-ordinated, multi-agency approach by the Family Court, the state child protection department and Legal Aid to the resolution of parenting disputes involving allegations of serious physical or sexual abuse of children.¹⁰¹
- 6.67 Parenting cases dealt with in the Magellan list are intensively case managed, with cases overseen by a team consisting of a registrar, a judge, and a family consultant. The program involves support from child protection departments through the provision of a Magellan report assessing questions of risk and abuse and legal aid commission through the provision of an Independent Children's Lawyer. Cases in this list adhere, at every stage, to a strict timeline.¹⁰²
- 6.68 In 2007, AIFS evaluated the Magellan program, finding that it had been successful in responding to allegations of serious child abuse.¹⁰³ The AIFS evaluation found that matters case-managed under the Magellan program:
- resolved more quickly (the total length of cases, from the date of application to finalisation is shorter by an average of 4.6 months; from the date the Court was advised of the allegations to the case outcome, Magellan cases were 3.4 months faster);
 - have greater involvement of the statutory child protection department (as demonstrated by the number of investigations, the evidence on file of the department planning to give evidence at trial, and the preparation of a short, focused 'Magellan Report' that is presented to the Court early in the matter);
 - have fewer Court events;
 - are dealt with by fewer different judicial officers; and

¹⁰⁰ Family Court of Australia, *Submission 44*, p. 3.

¹⁰¹ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System – Interim Report*, 2015, p. 24.

¹⁰² Family Court of Australia, *Submission 44*, pp. 3-4.

¹⁰³ Australian Institute of Family Studies, *Cooperation and Coordination: An evaluation of the Family Court of Australia's Magellan Case Management Model*, 2007; see also Family Court of Australia, *Submission 44*, p. 4.

- are more likely to settle early.¹⁰⁴

6.69 In 2010, the ALRC/NSWLRC report similarly found that the Magellan program had ‘narrowed the gap’ by:

... providing for agreed ways in which child protection agencies will work with the family courts in child abuse cases. But it has not closed the gap: it does not operate in all regions of Australia or in the Federal Magistrates Court.¹⁰⁵

6.70 The Family Law Council also noted in 2015 that the Magellan program is not currently available in the Federal Circuit Court, where ‘the vast majority of parenting disputes are now heard’.¹⁰⁶

6.71 The Queensland Law Society commended the Magellan program noting that under the program, the Court can order a report from the relevant child protection agency, which outlines whether:

- the agency intends to intervene in the proceedings;
- there have been any relevant investigations; and
- any recommendations or other relevant material.¹⁰⁷

6.72 In the Society’s view, the program should be extended and a similar procedure be introduced where the Court can order a report from relevant authorities, including child protection agencies, police and state health departments in matters involving family violence which would outline information relevant to the Court’s assessment of family violence.¹⁰⁸

Family reports

6.73 The Court may be assisted in determining parenting matters by admitting into evidence reports from professionals. These may include Family Reports¹⁰⁹ prepared by:

¹⁰⁴ Australian Institute of Family Studies, *Cooperation and Coordination: An evaluation of the Family Court of Australia’s Magellan Case Management Model*, ‘Key findings’, 2007, p. 16.

¹⁰⁵ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response – Final Report*, ALRC Report 114/NSWLRC Report 128, 2010, p. 912.

¹⁰⁶ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System – Interim Report*, 2015, p. 24.

¹⁰⁷ Queensland Law Society, *Submission 38*, p. 2.

¹⁰⁸ Queensland Law Society, *Submission 38*, p. 2.

¹⁰⁹ *Family Law Act 1975* (Cth), s 62G.

- court-based family consultants;¹¹⁰ or
- external report writers engaged by the family courts pursuant to Regulation 7 of the *Family Law Regulations 1984*;¹¹¹ or
- private psychologists, psychiatrists, paediatricians, speech and occupational therapists, and educational experts (expert reports).¹¹²

- 6.74 Family consultants may interview children and their parents/carers to provide reports to the Court on what orders will be in the best interests of children.¹¹³ The Court uses the evidence provided by the family consultant on a wide range of matters to assist with determining what orders should be made.¹¹⁴ The information provided to the family consultant is not privileged and can therefore be reported to the Court.¹¹⁵
- 6.75 The preparation of family reports is governed by the Australian Standards of Practice for Family Assessment and Reporting (the Standards). Developed in 2015, these provide minimum standards and best practice guidelines for family assessments in family law matters that are applicable to both court-based family consultants and private practitioners engaged under Regulation 7.¹¹⁶
- 6.76 Although stakeholders widely supported the provision of expert evidence to the Court when family law matters involve allegations of family violence,¹¹⁷ a substantial focus of evidence to the inquiry identified concerns regarding:
- the quality of family consultants' reports provided to the Court;¹¹⁸

¹¹⁰ *Family Law Act 1975* (Cth), s 11B.

¹¹¹ *Family Law Regulations 1984* (Cth), Reg 7.

¹¹² Family Court of Australia and Federal Circuit Court of Australia, *Family Violence Best Practice Principles*, 2016, pp. 18-19.

¹¹³ *Family Law Act 1975* (Cth), s 62G(2).

¹¹⁴ Castan Centre for Human Rights Law, *Submission 57*, p. 11.

¹¹⁵ *Family Law Act 1975* (Cth), s 62G.

¹¹⁶ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System – Final Report*, 2016, p. 31; see also Castan Centre for Human Rights Law, *Submission 57*, p. 11.

¹¹⁷ For example: the Hon. Professor Nahum Mushin AM, *Submission 123*, p. 2.

¹¹⁸ Australian Paralegal Foundation, *Submission 8*, pp. 20-22; Help Family Law, *Submission 13*, pp. 5, 10-11; Cara House, *Submission 21*, p. 10; Centacare Brisbane, *Submission 22*, p. 5; Junction Australia, *Submission 23*, p. 4; Domestic Violence Crisis Service, *Submission 29*, p. 6; Queensland Domestic Violence Services Network, *Submission 30*, p. 6; Castan Centre for Human Rights Law, *Submission 57*, p. 11; The Deli Centre, *Submission 67*, p. 7; Eastern Domestic Violence Service,

- the process of developing reports;
- the limited availability of family consultants and resulting delays;¹¹⁹ and
- the costs of obtaining a family report.¹²⁰

Quality of reports

- 6.77 The Committee received evidence that family reports have contained significant factual errors and false information, or that were otherwise dismissive of physical assaults or downplayed violence as ‘conflict’.¹²¹ Bravehearts also reported that it is aware of family consultants recommending action to the Court that ‘routinely places children at high risk’ due to outdated understandings of family violence and child abuse.¹²²
- 6.78 A recent study by Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih examined a series of family reports, with their research finding that family consultants frequently recommended that children spend significant time with the perpetrators of family violence.¹²³
- 6.79 The quality of family reports was also a feature of the report by the Victorian Royal Commission into Family Violence. The Commissioner, the Hon. Professor Marcia Neave AO advised the present inquiry:

We certainly heard a lot of evidence about the quality of report-writing, and some examples were given to us which were fairly appalling ... How widespread it is, I don’t know ... But my impression, and this is anecdotal, is

Submission 68, p. 2; Bravehearts, *Submission 84*, p. 6; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, pp. 6-9; The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 6; Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 13.

¹¹⁹ Eastern Domestic Violence Service, *Submission 68*, p. 2; Hume Riverina Community Legal Service, *Submission 76*, p. 7; NLA, *Submission 88*, p. 8; Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, pp. 13-14.

¹²⁰ Help Family Law, *Submission 18*, pp. 23-24; The Hon. Professor Nahum Mushin AM, *Submission 123*, p. 2; Ms Christine Craik, National Vice President, Australian Association of Social Workers, *Committee Hansard*, Melbourne, 24 July 2017, p. 51; Mrs Leonie Hazelton, Individual Advocate, People with Disability Australia, *Committee Hansard*, Sydney, 25 July 2017, p. 42.

¹²¹ For example, The Deli Centre, *Submission 67*, pp. 7-8; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, p. 2.

¹²² Bravehearts, *Submission 84*, p. 6.

¹²³ Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, p. 2.

that there is a view that they're uneven and sometimes, they're not very good at all.¹²⁴

- 6.80 A recent study by Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih has also found that there is 'significant variation in family report writers, in the way they go about doing things in their practice frameworks and in their qualifications'.¹²⁵
- 6.81 Yet the findings and recommendations of family consultants can be 'extremely powerful' in the direction of the Court's decision.¹²⁶ They can also impact the parties' out-of-court negotiations,¹²⁷ with the Domestic Violence Crisis Service advising that many of their clients 'simply consent' to the report's recommendations due to the weight the Court places on those reports.¹²⁸
- 6.82 The Castan Centre for Human Rights Law explained that cross-examination of the family consultant is the only way to challenge the recommendations contained in the family report. The Centre noted that 'this action is beyond the financial and legal capability of many victims of family violence who may feel that the consultant did not adequately take into account the nature and existence of violence in their case'.¹²⁹
- 6.83 At a public hearing, Ms Rathus explained the challenge of cross-examination of family consultants for self-represented litigants:

[W]hen people are representing themselves they have no idea how to analyse—you are analysing a document that is a description of you. There is

¹²⁴ The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 6.

¹²⁵ Ms Zoe Rathus, AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 1.

¹²⁶ Domestic Violence Crisis Service, *Submission 29*, p. 6; see also Queensland Domestic Violence Services Network, *Submission 30*, p. 6; Eastern Domestic Violence Service, *Submission 68*, p. 2. Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, p. 2; Ms Zoe Rathus, AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 1.

¹²⁷ Domestic Violence Crisis Service, *Submission 29*, p. 6; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih, *Submission 122*, p. 2.

¹²⁸ Domestic Violence Crisis Service, *Submission 29*, p. 6.

¹²⁹ Castan Centre for Human Rights Law, *Submission 57*, p. 12; see also The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 6; Ms Zoe Rathus, AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 6.

nothing more personal. What we know is that ... a practitioner brings to the law is the objectivity to stand back from the client and understand, apart from anything else, how the client looks to everyone else. But when you're the client and you are trying to cross-examine someone about this incredibly personal report that has been written about you, you have no capacity at all to bring an objective eye to it and to ask the questions that need to be asked. In fact, self-representing litigants ask exactly the questions that a good lawyer never would. They dive right in. They reveal all kinds of other silly things about themselves, because they're so terrified and so upset ... There couldn't be a worse combination of a court that doesn't have enough time to consider these things and self-representing litigants trying to deal with these documents.¹³⁰

- 6.84 To address the concerns regarding the quality of family reports and the challenges with self-represented litigants cross-examining family consultants, a number of stakeholders recommended the development of an out-of-court complaints process to review the conduct and recommendations of family consultants.¹³¹ This is addressed later in this chapter.
- 6.85 Family consultants are not required to undergo family violence training.¹³² Junction Australia commented that 'safe decisions about the future custody of children from families where domestic violence has occurred cannot possibly be made' without a 'solid understanding of the dynamics of domestic violence and the methods of control and coercion'.¹³³ This was echoed by a significant number of participants in the inquiry.¹³⁴ The professional capacity and understanding of family violence by family consultants, as well as proposals for an accreditation process,¹³⁵ is discussed further in Chapter 8.

Process of developing a family report

¹³⁰ Ms Zoe Rathus, AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 6.

¹³¹ Castan Centre for Human Rights Law, *Submission 57*, p. 12; see also Women Everywhere Advocating Violence Elimination, *Submission 16*, p. 6.

¹³² Castan Centre for Human Rights Law, *Submission 57*, p. 11.

¹³³ Junction Australia, *Submission 23*, p. 4.

¹³⁴ Domestic Violence Crisis Service, *Submission 29*, p. 6; Castan Centre for Human Rights Law, *Submission 57*, p. 12; The Deli Centre, *Submission 67*, pp. 7-9.

¹³⁵ Eastern Domestic Violence Service, *Submission 68*, p. 2.

6.86 The process for developing a family report was also identified as a concern by stakeholders, most critically in relation to the time spent with families.¹³⁶ Evidence to the inquiry noted that in some cases a family consultant may only interview a family for an hour, or at the most two hours.¹³⁷ Ms Rathus commented:

Some of the women were interviewed for only an hour or, at the most, two hours. The fathers will be interviewed, the family report writer might see everyone together and the whole thing might take less than a day. Yet that family report will become potentially one of the most influential documents in the whole proceedings.¹³⁸

6.87 Centacare Brisbane similarly noted that where family consultants have limited time to conduct interviews, they ‘cannot gather all relevant background on domestic and family violence and child abuse matters’.¹³⁹ The organisation also identified that this process can result in family law orders, that ‘pull against’ family violence orders (that prohibit all contact with children), and child protection orders (that may provide only for ‘supervised contact’) whilst the recommended family law order may be recommending ‘shared care’.¹⁴⁰

6.88 In another example, Women’s Legal Services Australia reported that one family consultant spent an hour with each family member before writing a report which advised that there were no indications that any claims of family violence were accurate, and resulted in a child being ordered to live with the perpetrator.¹⁴¹ The Australian Paralegal Foundation reported similar accounts.¹⁴²

6.89 The Central Australian Aboriginal Family Legal Unit (CAAFLU) similarly commented that ‘a certain number of hours is not going to be enough’ to

¹³⁶ Junction Australia, *Submission 23*, p. 4; Queensland Domestic Violence Services Network, *Submission 30*, p. 6; Ms Zoe Rathus, AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 3.

¹³⁷ Ms Zoe Rathus, AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 3.

¹³⁸ Ms Zoe Rathus, AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 3.

¹³⁹ Centacare Brisbane, *Submission 22*, p. 5.

¹⁴⁰ Centacare Brisbane, *Submission 22*, p. 5.

¹⁴¹ WLSA, *Submission 6*, p. 43.

¹⁴² Australian Paralegal Foundation, *Submission 8*, p. 43.

capture the experiences of the family affected by family violence, and the report 'cannot give the judge what he needs in that short frame of time'.¹⁴³

- 6.90 The process for developing family reports was described as 'sterile' and 'intimidating', nor is there an opportunity for the family consultant to build a rapport with children which can also impact on the information provided by children in the development of the family report.¹⁴⁴ Rather, Ms Rathus recommended the following process:

Family report writers should instead set aside a morning where they are going to interview mum in this case. Then, in the afternoon, they are going to interview dad from another case. Then, in a couple of weeks time, they get dad in from the first case, and, in a couple of weeks time, they do something else. You would then do it over a period of time. In the end, it needs to add up to more than two hours with mum, two hours with dad and an hour watching them with the kids. If they saw everyone twice, but over a period of time, that would start to change the dynamic that we've set up at the moment, which is so dangerous and artificial.¹⁴⁵

- 6.91 Junction Australia recommended that family reports should not be 'the only source of information' about family dynamics and 'should be written by experts in domestic and family violence'.¹⁴⁶ CAAFLU similarly recommended additional information be provided to the Court by way of a separate family violence report prepared by separately qualified independent professional:

It would simply be an assessment of the extent of the violence and could considering mapping, for example, who else in the family could assist this family ... If we were to have a family violence report at the very outset, that would then assist in any of the court forums that we've been talking about, and it would take the pressure off the family report writer, at a later stage, to be developing recommendations around long-term orders. Also, because it's something that's sooner and almost immediate for the clients, they would be more inclined to engage in the family law process, because something's

¹⁴³ Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 13.

¹⁴⁴ Ms Zoe Rathus, AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 3.

¹⁴⁵ Ms Zoe Rathus, AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 7.

¹⁴⁶ Junction Australia, *Submission 23*, p. 2.

actually happening; we're not waiting for this ideal report to be written at some later stage, which doesn't really make sense to our clients anyway.¹⁴⁷

- 6.92 Queensland Domestic Violence Services Network recommended a 'combined panel approach' comprising a women's specialist service, a child development expert (who can identify and articulate the impacts of family violence on a child), a perpetrator engagement and behaviour specialist, and a lawyer. The Network commented:

Not only would this remove any collusion with professionals, it would lead to an informed decision regarding the best interests and safety of all parties ... This panel approach may also contribute to clear and purposeful messages of accountability and responsibility.¹⁴⁸

- 6.93 A panel-approach to the development of family reports was also recommended by The Deli Women and Children's Centre.¹⁴⁹

Availability

- 6.94 The availability of family consultants was also identified as a challenge by some stakeholders.¹⁵⁰ For example, in Alice Springs, there is only one family consultant engaged to provide family reports to the Court, which can create further delays for families affected by violence.¹⁵¹
- 6.95 Further, Eastern Domestic Violence Service commented that the 'field [of available family consultants] tends to comprise of a closed shop of report writers who have contacts in the legal professional and have a reputation of being "liked" by judges'.¹⁵² The Service recommended a 'complete overhaul' of the family report system that 'prioritises the safety of children and their parents'.¹⁵³

¹⁴⁷ Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 13.

¹⁴⁸ Queensland Domestic Violence Services Network, *Submission 30*, p. 6.

¹⁴⁹ The Deli Centre, *Submission 67*, p. 7.

¹⁵⁰ Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, pp. 13-14.

¹⁵¹ Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, pp. 13-14.

¹⁵² Eastern Domestic Violence Service, *Submission 68*, p. 2.

¹⁵³ Eastern Domestic Violence Service, *Submission 68*, p. 2.

- 6.96 The Royal Australian and New Zealand College of Psychiatrists, the Hume Riverina Community Legal Service and National Legal Aid, recommended additional funding for the provision of expert advice to the Court.¹⁵⁴
- 6.97 In the 2017-18 Budget, the Australian Government announced it will provide \$10.7 million over the forward estimates to the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia. The funding will provide for the creation of 17 new family consultant positions nationally and support additional training.¹⁵⁵ The Attorney-General's Department stated:
- Improved access to family reports and identification of family violence risks will assist the family law courts to manage complex disputes, many of which involve allegations of family violence or child abuse.¹⁵⁶
- 6.98 The Community and Public Sector Union, representing family consultants employed directly by the Courts, reported that their members have found their casework has 'increased dramatically' over the past five years. This has, in turn, impacted the time that each family consultant has to complete reports.¹⁵⁷ The Union stated that 'this is not sustainable long term because there is limited opportunity to reflect on outcomes and best practice'.¹⁵⁸ The Union welcomed the announcement by the Australian Government to employ additional family consultants across Australia.¹⁵⁹

Costs

- 6.99 The Committee heard that family reports can cost many thousands of dollars, depending on the experience and reputation of the consultant.¹⁶⁰ The Australian Association of Social Workers, the representative professional body for social workers, noted its concern regarding the high costs of private

¹⁵⁴ RANZCP, *Submission 69*, p. 4; Hume Riverina Community Legal Service, *Submission 76*, p. 7; NLA, *Submission 88*, p. 8.

¹⁵⁵ Attorney-General's Department, *Submission 89*, p. 3.

¹⁵⁶ Attorney-General's Department, *Submission 89*, p. 3.

¹⁵⁷ Community and Public Sector Union (CPSU), *Submission 70*, p. 9.

¹⁵⁸ CPSU, *Submission 70*, p. 9.

¹⁵⁹ CPSU, *Submission 70*, p. 9.

¹⁶⁰ Eastern Domestic Violence Service, *Submission 68*, p. 2.

consultants.¹⁶¹ To address the exorbitant cost of family reports, Help Family Law recommended that the cost of family consultants be independently determined.¹⁶²

- 6.100 If a party qualifies for Legal Aid in a family law matter, the cost of the report will be covered by the grant. However, People with Disability Australia advised that this can be challenging for such parties as there is no opportunity to have another report prepared for the Court.¹⁶³ The organisation supported a right of appeal or review of family reports.¹⁶⁴

Calls to return to in-house family consultants

- 6.101 To address both concerns with costs and quality of family reports, a number of participants in the inquiry suggested that family consultants be brought back within the Court and the abolition of private practitioners engaged by the Court under Regulation 7.¹⁶⁵ The former Commissioner of the Victorian Royal Commission into Family Violence, the Hon. Professor Marcia Neave AO commented at a public hearing for this inquiry:

My personal view is that you would have, ideally, experienced practitioners working within the Family Court to do this work, but that's again in the past. That is what used to happen. Unfortunately, the funding for that was removed, and it was outsourced, and so now we have a situation where a lot of the work is done outside the Court.¹⁶⁶

- 6.102 This evidence was echoed by the Hon. Professor Nahum Mushin AM, a Justice of the Family Court until 2011, who in a submission commented that

¹⁶¹ Ms Christine Craik, National Vice President, Australian Association of Social Workers, *Committee Hansard*, Melbourne, 24 July 2017, p. 51.

¹⁶² Help Family Law, *Submission 18*, p. 24.

¹⁶³ Mrs Leonie Hazelton, Individual Advocate, People with Disability Australia, *Committee Hansard*, Sydney, 31 July 2017, p. 42.

¹⁶⁴ Mrs Leonie Hazelton, Individual Advocate, People with Disability Australia, *Committee Hansard*, Sydney, 31 July 2017, p. 42.

¹⁶⁵ Community and Public Sector Union, *Submission 70*, p. 9; The Hon. Professor Nahum Mushin AM, *Submission 123*, p. 2; The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 6; Ms Zoe Rathus, AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, pp. 3, 10.

¹⁶⁶ The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 6.

the reliance on expert evidence from inside the Court is one of the greatest strengths of the family law system in Australia.¹⁶⁷ Professor Mushin stated:

With the steady reductions in funding, the great proportion of that evidence now comes from private practitioners ... One of the strengths of ... in-house reports was ... a greater trust in the Courts' expert witnesses, particularly in matters in which family violence was relevant.¹⁶⁸

6.103 Professor Mushin noted anecdotal evidence that the costs of reports from a small number of private practitioners are 'exorbitant' and submitted that the Court's funding be increased to return to the former structure of reports being prepared by in-house family consultants. Professor Mushin also recommended a scale of costs be considered.¹⁶⁹

6.104 The Community and Public Sector Union also noted that where family consultants are employed directly by the Court, 'it is more cost effective and ensures consistency across states [as] the Courts can then implement internal consistent reporting practices across the states and ensure relevant professional training is consistent'.¹⁷⁰ The Union continued:

At the moment, some judges refer to external Regulation 7 Family Consultants because workload pressures for in house Family Consultants mean they cannot meet demand for timely reports. This is problematic because the CEO of the Courts does not have control over the decision of judges to outsource this work and its creates additional uncontrolled expenditure. Members report that the quality of Regulation 7 Family Consultants reports can vary, in some cases being of no use to the Courts in assisting to resolve disputes.¹⁷¹

6.105 Research by Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jefferies, and Dr Helena Menih has indicated that family reports done by in-house family consultants 'tend to be of higher quality' than reports done by private practitioners engaged under Regulation 7.¹⁷² These findings were also made by the Victorian Royal Commission into Family Violence.¹⁷³

¹⁶⁷ The Hon. Professor Nahum Mushin AM, *Submission 123*, p. 2.

¹⁶⁸ The Hon. Professor Nahum Mushin AM, *Submission 123*, p. 2.

¹⁶⁹ The Hon. Professor Nahum Mushin AM, *Submission 123*, p. 2.

¹⁷⁰ CPSU, *Submission 70*, p. 9.

¹⁷¹ CPSU, *Submission 70*, p. 9.

¹⁷² Ms Zoe Rathus, AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 10.

Incorporating children's perspectives in court

6.106 In order for the Court to have a greater comprehension of the impacts of family violence on children, 'there must be greater scope for children and young people themselves to be heard in the family law system'.¹⁷⁴ A significant number of participants in the inquiry advocated for improving the ability for children's voices and perspectives to be heard by the Court.¹⁷⁵ To a great extent, this has echoed evidence in other reviews and reports that have examined options for greater involvement by children in proceedings.¹⁷⁶

6.107 For example, Ms Rosie Batty stated:

... children are never around any of the discussions we have. We need to engage with children. We need to listen to them. We need to create safe and age appropriate ways for them to be able to say what they want and what is right for them and to listen to them. We are hugely influenced right now that the child is being engineered to say certain things. We go in with that assumption that they are actually lying unless we can prove otherwise ... It is bad enough as an adult woman to disclose family violence. The way that you are treated through our system is bad enough. But it is catastrophic for a child.¹⁷⁷

6.108 Similarly, Domestic Violence Crisis Service advised that 'children often feel that they do not have a say on custody matters ... and decisions are not always made in their best interests ... children can see themselves as pawns in this process'.¹⁷⁸

6.109 Ms Zoe Rathus AM similarly noted:

¹⁷³ The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 7.

¹⁷⁴ ACT Human Rights Commission, *Submission 33*, p. 6.

¹⁷⁵ Statewide Children's Resource Program, *Submission 3*, p. 2; Cara House, *Submission 21*, p. 13; Safe Steps, *Submission 34*, p. 5; Mrs Hetty Johnston AM, Founder and Executive Chair, Bravehearts Foundation Ltd, *Committee Hansard*, Melbourne, 24 July 2017, p. 6

¹⁷⁶ Australian Institute of Family Studies, *Independent Children's Lawyers Study – Final Report*, 2014, p. 58; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Interim Report*, 2015, p. 20; Megan Mitchell, National Children's Commissioner, *Children's Rights Report 2015*, pp. 22-23.

¹⁷⁷ Ms Rosie Batty, Private Capacity, *Committee Hansard*, Melbourne, 24 July 2017, pp. 13-14.

¹⁷⁸ Domestic Violence Crisis Service, *Submission 29*, pp. 4-5.

Children's voices tend to not necessarily be well-heard by some family report writers ... [I]t seems that when children say they don't want to see their fathers they are often disbelieved and it is suggested that this is something the mother has put in their mind ... If a child says they want to see their father, nobody ever wonders why that might be. There's no questioning of that. A child who wants to see their father will immediately be believed and smiled at. This child is obeying the notions that have become so precious in family law around children maintaining relationships with both parents. If a child says, 'I don't want to see dad,' immediately suspicion is cast on the mother, and that is highly problematic. We're not saying that mothers are always good; that's not true either. We're saying that assumptions can be drawn very quickly.¹⁷⁹

6.110 When determining the best interests of children, the Court must consider any views expressed by the child.¹⁸⁰ The requirement that the Court must have regard to the child's views is often satisfied by a report from a family consultant or court expert who has interviewed the child for this purpose.¹⁸¹ An independent children's lawyer (ICL) may be appointed to represent the best interests of a child in the proceedings on the application of any of the parties or an organisation concerned with the child's welfare, or in the initiative of the Court.¹⁸²

The role of independent children's lawyers

6.111 In contrast to the role played by child representatives in children's courts proceedings, an ICL is not the child's legal representative and is not obliged to act on the child's instructions.¹⁸³ Rather, the role of the child's representative in family law proceedings may be understood as comprising two distinct features:

- assistance to the Court to make a decision in the best interests of the child; and
- providing a voice for the child in proceedings affecting them.¹⁸⁴

¹⁷⁹ Ms Zoe Rathus, AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 2.

¹⁸⁰ *Family Law Act 1975* (Cth), s 60CC(3)(a).

¹⁸¹ *Family Law Act 1975* (Cth), s 62G(3A).

¹⁸² *Family Law Act 1975* (Cth), s 68L.

¹⁸³ *Family Law Act 1975* (Cth), s 68LA(4).

¹⁸⁴ Family Law Council, *Pathways for Children: A Review of Children's Representation in Family Law*, 2004, p. 6.

6.112 The Family Law Council noted in 2015, that providing a voice for the child does:

... not necessarily correlate with advocating for an outcome consistent with the child's views. Rather, the ICL must act in relation to the proceedings on what he or she believes to be in the best interests of the child, having formed that view based on the evidence available.¹⁸⁵

6.113 Although some stakeholders were critical of the quality of some ICLs,¹⁸⁶ others identified the impact that an appropriately trained ICL can make in individual cases. For example, The Deli Women and Children's Centre referred to the improved safety outcomes that were reported by a client:

When we were appointed an excellent Independent Children's Lawyer, she immediately tightened the consent orders, it immediately stopped some of the family violence ... I am so grateful for this help.¹⁸⁷

6.114 Recognising the important role that ICLs can play in family law matters involving family violence, some participants also recommended greater funding for more ICLs available to the Court.¹⁸⁸ The Law Council of Australia discussed the shortage of ICLs:

We went through a period in Victoria, for instance, where there was a quota applied by Victoria Legal Aid every month, and the quota of the number of ICLs that would be funded would be filled in the first week. So what you would do is strategically file your application at the beginning of the month so you would get an ICL if you needed one. That cannot be right. There were a number of really serious cases of family violence and child abuse ... that happened to be filed at the end of the month, and they did not get an [ICL] ... That has [now] been remedied [as] there was an injection of funding.¹⁸⁹

6.115 Where stakeholders were critical of the work conducted by ICLs, this was in large part due to insufficient training or a failure to comply with the

¹⁸⁵ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Interim Report*, 2015, p. 20; see also *Family Law Act 1975* (Cth), s 68LA(2).

¹⁸⁶ Justice for Children, *Submission 118*, p. 13.

¹⁸⁷ The Deli Centre, *Submission 67*, p. 8.

¹⁸⁸ Hume Riverina Community Legal Service, *Submission 76*, p. 7; Ms Wendy Kayler Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, pp. 7-8; Ms Gayathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 30.

¹⁸⁹ Ms Wendy Kayler Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, pp. 7-8.

Guidelines for Independent Children’s Lawyers. This is further discussed in Chapter 8.

- 6.116 However, other evidence was critical of the practice of some ICLs, most notably in the divergent practice regarding meeting with children to ascertain their views in developing recommendations to the Court as to the child’s best interests.¹⁹⁰ Indeed, a recent AIFS study revealed that there is diversity of practice amongst ICL’s regarding meeting with children.¹⁹¹ Some lawyers doing this work were seen to regularly meet with and interview children. Others do not adopt this practice, preferring to rely only on sources of information such as family and expert reports.¹⁹²

Box 6.2 Independent children’s lawyers

The following is a selection of responses to the Committee’s questionnaire:

‘The Independent Children’s Lawyer didn’t even meet with the children until towards the end of the final hearing and also lied in court by telling them that he had, in fact, met with them prior to doing so’.

— *Respondent from Queensland*

‘An Independent Children’s Lawyer was assigned to my child. He said what he witnessed but they didn’t take anything into consideration’.

— *Respondent from New South Wales*

‘The process was long, but in the end through the reporting process and the gathering of evidence by reporters and the Independent Children’s Lawyer, ultimately final orders were made in the children’s best interests. The children were relocated to live with me and they are now happy and healthy’.

— *Respondent from Victoria*

¹⁹⁰ National Child Protection Alliance, *Submission 5*, p. 10; Justice for Children, *Submission 118*, p. 13; Mrs Hetty Johnston AM, Founder and Executive Chair, Bravehearts Foundation Ltd, *Committee Hansard*, Melbourne, 24 July 2017, pp. 6-7.

¹⁹¹ Australian Institute of Family Studies, *Independent Children’s Lawyers Study – Final Report*, 2014, p. 58.

¹⁹² Australian Institute of Family Studies, *Independent Children’s Lawyers Study – Final Report*, 2014, p. 58.

‘My children’s voices were not heard. The [Independent] Children’s Lawyer never met them or spoke to them so how on earth could she represent them?’

— Respondent from Queensland

6.117 Bravehearts expressed concern where ICLs do not meet with children to ascertain their views, though also commented that ICLs may not be appropriately trained to determine a child’s best interests:

We have the wrong people making decisions about these children. They might be great lawyers but they are useless psychologists. They have no idea how children think or behave or respond yet they are making these decisions or offering this advice. [Children] need legal representation, but what they need more is psychology and they need an advocate and they need to be cared for.¹⁹³

6.118 Some of these proposals are explored further below.

Alternative mechanisms

6.119 A number of stakeholders supported the development of an independent child’s advocate that was not necessarily a legal representative.¹⁹⁴ Jannawi Family Centre recommended the development of a child’s advocate, commenting such a role is ‘really important’ to support children through the process of responding to their trauma and as matters progress through the family law system:

Engaging children in that process with an independent person or somebody that can sit separate to that is really powerful because children can then voice their worries and their concerns ... children are really important information givers in that regard as to how they experience each parent and how each parent meets their needs, is protective, who has got major responsibility, who

¹⁹³ Mrs Hetty Johnston AM, Founder and Executive Chair, Bravehearts Foundation Ltd, *Committee Hansard*, Melbourne, 24 July 2017, pp. 6-7; see also National Child Protection Alliance, *Submission 5*, p. 10.

¹⁹⁴ Council of Single Mothers and Their Children Victoria, *Submission 42*, p. 6; For Kids Sake, *Submission 79*, p. 4; Mrs Hetty Johnston AM, Founder and Executive Chair, Bravehearts Foundation Ltd, *Committee Hansard*, Melbourne, 24 July 2017, pp. 6-7.

has more power, who has control and those factors. But it takes quite a specialised skillset to do that.¹⁹⁵

- 6.120 Other stakeholders supported a combined model of both independent legal representation (that took instruction from the child) and child psychologists, advising that a combined model has worked positively in the United Kingdom¹⁹⁶ and Canada.¹⁹⁷
- 6.121 For example, the ACT Human Rights Commission canvassed a pilot program in Canada that combines a therapeutic/clinical approach with legal representation in matters where family violence has been identified. The pilot involved a partnership approaching combining child assessment and therapeutic counselling with legal representation for a child/young person. It aimed to:
- enhance the safety of children and young people (physical, psychological and emotional);
 - ensure children/young people's evidence was heard in judicial decision-making;
 - better ensure the safety of children and young people; and
 - seek to minimise potential risks for further victimisation.¹⁹⁸
- 6.122 The Commission advocated that programs and models of practice that effectively integrate clinical expertise and therapeutic supports with legal representation 'offer a way forward for the family court to better support and protect children'.¹⁹⁹

Committee comment

Prioritising children's safety

- 6.123 The Committee notes that successive governments have sought to prioritise the safety of children when introducing amendments to the Family Law Act. Significantly however, independent evaluations of those amendments have found that they not achieved their desired outcome. Indeed, despite

¹⁹⁵ Ms Biljana Milosevic, Director, Jannawi Family Centre, *Committee Hansard*, Sydney, 31 July 2017, p. 50.

¹⁹⁶ Domestic Violence Crisis Service, *Submission 29*, p. 5.

¹⁹⁷ ACT Human Rights Commission, *Submission 33*, pp. 7-8.

¹⁹⁸ ACT Human Rights Commission, *Submission 33*, pp. 7-8.

¹⁹⁹ ACT Human Rights Commission, *Submission 33*, pp. 7-8.

amendments in 2006 and again in 2012, the safety of children is not prioritised either because of:

- the structural design of a presumption, an exception, and a subsequent requirement for the Court to consider equal time; and/or
- the skills and expertise of the Court with respect to family violence.

- 6.124 The Committee makes further comment on the capacity of family law professionals, including the courts, in Chapter 8. The Committee is of the view that the structural design of Part VII of the Family Law Act is both confusing—leading to misinterpretations within the broader community and informal agreements or consent orders that would not be required by the Court—and fails to prioritise the safety of children in parenting matters involving family violence.
- 6.125 The Committee therefore recommends that Part VII of the Family Law Act be simplified, with consideration given to removing the presumption of equal shared parental responsibility. While the presumption does not apply in family violence matters, the Committee is also concerned that the presumption is improperly being applied to many cases involving family violence and that is giving rise to court orders and consent orders which put people effected by family violence, including children, at unacceptable risk.
- 6.126 The Committee recognises that this recommendation constitutes a significant departure from the current law. This must, however, be considered in tandem with the recommendations that allegations of family violence be determined at the earliest available opportunity in family law proceedings which is essential including for those against whom spurious or false allegations of family violence are made.
- 6.127 If allegations of family violence are determined very early in proceedings and if such allegations are found to be unsubstantiated, a Court is then able to make orders accordingly in the best interests of the child.
- 6.128 The Committee expects that this matter will be further considered by the Australian Law Reform Commission as part of its ongoing review of the family law system.
- 6.129 The Committee notes its previous recommendations that would deter false of spurious claims. Specifically, that appropriate risk assessments be conducted upon the filing of applications at the Court, and that the Family Law Act be amended to require early determination of family violence allegations in family law proceedings.

Recommendation 19

6.130 The Committee recommends that the Australian Law Reform Commission, as part of its current review of the family law system, develops proposed amendments to Part VII of the *Family Law Act 1975* (Cth), and specifically, that it consider removing the presumption of equal shared parental responsibility.

A new child safety service attached to the Court

- 6.131 As discussed throughout this report, the risk of harm to families who have been affected by family violence is not static, and can evolve over time as the dynamics of family relationships evolve. Indeed, once a family departs the family law system, changing dynamics can increase the risk of harm to that affected family in a way that was not present or apparent whilst the matter was before the Court.
- 6.132 The Committee was advised that in previous years, a family consultant or Independent Children’s Lawyer would seek to monitor the safety of families for a period of up to 12 months and report back to the Court.²⁰⁰
- 6.133 The Committee is of the view that more is required to ensure the ongoing safety of children following orders made by courts.
- 6.134 The Committee notes the Family Law Council’s recommendation for a family safety services modelled on the United Kingdom’s Children and Family Court Advisory and Support Service (CAFCASS). To some degree, the Council’s recommendation has been implemented, though in a limited form, under the Australian Government’s recent pilot program of Family Advocacy and Support Services (FASS).
- 6.135 The Committee considers that a child safety service should be attached to the Court, modelled on CAFCASS—representing an expansion of the existing FASS program. The service could exercise ongoing supervisory capacity and bring applications to the Court regarding safety concerns where an exercise of judicial power is required, or where matters need to be progressed with state and territory child protection agencies.

²⁰⁰ Ms Joanna Fletcher, Chief Executive Officer, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 22; Ms Helen Matthews, Director, Legal and Policy, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 23.

Recommendation 20

6.136 The Committee recommends that the Attorney-General extends the Family Advocacy and Support Services pilot, subject to positive evaluation, to include a child safety service attached to the Family Court of Australia and the Federal Circuit Court of Australia, modelled on the United Kingdom’s Children and Family Court Advisory and Support Service. The expanded service, which may require additional infrastructure, should:

- **provide ongoing supervision of the safety of children following orders made by a court;**
- **bring applications to the Court where the risk of a child’s safety is of concern and where an exercise of judicial power is required to ensure the child’s ongoing safety; and**
- **refer matters to state and territory child protection agencies, where required.**

Improving the information available to the Court

6.137 The provision of expert information is critical to the Court making informed decisions about the safety of children. It is also required at the earliest point in proceedings so that the procedures adopted by the Court and any interim orders properly account for the presence of family violence and/or child abuse.

6.138 Evidence to this inquiry indicates that the expert information submitted to the Court needs significant improvement in order to ensure the safety of children. Specifically, that the integration of child protection agencies’ investigations into family law proceedings, and improving the quality of family reports.

Integration of child protection agencies’ investigations

6.139 Both the ALRC/NSWLRC report in 2010 and the Family Law Council’s reports of 2015 and 2016 recommended significant amendments to provide for the better integration of child protection agencies’ investigations in family law proceedings.

6.140 As noted above, the ALRC/NSWLRC report recommended, among other things, that investigatory services in family law proceedings be provided by

a new specialist section in state and territory child protection departments. The Family Law Council recommended legislative reform to allow for the publication of child protection investigation reports in family law proceedings, improved information sharing protocols between the two jurisdictions, and the co-location of child protection agency staff in federal family court registries.

- 6.141 The Committee is of the view that a child safety service, as recommended above, could provide an appropriate liaison between the federal family courts and the state and territory child protection agencies. This is modelled on the CAFCASS program which includes a specialist screening unit that works with relevant child protection departments.²⁰¹
- 6.142 Further, the Committee notes that with respect to serious cases of child abuse, the Family Court has already established protocols with state and territory child protection agencies under the Magellan program. The Committee sees merit in extending this program to include all parenting matters involving family violence cases.
- 6.143 The Committee therefore recommends four substantial reforms to improve the information available to the Court. First, and as recommended by the Family Law Council, information sharing protocols must be established between the federal family courts and state and territory child protection agencies, accompanied by appropriate legislative amendments to permit the production of reports to the federal courts by child protection departments.
- 6.144 Second, the Committee recommends that the child safety service would be the appropriate liaison between the federal family courts and child protection agencies to ensure that appropriate information was provided at the earliest possible stage of proceedings.
- 6.145 Noting the clear and well-recognised links between federal family law and state-based child protection legislation, the Committee is of the view that more is required to ensure the seamless operation of these two concurrent systems. In particular, the Committee notes evidence from Bravehearts concerning a multidisciplinary panel whereby a child's evidence provided to that panel could be used in different jurisdictional settings. The Committee is aware that such multidisciplinary panels operate in the United States of America where, for matters involving allegations of child abuse, an interview with a child is conducted by a forensic interviewer in one room

²⁰¹ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Final Report, 2016, p. 37.

with very discrete cameras. The interview is observed by police and child protection services in another room.

- 6.146 The Committee notes and expresses its support for such approaches to the investigation of child abuse, however notes that this is a matter for state and territory governments.
- 6.147 Lastly, the Committee identifies that that the Magellan program be extended to include all parenting matters where there are allegations of family violence.

Recommendation 21

6.148 The Committee recommends the Attorney-General, through the Council of Australian Governments where necessary, works to improve the information available to courts exercising family law jurisdiction at the earliest possible point in proceedings by:

- **implementing the Family Law Council’s recommendations in its 2015 *Families with complex needs and the intersection of the family law and child protection systems – Interim Report* for information sharing protocols between the federal family courts and state and territory child protection departments;**
- **establishing a child safety service attached to the Court that operates as a liaison between the federal family courts and child protection departments to ensure all relevant information is available to the Court at the earliest possible stage; and**
- **consider the adoption of multi-disciplinary panels by state and territory governments for child abuse investigations which would assist the family law courts to determine whether family violence has occurred; and**

works with the Family Court of Australia to extend the Magellan program to all parenting matters where there are allegations of family violence.

Family reports

- 6.149 The Committee is particularly concerned about the quality of family reports being submitted to the Court, and the exorbitant fees that some private family consultants charge for the development of reports.

- 6.150 Despite these significant criticisms of the capacity of family consultants and the quality of family reports, the Committee notes the general agreement among stakeholders that expert evidence is required to assist the Court in making decisions under the Family Law Act. For this reason, the Committee does not seek changes to preclude the admission of expert evidence by family consultants.
- 6.151 Rather, evidence to the inquiry demonstrates that the quality of reports and the expertise of family consultants must be improved and made more consistent. It is on those issues that the Committee concentrates its comments and recommendations.
- 6.152 The Committee notes the Australian Government recently announced \$10.7 million for additional family consultants to be employed by the Family Court and the Federal Circuit Court. This was welcomed by a number of stakeholders in the Committee's inquiry.²⁰²
- 6.153 The Committee was persuaded by evidence that family reports done by 'in-house' family consultants employed directly by the Court, are generally of better quality than those by private practitioners engaged under the regulations.
- 6.154 The Committee is therefore of the view that, to address both the quality and cost concerns identified in evidence, that the Australian Government should abolish private family consultants, and that family consultants must only be engaged and administered by the court itself. The Committee considers that direct engagement by the courts would enable the Court to oversee the quality of those reports, and enforce established standards for their production.
- 6.155 Further, the Committee recommends that an agreed fee schedule be developed and inserted into the Family Law Regulations 1984 to provide certainty for families who require family reports to be developed for the Court.

Recommendation 22

- 6.156 The Committee recommends the Attorney-General pursues legislation and policy reform to abolish private family consultants, with family consultants to be only engaged and administered by the Court itself.**

²⁰² NLA, *Submission 88*, p. 8.

Further, the Committee recommends the development of an agreed fee schedule to regulate the costs of family reports and other expert witnesses.

Incorporating children's perspectives in court

- 6.157 The role of the legal representative for children in family law proceedings has evolved over time, and whilst a need for this role has been consistently affirmed, its precise nature has been the subject of multiple reviews and some criticism.
- 6.158 The Committee is of the view that it is critical for children's perspectives to be provided to the Court, however, the Committee has not reached a view on what alternative mechanism might be appropriate. The Committee identifies that the Australian Law Reform Commission is best placed to make recommendations for the long-term reform on this issue.

Recommendation 23

- 6.159 The Committee concludes that the Court must be better informed of children's views, concerns and matters affecting their welfare, and recommends that the Australian Law Reform Commission in its ongoing review of the family law system, examines and propose alternative mechanisms that would ensure children's perspectives are heard in court.**

7. Families with additional needs

- 7.1 There is no doubt that the challenges faced by families who have experienced family violence are significant. Navigating a complex family law system, accessing legal and non-legal supports, and recovering from the impacts of family violence are not small tasks for any family. However, in order to develop solutions to support and protect those affected by family violence, it is critical to fully comprehend the unique needs of those families at high risk and tailor responses to ensure that the family law system is meeting those needs.¹
- 7.2 Some families can face additional barriers or difficulties when reporting family violence and accessing the family law system, placing them at a greater risk of ongoing and escalating violence, including:
- Aboriginal and Torres Strait Islander families;
 - culturally and linguistically diverse (CALD) families;
 - families that include parents or children with disabilities;
 - people who identify as lesbian, gay, bisexual, transgender, intersex, or queer (LGBTIQ);
 - women recently released from prison;
 - families living with mental illness; and
 - families experiencing substance abuse.
- 7.3 Based on evidence received to the present inquiry, this chapter provides an overview of the unique difficulties that some of these high-risk families face when experiencing family violence and accessing the family law system. Many of these challenges are shared between these high-risk families, whilst others are unique to the context of each family. Yet each must be

¹ Ms Antoinette Braybrook, National Convenor, National Aboriginal Family Violence Prevention and Legal Services Forum, *Committee Hansard*, Melbourne, 24 July 2017, pp. 24-25.

accommodated in the design and delivery of the family law system if it is to provide protection from, and support following, family violence for those at risk.

- 7.4 Significantly, the barriers and difficulties faced by high-risk families are well documented, as are the recommendations for action to address those challenges. In 2012 the Family Law Council (FLC) produced two reports examining how to improve the family law system for Aboriginal and Torres Strait Islander families, and for CALD families.² Both reports examined the multiple barriers faced by these families in accessing the family law system, and the challenges experienced once within the system. These reports were followed in 2015 and 2016 by two reports on families with complex needs navigating the family law and child protection systems.³ The second and final report, in 2016, includes discussion of the challenges that vulnerable families face when accessing the family law system.
- 7.5 This chapter will consider the barriers and difficulties of each group listed above, and draw upon the findings and recommendations of those reports. The chapter concludes with the Committee's recommendations for reform to ensure that the family law system is accessible, equitable, responsive and prioritises the safety of all Australians.

Aboriginal and Torres Strait Islander families

- 7.6 Statistically, Aboriginal and Torres Strait Islander families are disproportionately affected by family violence.⁴ In comparison with other Australian women, Aboriginal and Torres Strait Islander women are 34 times more likely to be hospitalised as a result of family violence and 10 times more likely to be killed.⁵ Aboriginal and Torres Strait Islander

² Family Law Council, *Improving the family law system for Aboriginal and Torres Strait Islander clients*, 2012; Family Law Council, *Improving the family law system for clients from culturally and linguistically diverse backgrounds*, 2012.

³ Family Law Council, *Families with complex needs and the intersection of the family law and child protection system* – Interim Report, 2015, and Final Report, 2016.

⁴ National Family Violence Prevention and Legal Services Forum (NFVPLSF), *Submission 78*, p. 2; Northern Territory Government, *Submission 109*, p. 1; Ms Antoinette Braybrook, National Convenor, National Aboriginal Family Violence Prevention and Legal Services Forum, *Committee Hansard*, Melbourne, 24 July 2017, p. 25; see also Family Law Council, *Improving the family law system for Aboriginal and Torres Strait Islander clients*, 2012, p. 22; Victorian Royal Commission into Family Violence, *Summary and recommendations*, 2016, Volume IV, p. 20.

⁵ NFVPLSF, *Submission 78*, p. 3.

children are seven times more likely than non-Indigenous children to have received child protection services,⁶ and 10 times more likely to be the subject of state and territory care and protection orders, following violence in their family.⁷

7.7 Despite these statistics, multiple submissions reported that while Aboriginal and Torres Strait Islander families are overrepresented in the child protection, criminal and civil law systems, they are significantly underrepresented in the family law system.⁸ Evidence suggests that this is due to key barriers that these families face in accessing the family law system, including:

- the long-term impact of intergenerational trauma;
- fear of child protection notifications and child removal initiated by family law proceedings;
- geographic and economic barriers;
- language, literacy and education;
- culturally inappropriate services; and
- crisis and long-term housing.

7.8 The following sections discuss these barriers and recommendations for reform.

Barriers to the family law system

Intergenerational trauma and child removal

7.9 The historical legacy of the forced removal of children and forced resettlement of communities, as well as the contemporary cycles of engagement with criminal justice and child protection systems, has caused significant fear of engagement with the family law system.⁹

⁶ Australian Institute of Health and Welfare, *Child protection Australia 2015–16, Child welfare series no. 66*, p. 15; see also Northern Territory Government, *Submission 109*, p. 1.

⁷ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems—Interim Report*, 2015, p. 6.

⁸ Women's Legal Services Australia (WLSA), *Submission 6*, p. 23; Relationships Australia, *Submission 55*, p. 12; NFVPLSF, *Submission 78*, p. 3; Northern Territory Government, *Submission 109*, p. 2; see also Family Law Council, *Improving the family law system for Aboriginal and Torres Strait Islander clients*, 2012, p. 2.

⁹ WLSA, *Submission 6*, p. 23; Statewide Children's Resource Program, *Submission 3*, p. 2; NFVPLSF, *Submission 78*, p. 9; Women's Legal Service Queensland, *Submission 81*, p. 7; see also Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander clients*, 2012, p. 1.

- 7.10 The Central Australian Aboriginal Legal Aid Service (CAALAS) explained that the experiences of Aboriginal and Torres Strait Islander peoples within the justice system as a whole ‘must be seen through the prism of intergenerational trauma’ caused by such policies.¹⁰ Similarly, the Alice Springs Women’s Shelter (ASWS) noted that when trust is compromised in one part of the justice system, engagement in another can be compromised:

If women have had an experience of some sort with the justice system and have been treated poorly then they’re not going to trust it again. And there are issues with trusting the police. It starts from the very beginning, which then feeds down to the family law court.¹¹

- 7.11 The National Family Violence Prevention and Legal Services Forum (NFVPLSF) stated that ‘long held’ distrust of police and the justice system have established barriers to Aboriginal and Torres Strait Islander families accessing the family law system. NFVPLSF explained:

Historical contact between Aboriginal people and the justice system has resulted in families being separated, children taken away, men incarcerated and deaths in custody. Additionally, the prevalence of the police not taking Aboriginal victims’ complaints seriously, for example, calling it a “family matter” has deterred Aboriginal victims/survivors from accessing the justice system for their protection.¹²

- 7.12 The removal of children from families experiencing family violence was discussed in Chapter 6. For Aboriginal and Torres Strait Islander families however, ongoing intergenerational trauma from past child-removal policies can affect their experience of family violence and engagement with the family law system.

- 7.13 The ASWS reported that women ‘have regular stays at crisis accommodation services not only to keep themselves safe, but in many circumstances, to prevent the removal of their children from them ... due to family and domestic violence’.¹³ The Shelter elaborated:

¹⁰ Mr Matthew Thomas Bonson, Law and Project Manager, Central Australian Aboriginal Legal Aid Service, *Committee Hansard*, Alice Springs, 22 August 2017, pp. 16-17; see also Statewide Children’s Resource Program, *Submission 3*, p. 2.

¹¹ Mrs Dianne Gipey, Chief Executive Officer, Alice Springs Women’s Shelter, *Committee Hansard*, Alice Springs, 22 August 2017, p. 3.

¹² NFVPLSF, *Submission 78*, p. 4.

¹³ Mrs Dianne Gipey, Chief Executive Officer, Alice Springs Women’s Shelter, *Committee Hansard*, Alice Springs, 22 August 2017, p. 2.

The implications for child protection and child removal are also significant when a woman with children fleeing violence is presented with only two options: homelessness or violence. Child protection services may misinterpret this as a choice in the sense that they perceive women may have other choices. In the cultural context of family and domestic violence and small populations, there is no safe place for women and children to flee to.¹⁴

Geographic and economic barriers to access

- 7.14 Many Aboriginal and Torres Strait Islander families have no or limited access to the family law system due to geographic and economic reasons. For some families, these barriers can be insurmountable. By way of example, the family courts sit in Alice Springs only four times a year and the Local Court does not exercise family law jurisdiction, presenting significant challenges for the ongoing safety of families experiencing family violence.¹⁵
- 7.15 In regional and remote areas physically accessing the Court and other services can be difficult for many Aboriginal and Torres Strait Islander families, who may not have access to transport or live in areas not serviced by public transport. Other factors inhibiting travel include seasonal flooding, travel time and costs.
- 7.16 As discussed in Chapter 4, state and territory magistrates' courts have been reluctant to exercise jurisdiction under the *Family Law Act 1975* (Cth) (Family Law Act). However, the Family Law Council has found that where local magistrates have exercised the jurisdiction, a lack of understanding of the Family Law Act and in some instances family violence, have caused significant concerns for Aboriginal and Torres Strait Islander families.¹⁶

Language, literacy and education

- 7.17 Language, literacy and education can present a barrier to accessing the family law system, and related services, for Aboriginal and Torres Strait

¹⁴ Alice Springs Women's Shelter, *Submission 121*, p. 3.

¹⁵ Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, pp. 4-5; Ms Sophie Broughton-Cunningham, Court Support Officer, Alice Springs Women's Shelter, *Committee Hansard*, Alice Springs, 22 August, p. 4.

¹⁶ Family Law Council, *Improving the family law system for Aboriginal and Torres Strait Islander clients*, 2012, p. 47.

Islander families.¹⁷ Written and oral communication in the family law system relies strongly on English language proficiency. These accessibility challenges can be compounded when English is not a first language, or when there are literacy difficulties.¹⁸

- 7.18 Appropriately trained and qualified onsite interpreters can be critical to mitigating these language and communication barriers. Although interpreters may be used to ameliorate barriers, the availability of interpreters, particularly in some language groups, is severely limited.¹⁹ These shortages can be compounded by additional factors:
- for cultural reasons, it may be inappropriate to have an interpreter of a particular gender, age or relationship to a party;
 - the interpretation of family law concepts and procedures is technically challenging, requiring a high level of interpretive skill and understanding of legal jargon; and
 - in smaller communities, conflicts of interest and confidentiality concerns can exclude some trained interpreters.²⁰
- 7.19 The impact of the lack of interpreters can affect not only the family's understanding of their legal options, but also the information that is provided to the Court when matters are heard. For example, CAALAS advised that family reports are 'often' prepared without an interpreter to facilitate communication between the family consultant and the client/s.²¹ CAALAS commented that 'obviously, if there's no report writer that has that cultural awareness and no interpreter, the report's going to be deficient'.²²

¹⁷ Domestic Violence NSW, *Submission 48*, p. 11; Relationships Australia, *Submission 55*, p. 12; NFVPLSF, *Submission 78*, pp. 9-10; Family Law Council, *Improving the family law system for Aboriginal and Torres Strait Islander clients*, 2012, p. 41.

¹⁸ Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, pp. 10-11.

¹⁹ NFVPLSF, *Submission 78*, pp. 12-13; Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 11; Mr Simon Philip Caldwell, Family Legal Officer, Central Australian Aboriginal Legal Aid Service, *Committee Hansard*, Alice Springs, 22 August 2017, p. 18; Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, 2012, p. 43.

²⁰ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander clients*, 2012, p. 43.

²¹ Mr Simon Philip Caldwell, Family Legal Officer, Central Australian Aboriginal Legal Aid Service, *Committee Hansard*, Alice Springs, 22 August 2017, p. 18.

²² NFVPLSF, *Submission 78*, p. 12.

Culturally appropriate services

- 7.20 Culturally responsive services affirm Aboriginal and/or Torres Strait Islander cultural identity, respect for cultural norms relating to gender, and the use of verbal and non-verbal modes of communication. Such services appropriately respond to notions of kinship and involve a range of relevant extended kin networks in the resolution of disputes.²³ For Aboriginal and Torres Strait Islander families, the family law system is not culturally appropriate in addressing family violence and therefore can deter these families from using the family law system to protect and support them following violence.²⁴
- 7.21 For example, NFVPLSF notes that the family dispute resolution (FDR) process may be particularly ‘alienating’ for Aboriginal and Torres Strait Islander families, because it is built on western communication and conflict resolution methods.²⁵ Culturally inappropriate services can pressure families affected by family violence to accept settlements that do not meet their needs or preferences.²⁶
- 7.22 Significantly however, data provided in the 2012 FLC report *Improving the family law system for Aboriginal and Torres Strait Islander clients*, suggests that the use of FDR services is slowly increasing in Aboriginal and Torres Strait Islander families, particularly in regional areas.²⁷

Housing

Mr Simon Philip Caldwell, Family Legal Officer, Central Australian Aboriginal Legal Aid Service, *Committee Hansard*, Alice Springs, 22 August 2017, p. 18.

²³ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, February 2012, p. 4.

²⁴ WLSA, *Submission 6*, p. 23; Domestic Violence NSW, *Submission 48*, p. 10; NFVPLSF, *Submission 78*, p. 14.

²⁵ NFVPLSF, *Submission 78*, p. 15; see also Mr Simon Philip Caldwell, Family Legal Officer, Central Australian Aboriginal Legal Aid Service, *Committee Hansard*, Alice Springs, 22 August 2017, p. 18.

²⁶ NFVPLSF, *Submission 78*, p. 14; see also Mr Simon Philip Caldwell, Family Legal Officer, Central Australian Aboriginal Legal Aid Service, *Committee Hansard*, Alice Springs, 22 August 2017, p. 18.

²⁷ Family Law Council, *Improving the family law system for Aboriginal and Torres Strait Islander clients*, 2012, p. 32.

7.23 All families need safe, affordable and appropriate housing. For those experiencing family violence, accessing such accommodation is often difficult, if not impossible without experiencing significant financial hardship. Housing was raised as a key issue in evidence regarding Aboriginal and Torres Strait Islander families, with lack of safe housing identified as being a key contributor to the removal of children in Aboriginal and Torres Strait Islander communities.²⁸

7.24 ASWS provided evidence regarding the consequences of limited housing when trying to flee a violent situation:

The Northern Territory has a homeless rate 15 times the national average. This in effect forces victims back to environments where they must measure the level of violence they will experience in order to stay safe by relying on safety planning rather than legitimate justice outcomes. For example, a client may have no choice but to live in an overcrowded three bedroom dwelling belonging to a member of the extended family, where the perpetrator may be able to continue to access them, albeit at a lower or less frequent level of access.²⁹

7.25 The importance of crisis and long-term housing for all families experiencing family violence will be discussed in more detail in Chapter 9.

Recommendations for reform

7.26 The FLC's 2012 report *Improving the family law system for Aboriginal and Torres Strait Islander clients*, examined how the family law system could better meet the needs of Aboriginal and Torres Strait Islander clients, and discussed the various barriers that contribute to the underutilisation of the family law system by this community. In 2016 the FLC released the final report on *Families with complex needs and the intersection of family law and child protection systems*. This report considered a range of matters in relation to families with complex needs, including Aboriginal and Torres Strait Islander families.

7.27 The following section discusses a number of the recommendations developed by the FLC, which numerous submissions to this inquiry referenced and endorsed.³⁰

²⁸ Mr Matthew Thomas Bonson, Law and Project Manager, Central Australian Aboriginal Legal Aid Service, *Committee Hansard*, 22 August 2017, p. 20.

²⁹ Alice Springs Women's Shelter, *Submission 121*, p. 2; see also Mrs Dianne Gipey, Chief Executive Officer, Alice Springs Women's Shelter, *Committee Hansard*, Alice Springs, 22 August 2017, p. 5.

³⁰ WLSA, *Submission 6*, p. 9; Australian Paralegal Foundation, *Submission 8*, p. 15; Northern Integrated Family Violence Services, *Submission 11*, p. 3; InTouch Multicultural Centre Against

Community education

- 7.28 To address the education barriers faced by Aboriginal and Torres Strait Islander families, the FLC recommended a range of family law legal literacy and education strategies to:
- inform Aboriginal and Torres Strait Islander peoples about the formal justice system, legal responses to family violence and the rights and obligations of separated parents;
 - allow for education and information to be delivered in Indigenous languages, plain English and in formats appropriate to particular communities and age groups; and
 - ensure that the information is continuously accessible and delivered in a culturally appropriate format.³¹

A culturally competent family law system

- 7.29 A culturally competent family law system involves services that deliver appropriate, culturally safe practice. Cultural safety is more than simple cultural awareness; it is improving outcomes by incorporating culture into service delivery, and requires a ‘whole of organisation’ approach in which culture is understood, valued and ‘celebrated at its very core’.³²
- 7.30 Improvements in culturally safe service delivery involve changes in a number of areas, including cultural competency, professional development, and identified positions in the workforce.

Family Violence (InTouch), *Submission 13*, p. 10; Junction Australia, *Submission 23*, p. 5; Micah Projects Incorporated, *Submission 24*, p. 3; Public Health Association of Australia, *Submission 27*, p. 4; Baptist Care Australia, *Submission 28*, p. 2; Queensland Domestic Violence Services Network, *Submission 30*, p. 7; Sexual Assault Support Service, *Submission 32*, p. 2; Family Court of Australia, *Submission 44*, p. 12; Domestic Violence NSW, *Submission 48*, p. 14; Australian Women Against Violence Alliance, *Submission 49*, p. 6; Relationships Australia, *Submission 55*, p. 12; Magistrates’ Court of Victoria, *Submission 56*, p. 1; Monash University Castan Centre for Human Rights Law, *Submission 57*, p. 8; Hume Riverina Community Legal Service, *Submission 76*, p. 9; No To Violence/Men’s Referral Service (No To Violence), *Submission 82*, p. 4; National Legal Aid (NLA), *Submission 88*, p. 4; Legal Aid NSW, *Submission 90*, pp. 10-12, 21-22; Anti-Slavery Australia, *Submission 92.1*, p. 18; Professor Belinda Fehlberg, *Submission 106*, pp. 1-3; National Association of Community Legal Centres, *Submission 115*, p. 2.

³¹ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander clients*, 2012, Recommendation 1, pp. 96-97.

³² NFVPLSF, *Submission 78*, p. 11.

- 7.31 In 2012 the FLC recommended that a cultural competency framework be developed for the family law system and that the competency of family law professionals be improved through dedicated and flexible training and the development of good practice guides.³³
- 7.32 Additionally, the FLC recommended implementing workforce development strategies to help build an Aboriginal and Torres Strait Islander workforce in the family law system.³⁴ In a submission to the present inquiry the NFVPLS also highlighted the importance of employing more Aboriginal and Torres Strait Islanders within legal services:
- It is virtually impossible for a mainstream duty lawyer in a once-off, or intrinsically time-pressured environment to build the rapport and trust necessary to overcome the barriers faced by an Aboriginal or Torres Strait Islander victim/survivor in order to obtain full instructions and provide culturally competent, detailed yet readily understood advice – nor allay the intimidation, anxiety and cultural alienation frequently reported by our clients in attending the Family Law Courts.³⁵
- 7.33 In 2016, the FLC recommended the development of a pilot of a specialised court hearing process for Aboriginal and Torres Strait Islander families, to improve cultural safety. This process would involve the participation of elders to provide advice to the Court regarding any children involved in the case.³⁶
- 7.34 Further to this, the FLC recommended that Cultural Reports be included as an integral component of family reports for cases that involve Aboriginal and Torres Strait Islander children, and that these include a cultural plan for the child’s ongoing connection with country and kinship networks.³⁷
- 7.35 As noted by the FLC however, efforts to improve culturally responsive service delivery ‘must also take account of the diversity of Aboriginal and Torres Strait Islander peoples, and the important ways in which family

³³ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander clients*, 2012, Recommendation 2, p. 97.

³⁴ Family Law Council, *Improving the Family Law System for aboriginal and Torres Strait Islander clients*, 2012, Recommendation 5, p. 100.

³⁵ NFVPLSF, *Submission 78*, p. 17.

³⁶ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Final Report, Recommendation 16, 2016, p. 150.

³⁷ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Final Report, Recommendation 16, 2016, p. 150.

structures and practices may differ from those of other clients of the family law system'.³⁸

Family dispute resolution and conferencing

- 7.36 The need for cultural competency in FDR is referred to in a number of submissions, and in evidence provided at public hearings.³⁹ The evidence provided aligned with a recommendation from the FLC 2016 for the convening of family group conferences for Aboriginal and Torres Strait Islander families, for some family law matters. The FLC noted that some organisations within the family relationship sector are equipped to conduct family group conferences in the context of child protection, and that this experience could assist the development of family group conferences for the resolution of other family law matters.⁴⁰
- 7.37 CAALAS also noted the importance of involving elders in resolution processes. CAALAS recommended a family dispute resolution model where more traditional dispute resolution approaches are recognised, such as involving elders in the process:
- [We would propose to] have some kind of facility for elders to provide input or some kind of conferencing to allow family members to be involved and give a cultural perspective. There's no mechanism for that to occur at the moment. Only the parties can be involved in the proceedings or the mediation ... I think that is an important proposition.⁴¹
- 7.38 Central Australian Women's Legal Service (CAWLS) cautioned however that there can be 'difficulty involving elders' due to various 'family dynamics' in some communities.⁴²

³⁸ Family Law Council, *Improving the family law system for Aboriginal and Torres Strait Islander clients*, 2012, p. 1.

³⁹ Australian Women Against Violence Alliance, *Submission 49*, p. 6; Domestic Violence NSW, *Submission 48*, p. 11; NFVPLSF, *Submission 78*, p. 15; Ms Antoinette Braybrook, National Convenor, National Aboriginal Family Violence Prevention and Legal Services Forum, *Committee Hansard*, Melbourne, 24 July 2017, p. 25.

⁴⁰ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems*—Final Report, Recommendation 16, 2016, p. 150

⁴¹ Mr Simon Philip Caldwell, Family Legal Officer, Central Australia Aboriginal Legal Aid Service, *Committee Hansard*, Alice Springs, 22 August 2017, p. 19.

⁴² Ms Janet Taylor, Managing Principle Solicitor, Central Australian Women's Legal Service, *Committee Hansard*, Alice Springs, 22 August 2017, p. 31.

Family consultants

- 7.39 As described in Chapter 8, a number of submissions discussed the inadequacy of the capacity of family consultants and family report writers. This includes the ability to work effectively with clients from Aboriginal and Torres Strait Islander backgrounds.
- 7.40 The FLC's 2012 recommendations included that more Aboriginal and Torres Strait Islander family consultants and family liaison officer positions be developed to improve outcomes for Aboriginal and Torres Strait Islander families.⁴³ Further to this recommendation CAWLS suggested that targeted training for family consultants is important for effective reports to be developed by non-Indigenous family consultants.⁴⁴

Collaboration and service integration

- 7.41 The FLC noted that collaboration between Aboriginal and Torres Strait Islander services and services across the family law system is 'essential [for] meeting the complex needs of Indigenous clients'.⁴⁵ Once a service within the family law system identifies Aboriginality, it is important for the service to have strong referral pathways into culturally safe support services.⁴⁶
- 7.42 The FLC recommended strategies to enhance collaboration between the mainstream family law system and culturally specific service providers, including the creation of a 'roadmap' of services, integration of the roadmap into government resources and initiatives, and the promotion of these resources for Aboriginal and Torres Strait islander families.⁴⁷

Interpreter services

⁴³ Family Law Council, *Improving the family law system for Aboriginal and Torres Strait Islander clients*, 2012, Recommendation 6, p. 101.

⁴⁴ Ms Anna Ryan, Senior Lawyer, Central Australian Women's Legal Service, *Committee Hansard*, Alice Springs, 22 August 2017, p. 25.

⁴⁵ Family Law Council, *Improving the family law system for Aboriginal and Torres Strait Islander clients*, 2012, p. 98.

⁴⁶ NFVPLSF, *Submission 78*, pp. 5, 11.

⁴⁷ Family Law Council, *Improving the family law system for Aboriginal and Torres Strait Islander clients*, Recommendation 3, 2012, p. 99.

- 7.43 Echoing the FLC 2012 report, a number of submissions recommended improvements in access to interpreter services for Aboriginal and Torres Strait Islander languages. The FLC specifically suggested a needs analysis of:
- the prevalent language groups;
 - the pool of available interpreters for particular language groups;
 - an assessment of which language groups require interpreters;
 - initiatives to increase the pool of interpreters in required areas; and
 - developing regional lists of pools of interpreters with knowledge and understanding in family law.⁴⁸
- 7.44 Additionally, in 2016 the FLC recommended that legal interpreters should receive family law training as part of accreditation, and that protocols are established to ensure that Aboriginal and Torres Strait Islander clients are made aware of their right to an interpreter, and that an interpreter service is offered and provided, if needed.⁴⁹
- 7.45 Some submissions also recommended that interpreters should be flexible in service delivery and able to provide face-to-face as well as telephone interpretation services.⁵⁰

Culturally and Linguistically Diverse families

- 7.46 Multiple submissions recognised that people from CALD backgrounds are underrepresented in the family law system, and are less likely to seek help for issues regarding family violence.⁵¹
- 7.47 Evidence suggests that a number of barriers contribute to this underrepresentation:
- education about the legal system;
 - access to culturally appropriate services;
 - language difficulties; and
 - understanding culturally specific family violence.

⁴⁸ Family Law Council, *Improving the family law system for Aboriginal and Torres Strait Islander clients*, 2012, p. 102.

⁴⁹ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Final Report, 2016, p. 103.

⁵⁰ WLSA, *Submission 6*, p. 55; NFVPLSF, *Submission 78*, p. 5; Northern Rivers Community Legal Centre, *Submission 83*, p. 11; NLA, *Submission 88*, p. 3.

⁵¹ WLSA, *Submission 6*, p. 23; Jannawi Family Centre, *Submission 51*, p. 2.

7.48 The following sections discuss these barriers and recommendations for reform.

Barriers to the family law system

Education, language and literacy

7.49 Whilst CALD families experience similar forms of family violence as non-CALD families, they are often unaware that their experiences constitute family violence and are illegal.⁵² This lack of awareness of rights and of Australian law commonly means that CALD families do not report violence or engage in the legal system.

7.50 Access Community Services (Access) suggests that people from CALD backgrounds may use their home country as a 'frame of reference' for viewing family violence.⁵³ For example, a CALD family may originate from a region where:

- violence against women is legal or not recognised;
- there are no legal protections against family violence;
- seeking help from outside of the family group is considered shameful; or
- there is a culture that promotes greater acceptance of family violence as normal.⁵⁴

If these cultural settings are used as a frame of reference, it encourages silence about family violence.⁵⁵

7.51 In addition, CALD families may have minimal knowledge of Australia's legal system.⁵⁶ In particular, a lack of knowledge about migration law can be detrimental to CALD families. Multiple submissions reported that an unfounded fear of deportation prevents many newly arrived immigrants from reporting family violence and accessing support.⁵⁷ This fear arises where CALD families arrive in Australia on a partner visa, with knowledge that they can remain in Australia on the basis of their relationship with an

⁵² InTouch, *Submission 13*, p. 1.

⁵³ Access Community Services, *Submission 12*, p. 3.

⁵⁴ Australian Centre for Human Rights and Health, *Submission 4*, p. 5; Access Community Services, *Submission 12*, p. 3; The Humanitarian Group, *Submission 37*, p. 7.

⁵⁵ Access Community Services *Submission 12*, p. 3.

⁵⁶ The Humanitarian Group, *Submission 37*, p. 7.

⁵⁷ InTouch, *Submission 13*, p. 23; Anti-Slavery Australia, *Submission 92 – Attachment 1*, p. 32.

Australian citizen or permanent resident (sponsor). However, many are unaware that the *Migration Regulations 1994* (Cth) prescribe a family violence exception where a person can remain in Australia if they, or a member of the family unit, 'has suffered family violence committed by the sponsoring partner'.⁵⁸ Without this awareness, many victims of family violence remain in the violent relationship.⁵⁹

- 7.52 If a CALD family does seek to report family violence and access the family law system, language differences can present a significant barrier. Multiple submissions refer to the inadequate provision of information in languages other than English in legal and non-legal services, police stations, online application lodgement systems, and at courts.⁶⁰ For example, the Magistrates' Court of Victoria advised that family violence intervention orders are not provided in languages other than English, and that 'translations are not accommodated by the courts' case management system ... due to the personalised nature of intervention orders'.⁶¹ This can present significant safety risks for CALD families.
- 7.53 For the legal system to respond to the needs of CALD families, the availability of 'professional, appropriate and skilled interpreters' is crucial.⁶² The Legal Services Commission of South Australia provided an example of the demand for interpreters, reporting that approximately 25 per cent of their clients accessing legal advice from July 2016 to April 2017 required interpreter services.⁶³ Further, the Magistrates' Court of Victoria advised that in 2013/14 there were 1,210 individual case requests for interpreters, with some using interpreter services on multiple occasions.⁶⁴

⁵⁸ *Migration Regulations 1994* (Cth), Sch. 2, cls. 100.221(3)–(4).

⁵⁹ Anti-Slavery Australia, *Submission 92 – Attachment 1*, p. 32; Mrs Luba Tanevski, Migration Agent, InTouch, *Committee Hansard*, Melbourne, Monday 24 July 2017, p. 56.

⁶⁰ Access Community Services, *Submission 12*, p. 3; InTouch, *Submission 13*, p. 2; The Humanitarian Group, *Submission 37*, p. 5.

⁶¹ Magistrates' Court of Victoria, *Submission to the Victorian Royal Commission into Family Violence*, June 2015, p. 43 <<http://www.rcfv.com.au/getattachment/BC1EFD6C-DE17-4005-AF31-E198CF51D7C9/Magistrates'-Court-of-Victoria-and-Children's-Court-of-Victoria>>, last accessed 6 December 2017.

⁶² Federation of Ethnic Communities' Councils of Australia (FECCA), *Submission 62*, p. 3.

⁶³ Legal Services Commission of South Australia, *Submission 77*, p. 1.

⁶⁴ Magistrates' Court of Victoria, *Submission to the Victorian Royal Commission into Family Violence*, June 2015, p. 43 <<http://www.rcfv.com.au/getattachment/BC1EFD6C-DE17-4005-AF31-E198CF51D7C9/Magistrates'-Court-of-Victoria-and-Children's-Court-of-Victoria>>, last accessed 6 December 2017.

- 7.54 Despite this demand, multiple submissions advised that there is often a lack of ready access interpreters within court and other services.⁶⁵
- 7.55 In addition, to assist CALD families to successfully access interpreter services, court and support staff must be aware of the need to consider certain cultural complexities and needs. For example:
- whether interpreters are versed in the correct cultural practices or communication styles;
 - concerns around confidentiality in small language groups where the interpreter may be known to the family;
 - using an interpreter who is a different gender to the client can cause distress;
 - the interpreter needs to be appropriately qualified and understand technical and legal language; and
 - it is important to determine which dialect of the language is needed.⁶⁶

Culturally appropriate services

- 7.56 A number of submissions raised concerns about lack of access to culturally appropriate legal and support services for CALD clients.⁶⁷ CALD individuals may be deterred from accessing services due to:
- services failing to advertise that they employ staff with CALD backgrounds;
 - limited provision of information in appropriate languages;
 - limited understanding of the impact of trauma;
 - limited understanding of culturally-specific violence;
 - community pressure to solve problems ‘in-house’, and fear of social isolation;
 - prejudice or discriminatory attitudes from staff; and

E198CF51D7C9/Magistrates'-Court-of-Victoria-and-Children's-Court-of-Victoria>, last accessed 6 December 2017.

⁶⁵ InTouch, *Submission 13.1*, p. 5; The Humanitarian Group, *Submission 37*, pp. 4-5; FECCA, *Submission 62*, p. 3; Law Council of Australia, *Submission 85.1*, p. 14.

⁶⁶ Access Community Services, *Submission 12*, p. 3; InTouch, *Submission 13.1*, p. 5; The Humanitarian Group, *Submission 37*, pp. 5-6.

⁶⁷ WLSA, *Submission 6*, p. 23; Access, *Submission 12*, p. 3; The Humanitarian Group, *Submission 37*, p. 4; Victorian Legal Aid, *Submission 60e*, p. 19.

- general lack of cultural awareness and sensitivity.⁶⁸

Dowry demands

- 7.57 Multiple organisations expressed concern about culturally specific family violence involving dowries and bride prices.⁶⁹ Dowry is defined as money, gifts or property that a bride or her family gives to the groom in the context of a marriage. Bride-price occurs when a man ‘pays’ an amount (in money or other goods) to the bride’s family before marriage—the wife is then considered ‘paid-for’ and owned by the husband.⁷⁰
- 7.58 Dowry (including bride-price) abuse is a specific form of financial abuse that can occur for individuals from countries that have these practices.⁷¹ The abuse often occurs in the form of coercive demands for additional payments from the bride or her family after the marriage, often accompanied by physical and emotional violence; or demands for dowry return if the marriage ends.⁷²
- 7.59 Although economic abuse is defined as a dimension of family violence in the Family Law Act, it is poorly understood by service providers, the police, family law professionals, and the persons experiencing it.⁷³ When there are cultural aspects to the abuse, it may be even less understood.

Recommendations for reform

- 7.60 The FLC’s 2012 report, *Improving the Family Law System for Culturally and Linguistically Diverse Clients* examined how the family law system could be made more effective for CALD families. The FLC made a number of recommendations for improvement which were referenced and built on in the 2016 report. The following section will discuss the key recommendations

⁶⁸ WLSA, *Submission 6*, p. 23; Access, *Submission 12*, p. 3; InTouch, *Submission 13.1*, p. 4; The Humanitarian Group, *Submission 37*, p. 7; FECCA, *Submission 62*, p. 4.

⁶⁹ Australasian Centre for Human Rights and Health, *Submission 4*, p. 5; InTouch, *Submission 13*, p. 16; Legal Services Commission of South Australia, *Submission 77*, p. 1.

⁷⁰ Australasian Centre for Human Rights and Health, *Submission 4*, p. 7.

⁷¹ Australasian Centre for Human Rights and Health, *Submission 4*, pp. 6-7; Legal Services Commission of South Australia, *Submission 77*, p. 1.

⁷² Australasian Centre for Human Rights and Health, *Submission 4*, p. 8; InTouch, *Submission 13*, p. 16; Legal Services Commission of South Australia, *Submission 77*, p. 1.

⁷³ Supriya Singh, Marg Liddell, and Jasvinder Sidhu, *Submission 65*, p. 8.

from the FLC which were referenced or endorsed by multiple submissions to this inquiry.⁷⁴

Education, language and literacy

- 7.61 The FLC recognised the need for legal education in CALD communities, and recommended development of family law legal literacy and education strategies for CALD communities.⁷⁵ To assist with language barriers the FLC further recommended that information regarding the family law system is available in multiple languages – whether online or in hard copy – and that this information is adequately distributed to migrant and mainstream services.⁷⁶
- 7.62 The FLC Report highlighted the need to enhance the ability of CALD families to communicate effectively in the family law system. This included recommendations for legal interpreters to be trained in family law as part of the accreditation process, the development of a national protocol on the use of interpreters in the family law system, and the development of pools of interpreters with knowledge and understanding of the law.⁷⁷ Supporting the FLC recommendation, the Federation of Ethnic Communities' Councils of Australia further recommended that investments be made to ensure the provision of fully accredited translators in family law cases, and fill any absences of interpreters in specific language groups immediately.⁷⁸

Culturally appropriate services and engagement

- 7.63 The FLC recommended the development of a cultural competency framework for the family law system, covering culturally responsive practice with CALD families. The report recommended improving cultural competency by:

⁷⁴ WLSA, *Submission 6*, pp. 23-24; Access, *Submission 12*, pp. 3, 5; InTouch, *Submission 13*, p. 11; InTouch, *Submission 13.1*, p. 5; The Humanitarian Group, *Submission 37*, pp. 5-6, 14; FECCA, *Submission 62*, p. 3; Legal Services Commission of South Australia, *Submission 77*, p. 4; Monash School of Social Sciences, *Submission 100*, p. 11.

⁷⁵ Family Law Council, *Improving the family law system for clients from culturally and linguistically diverse backgrounds*, 2012, Recommendation 1, p. 90.

⁷⁶ Family Law Council, *Improving the family law system for clients from culturally and linguistically diverse backgrounds*, 2012, Recommendation 1, p. 90.

⁷⁷ Family Law Council, *Improving the family law system for clients from culturally and linguistically diverse backgrounds*, 2012, Recommendation 6, p. 90.

⁷⁸ FECCA, *Submission 62*, p. 1.

- investing in flexible learning packages that are adaptable across different settings;
- developing ‘good practice guides’ for being culturally responsive in specific service areas;
- making cultural competency a professional development requirement in vocational and tertiary education programs; and
- ensuring that cultural competency is embedded within the family law system.⁷⁹

7.64 The Legal Services Commission of South Australia highlighted the need for cultural competency training to be provided to police officers as well as judicial officers.⁸⁰ WLSA recommended the development of a consistent Code of Practice for the investigation of family violence, for all state and territory police. Such a code would include specific requirements for police to receive effective cultural awareness training for working with CALD and Aboriginal and Torres Strait Islander communities.⁸¹

7.65 Multiple submissions called for a more diverse workforce, with staff ‘empowered with an understanding of cultural context’ that practice in culturally appropriate ways.⁸² The FLC noted the need for more bicultural and bilingual employees within the family law system, and made a series of recommendations for workforce development. These included strategies to increase the number of CALD employees across family law systems services and funding for CALD Community Liaison Officers to work within family relationship services and the family law courts.⁸³ In 2016 the FLC additionally recommended the incorporation of CALD services in the development of any new, integrated services models for the family law system.⁸⁴

⁷⁹ Family Law Council, *Improving the family law system for clients from culturally and linguistically diverse backgrounds*, 2012, Recommendation 2, p. 93.

⁸⁰ Legal Services Commission of South Australia, *Submission 77*, p.3.

⁸¹ WLSA, *Submission 6*, p. 51; see also No To Violence, *Submission 82*, p. 17.

⁸² WLSA, *Submission 6*, p. 23; Domestic Violence NSW, *Submission 48*, p. 10; FECCA, *Submission 62*, p. 4.

⁸³ Family Law Council, *Improving the family law system for clients from culturally and linguistically diverse backgrounds*, 2012, Recommendation 4, p. 96.

⁸⁴ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems – Final Report*, 2016, Recommendation 17, p. 17.

7.66 The FLC noted the need for engagement and consultation with CALD communities, and recommended that support be provided to courts, agencies and services within the family law system to collaborate with CALD communities in ‘the development, delivery and evaluation of services’.⁸⁵ In 2016 the FLC later recommended implementing processes to support family group conferencing for CALD families, to enhance decision-making and establish the interests of children involved in a family law matter.⁸⁶

Dowry

7.67 In 2012 the FLC noted that there was a lack of understanding of dowry in Australian law, particularly regarding property division settlements. Multiple submissions urged that:

- dowry related abuses be recognised as constituting family violence;
- family law professionals be educated on dowry and bride price, in order to increase awareness and recognition of dowry-related abuse; and
- the practice of dowry/bride price be taken into account in property-division process.⁸⁷

7.68 The Australasian Centre for Human Rights further recommended that the term ‘dowry extortion’ should be considered as an example of extortion in the Family Law Act.⁸⁸

Families with parents or children with disabilities

7.69 People with disability experience violence at higher rates than people without disability. For example, women with disability are 40 per cent more likely to experience domestic and family violence. Children with disability also have a different experience of family violence, and can either be the target of that violence, or the perpetrator. The family law system must respond effectively to the needs of people with disability and understand the substantial barriers faced when engaging with the family law system.

⁸⁵ Family Law Council, *Improving the family law system for clients from culturally and linguistically diverse backgrounds*, 2012 Recommendation 3, p. 95.

⁸⁶ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems* – Final Report, 2016, Recommendation 17, p. 17.

⁸⁷ Australasian Centre for Human Rights and Health, *Submission 4*, p. 2; InTouch, *Submission 13*, p. 16; Legal Services Commission of South Australia, *Submission 77*, pp. 3-4.

⁸⁸ Australasian Centre for Human Rights and Health, *Submission 4*, p. 2.

- 7.70 Siblings of children with disability can be adversely affected in family violence situations. Siblings may feel pressure to protect their siblings with a disability – both from family violence and from traumatic family law procedures.⁸⁹ Additionally, siblings of children with disability may experience family violence perpetrated by their sibling.
- 7.71 Siblings Australia highlighted the significant impact of family violence within families that have a child with disability who is violent toward their siblings. They note that parents can hide such violence for fear of having a child removed from the family. The Committee heard that the experience of violence can cause significant trauma and ongoing emotional, psychological and physical difficulties for the sibling experiencing the violence.⁹⁰
- 7.72 Children or parents with disability experiencing family violence can be placed at risk when accessing the family law system. A lack of understanding of disability among family law professionals such as family report writers can have significant consequences. For example, a report that casts a parent with disability in ‘a less favourable light’ or as less capable of parenting may result in a favourable outcome for the perpetrator of family violence (without disability).⁹¹ In fact, parents with disability are 10 times more likely to have a child removed from care, than parents without disability.⁹² If the child is returned to the perpetrator they are placed at significant risk of harm.
- 7.73 People with Disability Australia explained that there is limited support to parents with disability who have experienced family violence:

[Child protection departments] believe that they have a bit more of a right to then get involved and remove those children. There seems to be very little awareness or support for them to support those parents appropriately in keeping their children, in particular if one of them is experiencing family domestic violence. There really seems to be very little support.⁹³

- 7.74 This is particularly the case for parents with intellectual disability:

⁸⁹ Emma Gierschick, *Submission 111 – Attachment 1*, p. 24.

⁹⁰ Siblings Australia Inc., *Submission 117*, pp. 1-2.

⁹¹ Ms Leonie Hazelton, Individual Advocate, People with Disability Australia, *Committee Hansard*, Sydney, 31 July 2017, p. 41.

⁹² People with Disability Australia, *Submission 25*, p. 7.

⁹³ Ms Paulina Gutierrez, Individual Advocate, People with Disability Australia, *Committee Hansard*, Sydney, 31 July 2017, p. 41.

Parents with intellectual disability have to be given the opportunity to parent. Often children are removed before they even have a chance. If given the opportunity and if given the chance to demonstrate what supports they may need to parent their children, we can then look at the ongoing supports and providing them in an appropriate manner.⁹⁴

Barriers to the family law system

Reporting family violence

7.75 The experience of violence for people with disability can be unique, and involve forms such as the withholding of food, water or medication, threats to withdraw care or institutionalise, threats against support animals, and forced isolation.⁹⁵ People with disability can hesitate to disclose such experiences because these forms of violence are not easily identified as family violence by police and other services. Further, people with disability who have difficulty communicating may be reliant on services to recognise that violence is occurring.⁹⁶

7.76 People with disability may also hesitate to report family violence for a number of other reasons including:

- fear of the withdrawal of physical or financial support;
- limited relationships education, resulting in limited awareness of rights and of what constitutes violence;
- discrimination and victim blaming, particularly if the perpetrator is a carer; and
- fear of child removal.⁹⁷

Appropriate support services

7.77 Domestic violence shelters are a common point of entry into support services.⁹⁸ For a person with a physical disability, physical access to shelters

⁹⁴ Ms Meredith Lea, Policy Officer, Violence Prevention, People with Disability Australia, *Committee Hansard*, Sydney, 31 July 2017, p. 42.

⁹⁵ People with Disability Australia, *Submission 25*, p. 3.

⁹⁶ People with Disability Australia, *Submission 25*, pp. 3-4.

⁹⁷ People with Disability Australia, *Submission 25*, pp. 4-5.

⁹⁸ Victorian Royal Commission into Family Violence, *Summary and recommendations*, p. 75.

‘is a big barrier’ that limits ‘access to any information or services that they [people with physical disability] could receive in those settings’.⁹⁹

7.78 Once within the family law system, a lack of understanding of and experience with disability by family law professionals and service staff can present difficulties. Court-based support services need to identify and respond to the needs of people with disability effectively, but this is difficult without proper understanding of disability and the unique ways family violence can affect people with disability. Significantly, this can present safety risks if family violence is not properly identified, risk assessments are not completed, or appropriate support is not provided.¹⁰⁰

Recommended reform

7.79 Multiple submissions recommended that enhanced disability awareness education within the family law system and support services on disability awareness, including:

- impact on children with disability;
- additional barriers for parents with children who have disability;¹⁰¹
- children with disability perpetrating violence;¹⁰²
- the unique experiences of family violence for people with disability;
- barriers to accessing the family legal system; and
- strength-based approaches to working with people with disability.¹⁰³

7.80 Many submissions¹⁰⁴ endorsed the WLSA *Safety First Plan*,¹⁰⁴ with amendments to properly support people with disability, including:

- a risk assessment framework that is inclusive of the experiences of people with disability;
- court based support services and family violence specialists who have received disability awareness training;

⁹⁹ Ms Meredith Lea, Policy Officer, Violence Prevention, People with Disability Australia, *Committee Hansard*, Sydney, 31 July 2017, p. 40.

¹⁰⁰ People with Disability Australia, *Submission 25*, p. 6

¹⁰¹ Emma Gierschick, *Submission 111 – Attachment 1*, pp. 35-36.

¹⁰² Siblings Australia Inc., *Submission 117*, p. 2.

¹⁰³ People with Disability Australia, *Submission 25*, p. 5; Ms Paulina Gutierrez, Individual Advocate, People with Disability Australia, *Committee Hansard*, Sydney, 31 July 2017, p. 45.

¹⁰⁴ WLSA, *Safety first in family law*, May 2017.

- embedding disability advocacy organisations into the family law system, in addition to domestic violence services; and
- family violence training for family law professionals that includes disability awareness training.¹⁰⁵

Other groups with particular needs

- 7.81 LGBTIQ communities experience family violence in distinct ways, and have unique barriers in accessing the family law system. The Victorian Royal Commission into Family Violence reported that LGBTIQ communities may be reluctant to seek help due to discrimination, homophobia or transphobia.¹⁰⁶ Further, a lack of awareness of LGBTIQ needs amongst legal and non-legal service providers can discourage engagement with the family law system.¹⁰⁷
- 7.82 The Victorian Royal Commission also noted that women in prison who have experienced family violence may have particular vulnerabilities and needs when accessing the family law system.¹⁰⁸ For example, accessing appropriate support to recover from family violence, whilst incarcerated.
- 7.83 The Victorian Royal Commission suggested that early identification of women prisoners who have experienced family violence, and provision of appropriate supports both within and on release from prison, is necessary to help protect this group from the risk of further violence.¹⁰⁹
- 7.84 Multiple submissions noted a need for improvement in the quality and accessibility of services for people from LGBTIQ communities, and women in prison, and recommended that family law professionals receive training on working with these groups to ensure that the family law system is accessible and responsive to the needs of all Australians.¹¹⁰

¹⁰⁵ People with Disability Australia, *Submission 25*, pp. 5-7; Domestic Violence NSW, *Submission 48*, p. 12; Women's Legal Services NSW, *Submission 71*, p. 2.

¹⁰⁶ Victorian Royal Commission into Family Violence, *Summary and recommendations*, p. 35.

¹⁰⁷ Victorian Royal Commission into Family Violence, *Summary and recommendations*, p. 35; Domestic Violence NSW, *Submission 48*, pp. 10-11.

¹⁰⁸ Victorian Royal Commission into Family Violence, *Summary and recommendations*, p. 37.

¹⁰⁹ Victorian Royal Commission into Family Violence, *Summary and recommendations*, 2016, p. 38.

¹¹⁰ Statewide Children's Resource Program, *Submission 3*, p. 2; WLSA, *Submission 6*, p. 42; Northern Integrated Family Violence Services, *Submission 11*, p. 2; Domestic Violence NSW, *Submission 48*, p. 14; Australian Women Against Violence Alliance, *Submission 49*, p. 6; Hume Riverina

Committee comment

- 7.85 Whilst all families experiencing family violence face immense difficulty in seeking help and navigating the family law system, there are some groups of people who have particular needs, particularly Aboriginal and Torres Strait Islander communities, people from culturally and linguistically diverse backgrounds, and people with disability.
- 7.86 The Committee notes the work of the Australian Government on the *National Plan to Reduce Violence against Women and their Children 2012-2020* (the National Plan). In particular to:
- improve community safety, and access to resources for Aboriginal and Torres Strait Islander families;
 - support Aboriginal and Torres Strait Islander communities to prevent and respond to violence; and
 - provide improved, trauma-informed, and community driven support for Aboriginal and Torres Strait Islander families experiencing family violence;
 - work with culturally and linguistically diverse communities to reduce and respond violence; and
 - provide training to raise awareness of the needs of women with disability experiencing family violence.¹¹¹
- 7.87 The Committee recognises that many of the obstacles that families from these groups face in accessing the family law system can put them at greater risk of harm, and change is needed urgently.
- 7.88 People with disability often experience family violence at higher rates, for longer periods of time, and in additional ways to people without disability. The significant barriers that people with disability face when trying to access the family law system can place these families at greater risk of further harm. The Committee is exceptionally concerned by the high rates of child removal from parents with disability, and the associated implicit bias regarding the parenting capacity of parents with disability. Children who are inappropriately removed from a parent with disability and ordered to live with a perpetrator of violence face an unacceptable risk of harm.

Community Legal Service, *Submission 76*, p. 3; Northern Rivers Community Legal Centre, *Submission 83*, p. 6.

¹¹¹ Australian Government, *National plan to reduce violence against women and their children*, <<http://plan4womenssafety.dss.gov.au/>>, last accessed 10 October 2017.

7.89 Although the Committee did not receive sufficient evidence to the inquiry, the Committee acknowledges that other marginalised groups, including LGBTIQ communities and women in prison, have unique needs and face unique obstacles when accessing the family law system.¹¹² It is understood that the issues facing these groups, and people with disability, will be examined in more detail by the Australian Law Reform Commission, in regards to the Commission's examination of families with complex needs as part of its *Review of the family law system*.¹¹³ As noted earlier, the Commission is due to report to in 2019. The Committee is confident that the Commission will look to address the unique needs of these less-recognised families in developing a revised family law system that is accessible to all Australians.

Aboriginal and Torres Strait Islander families

7.90 The Committee notes the significant barriers that Aboriginal and Torres Strait Islander families face when accessing the family law system. The Committee was deeply affected by a number of site inspections in Alice Springs, which focused on how Aboriginal and Torres Strait Islander families currently experience the family law system and wider supports, and how they could be better supported through the family law system.

7.91 A central contribution to the underutilisation of the family law system by Aboriginal and Torres Strait Islander families is a lack of understanding about the family law system, inappropriate cultural responsiveness, and a distrust of services within the family law system. Many recommendations for reform discussed at the site inspections are well known, and action is required to implement them. The Committee notes that these concerns were key focus areas in the recommendations for improvement made in the Family Law Council's 2012 report, *Improving the family law system for Aboriginal and Torres Strait Islander clients*.

7.92 Aboriginal and Torres Strait Islander women are more likely to be hospitalised and more likely to lose their life as a result of family violence. Yet Aboriginal and Torres Strait Islander families are not engaging in the family law system because of cultural incompetency, under resourcing of interpreters, limited information in Indigenous languages and a lack of

¹¹² WLSA, *Submission 6*, p. 36; Northern Integrated Family Violence Services, *Submission 11*, p. 2; Domestic Violence NSW, *Submission 48*, pp. 5, 10; Australian Women Against Violence Alliance, *Submission 49*, p. 6; WLSA, *Safety first in family law*, May 2017, p. 1.

¹¹³ Australian Law Reform Commission, *Review of the family law system: Terms of reference*, September 2017; see Appendix B of this Report for terms of reference.

community education. This is a significant problem that has been examined and reviewed extensively with gaps still existing in service provision. The Family Law Council's recommendations are strong, well developed, and thorough, and have received strong community support including endorsement by 23 submissions to the present inquiry.

- 7.93 The Committee notes that the Australian Government, as part of the National Plan, has provided \$6.2 million to fund the development and piloting of new, culturally appropriate and effective models of family dispute resolution.¹¹⁴ The Committee awaits with interest the outcome of these pilot programs.
- 7.94 The Committee is of the view, however, that there is much more that can be done to ensure the family law system is accessible, equitable, responsive, and prioritises safety for this particularly vulnerable group. In presenting these recommendations to government, the Committee draws upon the strong, well-developed and thorough recommendations of the Family Law Council as supported by evidence to the present inquiry.
- 7.95 The Committee also notes its earlier recommendation, Recommendation 11, that a trial be conducted in state and territory specialist family violence courts that would enable all family law issues in family violence cases be determined by the one court. As part of that recommendation, the Committee also strongly recommends that one of these trial courts should be located in an area of high indigenous population.

Recommendation 24

7.96 The Committee recommends that, as a matter of urgency, the Australian Government implements the Family Law Council recommendations from both the 2012 *Improving the family law system for Aboriginal and Torres Strait Islander clients report*, and the 2016 *Families with complex needs and the intersection of the family law and child protection systems – Final Report*, as they relate to Aboriginal and Torres Strait Islander families, including those recommendations addressing:

- **community education;**
- **cultural competency;**

¹¹⁴ The Hon. Senator George Brandis QC, Attorney-General, 'Third Action Plan to reduce family violence', *Media Release*, 28 October 2016.

- **service collaboration;**
- **culturally diverse workforce;**
- **early assistance and outreach;**
- **legal and non-legal services;**
- **interpreters;**
- **cultural reports;**
- **family group conferences;**
- **participation of elders or respected persons in court hearings; and**
- **consulting with Aboriginal and Torres Strait Islander representatives in the development of any reforms.**

Culturally and Linguistically Diverse families

- 7.97 The Committee acknowledges that inadequacies within the family law system are contributing to the underrepresentation of CALD families in the family law system. Of particular concern to the Committee is the limited awareness of legal rights amongst the CALD community, the significant difficulties associated with accessing appropriate interpreter services, and the need for culturally competent services.
- 7.98 The Committee notes the considerable work of the Family Law Council in this area. The Family Law Council has made robust, detailed and well-considered recommendations for improving the family law system for families from CALD backgrounds. These recommendations have been well-accepted by the community, and endorsed by eight submissions to the present inquiry. Despite this, minimal changes have been made to address key issues facing this vulnerable group.
- 7.99 The Committee notes recent media coverage foreshadowing that the Victorian Government is preparing legislation to prevent the extortion of dowry money, as a response to the findings of the Victorian Royal

Commission into Family Violence.¹¹⁵ The Committee looks forward to following the development of this legislation.

7.100 However, the Committee believes that the family law system is not currently accessible, equitable, responsive or prioritises the safety of CALD families. In making recommendations to government to address these concerns, the Committee draws upon the strong, focused, well-developed recommendations of the Family Law Council as supported by evidence to the present inquiry.

Recommendation 25

7.101 The Committee recommends that, as a matter of urgency, the Australian Government implements recommendations from both the 2012 *Improving the family law system for clients from culturally and linguistically diverse backgrounds* report, and the 2016 *Families with complex needs and the intersection of the family law and child protection systems – Final Report*, as they relate to culturally and linguistically diverse families, including those recommendations addressing:

- **community education;**
- **cultural competency;**
- **service integration;**
- **culturally diverse workforce;**
- **consultation with culturally and linguistically diverse communities in service evaluation;**
- **interpreters;**
- **cultural connection for children; and**
- **family group conferences.**

¹¹⁵ Gareth Boreham, *Australia to become the first country outside Australia to target dowry abuse*, SBS News Online, 13 October 2017, < <http://www.sbs.com.au/news/article/2017/10/13/australia-become-first-country-outside-india-target-dowry-abuse>>, last accessed 6 December 2017.

7.102 Building on its previous recommendations for an expanded Family Advocacy and Support Service attached to the Court, the Committee also recommends that this service provide collaboration and referral pathways to support services, particularly for those families with additional challenges as discussed in this chapter.

Recommendation 26

7.103 The Committee recommends the Attorney-General extends the Family Advocacy and Support Service pilot to include collaboration and referral pathways to specialist support services for families with additional challenges, using the Children and Family Court Advisory and Support Service model.

8. Strengthening the capacity of family law professionals

- 8.1 The family law system can only be as effective as the calibre of professionals upon which it relies.¹ Families involved in the family law system interact with a range of family law professionals including judicial officers, registrars and other court staff, family consultants, independent children’s lawyers and family dispute resolution practitioners.
- 8.2 In order for the family law system to be accessible, equitable, responsive and prioritise the safety of families impacted by family violence, it is critical that all family law professionals have a strong understanding of family law and the complexities of family violence. Further, achieving such a system will require improved resourcing capacity to respond to critical risks and changing family dynamics.
- 8.3 This chapter examines the evidence relating to capacity, both as it relates to skills and expertise as well as resourcing. First, the chapter discusses options for improving the general capacity of family law professionals, before examining each of the specific professions separately. This chapter then discusses resourcing issues as they relate to the capacity of the family law system particularly the Court, to effectively respond to cases involving of family violence.
- 8.4 The Committee’s comment and recommendations appear at the end of the chapter.

Improving skills and expertise across the system

¹ For Kids Sake, *Submission 79*, p. 9.

- 8.5 Whilst there are skilled and highly competent family law professionals within the family law system,² evidence to the current inquiry identified significant broad-based concern about the current lack of family law and family violence training provided to professionals working within the family law system.³
- 8.6 For example, Victoria Legal Aid advised that the current capacity of some family law professionals is lacking to the point of compromising the safety of families affected by family violence, and argued that improved understanding of family violence is ‘vital’.⁴ Similarly, Jannawi Family Centre stated that ‘there is a lack of training and there are also quite judgemental ... approaches within the culture of the family court system’.⁵

Box 8.1 Improving skills and expertise across the system

The following is a selection of responses to the Committee’s questionnaire:

‘It is imperative they [family law professionals] be educated about the patterns of power/coercion and control and [that] this is entirely different from any other marital/relational disagreement. There are recognisable patterns and the impact on the victim is severe. The gross injustice occurs when this differentiation is ignored’.

² The Deli Women and Children’s Centre (The Deli Centre), *Submission 67*, p. 8; Mrs Hetty Johnston AM, Founder and Executive Chair, Bravehearts Foundation Ltd, *Committee Hansard*, Melbourne, 24 July 2017, p. 9.

³ Australasian Centre for Human Rights and Health), *Submission 4*, p. 11; Women’s Legal Services Australia (WLSA), *Submission 6*, p. 41; Northern Integrated Family Violence Services, *Submission 11*, p. 2; InTouch Multicultural Centre Against Family Violence (InTouch), *Submission 13*, p. 19; Centacare Brisbane, *Submission 22*, p. 4; Junction Australia, *Submission 23*, p. 5; People with Disability Australia, *Submission 25*, p. 2; Baptist Care Australia, *Submission 28*, p. 5; Domestic Violence Crisis Service, *Submission 29*, p. 6; Sexual Assault Support Service, *Submission 32*, p. 1; Safe Steps Family Violence Response Centre (Safe Steps), *Submission 34*, p. 8; Domestic Violence NSW, *Submission 48*, p. 5; Australian Women Against Violence Alliance, *Submission 49*, p. 2; Women’s Legal Service NSW, *Submission 71*, p. 2; Northern Rivers Community Legal Centre, *Submission 83*, p. 3; National Association of Community Legal Centres, *Submission 115*, p. 2; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jeffries, Dr Helena Menih, *Submission 122*, p. 8.

⁴ Ms Gayathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 36.

⁵ Ms Biljana Milosevic, Director, Jannawi Family Centre, *Committee Hansard*, Sydney, 31 July 2017, p. 51.

—*Respondent from New South Wales*

‘Everybody involved in the court process must be extensively trained in family violence and trauma and perform and pass family violence training every year’.

—*Respondent from Queensland*

‘Better communication with compassion. Educate the people who work in the system to understand exceptional circumstances’.

—*Respondent from South Australia*

‘[Family law professionals] need to be educated about what family violence actually is. It is not just the physical violence, but the emotional abuse as well. They need to stop minimising the violence that women experience and they need to understand that a father who is domestically violent towards his wife, is not a safe person to be allowed unsupervised time with a child. They should all have to undergo not only training from specialised professionals on domestic violence but also hear firsthand case studies of victims of domestic violence, including children. It needs to become real to them’.

—*Respondent from Western Australia*

‘Educate [family law professionals] in the dynamics of family domestic violence and the affects and trauma it has on victims. Make them support those whom are self-representing and make sure they know the true facts of behind the scenes’.

—*Respondent from Queensland*

‘The [family law] professionals need education through [a] domestic violence service to [understand family violence] and have an understanding what it feels like to be in court’.

—*Respondent from Queensland*

‘The people who work in the family court need to be more supportive and informed about the effects of family violence on children and protective parents. This would come with education and training in family violence’.

— Respondent from Victoria

- 8.7 A number of submissions also noted the existing training packages available to family law professionals, such as the Addressing Violence: Education Resources and Training (AVERT) package, released in 2011-12.⁶ AVERT is a multi-disciplinary training package providing all professionals within the family law system with a thorough understanding of family violence, including its impact, appropriate responses, and an understanding of collaboration across services within the family law system.⁷ The National Family Violence Bench Book was also acknowledged by some stakeholders as an ‘excellent initiative’, and ‘great addition’ for ongoing training for family law professionals.⁸
- 8.8 Although stakeholders provided examples of good practice, others identified a lack of consistency in considered, appropriate responses to family violence within the family law system.⁹ Indeed, stakeholders indicated that the standard of service delivery is ‘far from uniform’, and varies considerably by profession, as well as within each profession.¹⁰ To address this, a large number of participants recommended improved and ongoing training and development of all family law professionals in family violence and trauma-informed practice.¹¹

⁶ Ms Joanna Fletcher, Chief Executive Officer, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 16; Mr Ross Butler, Senior Manager, Family Dispute Resolution, Interrelate Ltd, *Committee Hansard*, Sydney, 31 July 2017, pp. 12-13; Family and Relationship Services Australia (FRSA), *Submission 80*, p. 11.

⁷ Attorney-General’s Department, *Submission 89*, p. 3.

⁸ People with Disability Australia, *Submission 25*, p. 5; Queensland Domestic Violence Service Network, *Submission 30*, p. 6; Council of Single Mothers and Their Children Victoria, *Submission 42*, p. 2.

⁹ Ms Joanna Fletcher, Chief Executive Officer, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 17.

¹⁰ For Kids Sake, *Submission 79*, p. 17.

¹¹ Australasian Centre for Human Rights and Health, *Submission 4*, p. 11; WLSA, *Submission 6*, p. 41; Northern Integrated Family Violence Services, *Submission 11*, p. 2; InTouch, *Submission 13*, p. 19; Centacare Brisbane, *Submission 22*, p. 4; Junction Australia, *Submission 23*, p. 5; People with Disability Australia, *Submission 25*, p. 2; Baptist Care Australia, *Submission 28*, p. 5; Domestic Violence Crisis Service, *Submission 29*, p. 6; Sexual Assault Support Service, *Submission 32*, p. 1; Safe Steps, *Submission 34*, p. 8; Domestic Violence NSW, *Submission 48*, p. 5; Australian Women Against Violence Alliance, *Submission 49*, p. 2; Women’s Legal Service NSW, *Submission 71*, p. 2; Northern Rivers Community Legal Centre, *Submission 83*, p. 3; National Association of

- 8.9 This evidence echoes a number of previous reports and inquiries that have all recommended improved family violence training and professional development.¹² For example, in 2016 the Family Law Council recommended the development of a learning package for all professionals working the family law system. Such a training package would provide minimum competencies and in-depth knowledge on family violence and trauma for a range of family law professionals.
- 8.10 Junction Australia and Jannawi Family Centre recommended that all family law professionals receive training in the Safe and Together Model to improve understanding of the impacts of family violence.¹³ The Safe and Together Model is a model for working with child protection and family violence, which emphasises the patterns of abuse in family violence, the behaviours of non-offending parents, the impact of family violence on children, and holding the perpetrator to account.¹⁴

Skills and expertise in specific professions

- 8.11 In addition to the above recommendations for general improvement in the capacity of family law professionals, evidence to the inquiry also discussed the current capacity, and recommendations for improved capacity, of certain professions within the family law system including:
- judicial officers;
 - registrars and other court staff;
 - family consultants;
 - independent children’s lawyers; and
 - family dispute resolution practitioners.
- 8.12 Each is discussed below.

Judicial officers

Community Legal Centres, *Submission 115*, p. 2; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jeffries, Dr Helena Menih, *Submission 122*, p. 8.

¹² Family Law Council, *Families with complex needs and the intersection of family law and child protection systems – Final Report*, 2016, p. 6; Royal Commission into Family Violence, *Summary and Recommendations*, 2016, p. 104; Senate Standing Committee on Finance and Public Administration, *Domestic violence in Australia*, August 2015, p. xi.

¹³ Junction Australia, *Submission 23*, p. 5; Jannawi Family Centre, *Submission 51*, p. 2.

¹⁴ Junction Australia, *Submission 23*, p. 5.

- 8.13 Family violence is considered ‘core’ business of the Court.¹⁵ Over 50 per cent of cases before the Family Court of Australia, the Federal Circuit Court, and the Family Court of Western Australia involve allegations of family violence, with this figure rising to 70 per cent for the Federal Circuit Court alone.¹⁶ It is therefore essential that judicial officers have the requisite expert knowledge of family law and family violence.
- 8.14 However, a number of stakeholders expressed concern about the level of expertise of judicial officers in family violence¹⁷ as well as family law.¹⁸ These concerns related to both the federal courts and state and territory magistrates’ courts exercising their jurisdiction under the *Family Law Act 1975* (Cth) (the Family Law Act).

Family violence training and expertise

- 8.15 Multiple submissions commented that there is a need for improved family violence training for judicial officers.¹⁹ Whilst family violence is involved in the majority of family law cases, training in family violence is not mandatory.²⁰

¹⁵ Australia’s National Research Organisation for Women’s Safety (ANROWS), *Submission 73*, p. 5; Ms Gayathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 26; Ms Joanna Fletcher, Chief Executive Officer, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 36.

¹⁶ Monash University – Castan Centre for Human Rights Law (Castan Centre for Human Rights Law), *Submission 57*, p. 2.

¹⁷ Australasian Centre for Human Rights and Health, *Submission 4*, p. 11; WLSA, *Submission 6*, p. 41; Northern Integrated Family Violence Services, *Submission 11*, p. 2; InTouch, *Submission 13*, p. 19; Centacare Brisbane, *Submission 22*, p. 4; Junction Australia, *Submission 23*, p. 1; People with Disability Australia, *Submission 25*, p. 5; Baptist Care Australia, *Submission 28*, p. 5; Domestic Violence Crisis Service, *Submission 29*, p. 6; SASS, *Submission 32*, p. 3; Safe Steps, *Submission 34*, p. 8; The Humanitarian Group, *Submission 37*, p. 13; Springvale Monash Legal Service, *Submission 47*, p. 8; Australian Women Against Violence Alliance, *Submission 49*, p. 3; Relationships Australia, *Submission 55*, p. 14; Federation of Ethnic Communities Councils of Australia (FECCA), *Submission 62*, p. 1; No To Violence/Men’s Referral Service (No To Violence), *Submission 82*, p. 4; Northern Rivers Community Legal Centre, *Submission 83*, p. 44; Legal Aid NSW, *Submission 90*, p. 28.

¹⁸ Legal Aid NSW, *Submission 90*, p. 28; Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 1.

¹⁹ ACT Human Rights Commission, *Submission 33*, p. 1.

²⁰ Domestic Violence Crisis Service, *Submission 29*, p. 5; Sexual Assault Support Service, *Submission 32*, p. 7.

- 8.16 The Domestic Violence NSW survey of domestic and family violence practitioners and services found that practitioners rated judicial officers as ‘having the poorest understanding of [domestic and family violence].²¹ Some stakeholders noted that the knowledge and understanding of family violence amongst judicial officers can be ‘less than adequate’, for example regarding financial and abuse of process.²²
- 8.17 The Judicial College of Victoria (JCV) currently provides training to judicial officers to try to fill such gaps. Whilst the College presently conducts two-day family violence education for magistrates in Victoria, the JCV advised it anticipates that the development of additional family violence training will be a strong focus of the college in the future. This renewed focus is as a result of the recommendations of the Victorian Royal Commission into Family Violence that more comprehensive family violence education should be provided to all judicial officers and other family law professionals in Victoria.²³
- 8.18 A particular concern among stakeholders regarded judicial officers’ understanding of how family violence can impact children.²⁴ Family violence has a significant and unique impact on the emotional, psychological and physical wellbeing of children, and inappropriate, ill-informed decision making can result in children being further exposed to family violence.²⁵ For example, understanding how a child can be coerced to misrepresent their experience is vital to making appropriate decisions; however few family law professionals possess this ability.²⁶
- 8.19 Knowledge about family violence and its impacts is constantly evolving and improving, and training should reflect these developments to keep all family law professionals, including judicial officers, informed on current best

²¹ Domestic Violence NSW, *Submission 48*, p. 19.

²² Council of Single Mothers and their Children, Victoria, *Submission 42*, p. 2; Supriya Singj, Marg Liddell, and Jasvinder Sidhu, *Submission 65*, p. 9; Professor the Honourable Nahum Mushin AM, *Submission 123*, p. 3.

²³ Judicial College of Victoria, *Submission 36*, pp. 1-2; FRSA, *Submission 80*, p. 17.

²⁴ Statewide Children’s Resource Program, *Submission 3*, p. 2; Women Everywhere Advocating Violence Elimination, *Submission 16*, p. 5; Australian Childhood Foundation, *Submission 19*, p. 5; Centacare Brisbane, *Submission 22*, p. 4.

²⁵ Statewide Children’s Resource Program, *Submission 3*, p. 1; Australian Childhood Foundation, *Submission 19*, p. 5; Junction Australia, *Submission 23*, p. 3.

²⁶ For Kids Sake, *Submission 79*, p. 10.

practice.²⁷ Many submissions not only express that there is a need for improved training, but specify that this training needs to be both ongoing and mandatory.²⁸

Family law training and expertise

8.20 Family law is ‘a complex and specialist’ area of law.²⁹ Many stakeholders submitted that judicial officers practicing in the Federal Circuit Court, or those state and territory courts exercising jurisdiction under the Family Law Act, require more training in family law.³⁰ The Law Council of Australia explained:

We talk about the need for an expert response, yet the background of many of the judges ... is that they have not come from a background of practising in family law ... they need to have an extra level of experience in family law to properly respond to the [complex] needs of those families.³¹

8.21 Under the Family Law Act, judges cannot be appointed to the Family Court unless they are deemed suitable to preside over family law matters ‘by reason of training, experience and personality’.³² However, judges appointed to the Federal Circuit Court do not need to meet the same requirements because the Court exercises jurisdiction in general federal law

²⁷ Ms Jane Mevel, Manager, Research and Policy, Judicial College of Victoria, *Committee Hansard*, Melbourne, 25 July 2017, p. 13.

²⁸ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 2; Ms Gayahri Paramasivam, Associate Director Family Law, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 24; Women’s Council for Domestic and Family Violence Services, *Submission 7*, p. 2; InTouch, *Submission 13*, p. 20; Junction Australia, *Submission 23*, p. 6; Safe Steps, *Submission 34*, p. 4; Jannawi Family Centre, *Submission 51*, p. 3; The Deli Centre, *Submission 67*, p. 4; Royal Australian and New Zealand College of Psychiatrists, *Submission 69*, p. 5; ANROWS, *Submission 73*, pp. 14-15; FRSA, *Submission 80*, p. 17; Legal Aid NSW, *Submission 90*, p. 29.

²⁹ Legal Aid NSW, *Submission 90*, p. 28.

³⁰ Ms Jane Mevel, Manager, Research and Policy, Judicial College of Victoria, *Committee Hansard*, Melbourne, 25 July 2017, p. 12; Judicial College of Victoria, *Submission 36*, p. 1; Springvale Monash Legal Service, *Submission 47*, p. 8; FRSA, *Submission 80*, p. 20; Legal Aid NSW, *Submission 90*, p. 28.

³¹ Ms. Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 1.

³² *Family Law Act 1975* (Cth), s 22(2)(b); see also Family Court of Australia, *Submission 44*, p. 11; Professor Patrick Parkinson AM, Private Capacity, *Committee Hansard*, Canberra, 17 October 2017, p. 1.

matters, despite the fact that 87 per cent of the total family law workload is heard in that court.³³

- 8.22 Magistrates' ability to exercise federal jurisdiction in family law matters is also underutilised. The Australian Law Reform Commission (ALRC) has commented that 'one of the greatest barriers' contributing to this underutilisation is insufficient knowledge of family law and, by extension, family violence.³⁴ The Judicial College of Victoria has attempted to address these problems amongst Victorian magistrates, and have developed a number of family violence and family law training initiatives, including:
- comprehensive family violence training run;³⁵
 - a series of workshops with presentations and practical exercises to help improve magistrates' ability to make appropriate and effective decisions with complex cases;³⁶
 - online Family Law Manual to assist Magistrates' to exercise federal jurisdiction in family law related decisions.³⁷
- 8.23 However stakeholders have noted that this manual requires updating urgently and regularly, and advocated for federal funding to undertake the necessary updates.³⁸

Recent training initiatives for judicial officers

- 8.24 To address these identified challenges, the ALRC recommended in 2010, the development of a national family violence bench book to assist judicial officers to preside over family law matters involving family violence.³⁹

³³ Professor Patrick Parkinson AM, Private Capacity, *Committee Hansard*, Canberra, 17 October 2017, p. 1.

³⁴ Australian Law Reform Commission and NSW Law Reform Commission, *Family violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 735.

³⁵ Ms Jane Mevel, Manager, Research and Policy, Judicial College of Victoria, *Committee Hansard*, Melbourne, 25 July 2017, p. 13.

³⁶ Ms Jane Mevel, Manager, Research and Policy, Judicial College of Victoria, *Committee Hansard*, Melbourne, 25 July 2017, p. 13.

³⁷ Magistrates' Court of Victoria, *Submission 56*, p. 4; Ms Jane Mevel, Manager, Research and Policy, Judicial College of Victoria, *Committee Hansard*, Melbourne, 25 July 2017, p. 13.

³⁸ Judicial College of Victoria, *Submission 36*, p. 2; Magistrates' Court of Victoria, *Submission 56*, p. 4.

³⁹ Australian Law Reform Commission and NSW Law Reform Commission, *Family violence – A national legal response*, ALRC Report 114/NSWLRC Report 128, 2010, p. 47.

- 8.25 The Australian Government accepted this recommendation and funded the Australasian Institute of Judicial Administration and the University of Queensland to develop the National Domestic and Family Violence Bench Book (the National Bench Book), which is a national online resource for judicial officers.
- 8.26 The Attorney-General's Department (the Department) advised:
- The [National] Bench Book promotes best practice and consistency in judicial decision making in cases involving family violence. The Bench Book includes information about the dynamics of domestic and family violence, guidelines for courtroom management, information about referrals for those affected by family violence and perpetrators, and other matters judicial officers may wish to consider.⁴⁰
- 8.27 The first stage of the National Bench Book was launched in August 2016, and the final stage was made available in June 2017. The full National Bench Book now includes advice on family law proceedings to assist all judicial officers with jurisdiction under the Family Law Act.⁴¹
- 8.28 The Department advised a training package for judicial officers will be rolled out in 2017–18, covering the 'nature and dynamics of family violence, and the specific matters [judicial officers] should consider in dealing with these cases'. This package was developed in response to recommendations by the Senate inquiry into domestic violence in Australia.⁴²
- 8.29 The Department further advised that training for judicial officers on parenting matters and property matters has been funded in response to the Family Law Council's 2016 report recommendation to develop a continuing joint professional development program in family law for judicial officers. It is expected that this training could assist state and territory magistrates to effectively exercise family law jurisdiction when necessary.⁴³
- 8.30 The National Bench Book was noted by the Family Court as being an important resource for building the capacity of judicial officers working with family violence, along with the Family Court's own Best Practice

⁴⁰ Attorney-General's Department, *Submission 89*, p. 10.

⁴¹ Attorney-General's Department, *Submission 89*, p. 10.

⁴² Senate Standing Committee on Finance and Public Administration, *Domestic violence in Australia*, August 2015, pp. 9-12; see also Attorney-General's Department, *Submission 89*, p. 10.

⁴³ Attorney-General's Department, *Submission 89*, p. 10.

Principles.⁴⁴ The Court also noted that professional development opportunities are provided to judicial officers of the Family Court in relevant areas and referenced a one-day family violence training course provided by the National Judicial College of Australia.⁴⁵

- 8.31 The Judicial College of Victoria also provides a separate Family Violence Bench Book for Victorian judicial officers, which discusses family violence issues and the interaction of family law and family violence in relation to the *Family Violence Protection Act 2008* (Vic).⁴⁶
- 8.32 Whilst multiple submissions expressed support for the introduction of the National Bench Book as a much needed resource for judicial officers,⁴⁷ others argued that it does not provide sufficient training, and is overly simplistic,⁴⁸ particularly in relation to the impact of trauma on adults and children,⁴⁹ cultural competency,⁵⁰ and disability awareness.⁵¹

Registrars and other court staff

- 8.33 General court or registry staff may be one of the first points of contact with the family law system. Court and staff are responsible for supporting court-users to access the courts, and for providing appropriate advice on court processes and procedures. The actions and advice of court staff may have significant impact on the perception of the court process for families accessing the court system.⁵² It is therefore important for court staff to be

⁴⁴ Family Court of Australia, *Submission 44*, p. 12.

⁴⁵ Family Court of Australia, *Submission 44*, p. 11.

⁴⁶ Judicial College of Victoria, *Submission 36*, p. 1; Magistrates' Court of Victoria, *Submission 56*, p. 4.

⁴⁷ Centacare Brisbane, *Submission 22*, p. 4; People with Disability Australia, *Submission 25*, p. 5; QLD Domestic Violence Services Network, *Submission 30*, p. 6; Australian Law Reform Commission, *Submission 31*, p. 4; Council of Single Mothers and their Children Victoria, *Submission 42*, p. 3.

⁴⁸ For Kids Sake, *Submission 79*, p. 17.

⁴⁹ People with Disability Australia, *Submission 25*, p. 5; Sexual Assault Support Service, *Submission 32*, p. 3; Council of Single Mothers and their Children Victoria, *Submission 42*, p. 3

⁵⁰ Australasian Centre for Human Rights and Health, *Submission 4*, p. 11; InTouch, *Submission 13*, p. 19; The Humanitarian Group, *Submission 37*, p. 13; FECCA, *Submission 62*, p. 1; Legal Services Commission of South Australia, *Submission 77*, p. 3.

⁵¹ People with Disability Australia, *Submission 25*, p. 5.

⁵² Magistrates' Court of Victoria, *Submission to the Family Law Council Families with Complex Needs Terms of Reference*, April 2015, p. 8.

able to quickly and effectively identify family violence, be aware of the intricacies and dynamics of family violence, and know how to respond appropriately.

8.34 In a submission, the Family Court advised that it provides an eLearning family violence package, which contains content aimed at strengthening the ‘awareness, knowledge and skills’ of staff when working with families impacted by family violence.⁵³ However, multiple stakeholders were of the view that improved understanding and responses to family violence by court staff are critical to improving risk assessment as well as collaboration and referral between courts and other support services.⁵⁴ It is particularly important for training for court staff to include:

- recognising family violence;
- conducting appropriate family violence screening and risk assessment;
- appropriate responses to support families impacted by family violence;
- how to implement any proposed family law amendments;
- working with trauma;
- disability awareness; and
- cultural awareness.⁵⁵

Family consultants

8.35 Family consultants, also known as family report writers, are usually social workers or psychologists who provide judicial officers with independent assessments in the form of family reports. These reports are considered to contain independent, expert advice to inform judicial officers on how best the best interests of the child could be served in post-separation parenting arrangements.⁵⁶

8.36 Family consultants may be employed by the family courts or engaged privately by the family courts under Regulation 7 of the *Family Law*

⁵³ Family Court of Australia, *Submission 44*, p. 12.

⁵⁴ Judicial College of Victoria, *Submission 36*, p. 2; Australian Association of Social Workers (AASW), *Submission 63*, p. 4; Community and Public Sector Union (CPSU), *Submission 70*, p. 9; Hume Riverina Community Legal Service, *Submission 76*, p. 3; National Family Violence Prevention Legal Services Forum (NFVPLSF), *Submission 78*, p. 5; Eastern Community Legal Centre, *Submission 91*, pp. 7-8.

⁵⁵ Australian Association of Social Workers, *Submission 63*, p. 4; CPSU, *Submission 70*, p. 9; Hume Riverina Community Legal Service, *Submission 76*, p. 3; NFVPLSF, *Submission 78*, p. 5; Eastern Community Legal Centre, *Submission 91*, p. 8.

⁵⁶ WLSA, *Submission 6*, p. 42.

Regulations 1984.⁵⁷ These private family consultants are often used when court-based family consultants cannot meet the demand for family reports.⁵⁸

- 8.37 As noted in Chapter 6, family reports are extremely influential documents. Family reports not only provide recommendations to judicial officers about parenting arrangements, but can be used as tools in dispute negotiations, and to determine whether a grant of legal aid is appropriate for one party.⁵⁹ Importantly, these reports can hold a privileged position over other evidence such as evidence from the non-perpetrating parent, the child or children, therapists, child protection officers and police.⁶⁰
- 8.38 Despite the critical role that family reports can play in the outcome of family law proceedings, family consultants are not required to undertake formal training, accreditation or evaluation.⁶¹ If untrained family consultants are providing recommendations to judicial officers who may also be untrained in family violence, the consequence is that the safety of children and families is put in jeopardy. Numerous submissions to this inquiry referred to the limited training of family consultants, and expressed significant concern as to the impact of this on practice.⁶²

Box 8.2 Family consultants

The following is a selection of responses to the Committee's questionnaire:

'The family report writing process was absolutely critical and the children's independent legal representation was vital for giving them a voice in the whole process. These additional services led to the best possible result for the children'.

⁵⁷ *Family Law Regulations 1984 (Cth)*, reg 7.

⁵⁸ CPSU, *Submission 70*, p. 8.

⁵⁹ Ms Zoe Rathus AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 1.

⁶⁰ Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jeffries, Dr Helena Menih, *Submission 122*, p. 17.

⁶¹ WLSA, *Submission 6*, p. 42, Ms Zoe Rathus AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 4.

⁶² WLSA, *Submission 6*, pp. 42-43; InTouch, *Submission 13.1*, p. 3, Help Family Law, *Submission 18*, p. 6; Victoria Legal Aid (VLA), *Submission 60*, p. 6; Castan Centre for Human Rights Law, *Submission 57*, pp.11-12; CPSU, *Submission 70*, p. 8; No To Violence, *Submission 82*, p. 7; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jeffries, Dr Helena Menih, *Submission 122*, pp. 1-9.

—*Respondent from Victoria*

‘Training and education of family consultants in particular in family violence. They cause a lot of trauma to protective parents [when] they get their assessment wrong ... More people from various backgrounds need to be involved in the decision making process working alongside the family consultant to reduce bias from the family consultant and determine the truth of a family violence matter’.

—*Respondent from Victoria*

‘Family consultants need to understand family violence and the impacts. They blamed me for allowing the violence and abuse to occur and to the children. They state that as I was no longer in the relationship the violence would stop and I needed to stop living in the past even though he was still doing the same things’.

—*Respondent from Victoria*

‘A family report writer sees the family for one or two hours. This is insufficient time to see what is really going on in the family. I don’t think the answer lies in further training of family violence—it lies in a better interaction between mental health professionals and family law professionals’.

—*Respondent from Victoria*

‘There is also a problem of family reporters opinions being taken as ‘gospel’ even when they only spend very limited time with each person involved. This is not ok. Therefore it is imperative that family reporters are thoroughly trained in family violence/abuse. They need to know how to recognise the ‘red flags’ in short space of time as well as the different effects on different children. There is too much ignorance around this subject’.

—*Respondent from Victoria*

- 8.39 The following sections will outline three key issues raised in evidence regarding family consultants: training and accreditation, how consultants are employed, and the monitoring of consultants.

Training and accreditation

8.40 Currently family consultants must have a tertiary qualification in the social sciences—usually psychology or social work—and a minimum of five years’ practice experience. At present, family consultants are not required to undertake formal family violence training.

8.41 Limited understanding of the dynamics of family violence by family consultants can result in increased risk of harm due to:

- consultants invalidating violence by minimising disclosure of violence, suggesting the violence is inconsequential, believing violence in the past is not relevant, determining that coercive control is ‘not that serious’;
- making recommendations based on the legislative presumption of equal shared parental responsibility without understanding the exception to this presumption;
- using inappropriate practices in interviews and assessments, such as silencing or misrepresenting children’s voices, believing children are coached by their protective parent, requesting to meet with each parent at the same or a similar time, or at inappropriate locations;
- a lack of cultural competency and understanding of the cultural forms of family violence; and
- a lack of disability awareness and understanding.⁶³

8.42 For example, a number of submissions noted that if family consultants, and indeed other family law professionals, do not have an understanding of trauma and the impact of trauma on behaviour, then trauma can be misinterpreted and the related behaviours considered a reflection that the person is unfit to parent. This can result in the family report recommending that the child spend time with the perpetrator of violence.⁶⁴ Similarly, People with Disability Australia reports that when family consultants do not have expertise working with disability they can write a report that may ‘cast the parent with disability in a less favourable light’ due to biases against people

⁶³ WLSA, *Submission 6*, p. 43; InTouch, *Submission 13*, p. 19; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jeffries, Dr Helena Menih, *Submission 122*, pp. 7, 16-18; Mrs Leonie Hazelton, Individual Advocate, People with Disability Australia, *Committee Hansard*, Sydney, 31 July 2017, p. 39.

⁶⁴ Australian Paralegal Foundation, *Submission 8*, p. 7; Mallee Family Care, *Submission 41*, p. 3; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jeffries, Dr Helena Menih, *Submission 122*, p. 17; Ms Christine Craik, National Vice President, Australian Association of Social Workers, *Committee Hansard*, Melbourne, 24 July 2017, p. 46.

with disability or towards the perpetrator (who is often the carer), potentially resulting in the child being placed with the perpetrator.⁶⁵

- 8.43 To address these problems, multiple submissions recommended the development of national, consistent, compulsory, comprehensive training for family consultants.⁶⁶ It was recommended that such training would include the nature and dynamics of family violence, the impact of family violence, trauma-informed practice, cultural competency, and disability awareness.⁶⁷
- 8.44 Dr Jeffries and Dr Menih recommended that training should be delivered by a range of family violence experts on topics including: the nature of family violence, working with perpetrators, working with victims of family violence, and trauma and trauma behaviours in both adults and children.⁶⁸
- 8.45 Further, a number of submissions emphasised that in addition to training, an accreditation process and minimum standards needed to be developed to ‘get some expertise into the report writing’.⁶⁹ Women’s Legal Service Victoria stated that the Family Dispute Resolution (FDR) practitioner accreditation framework has some ‘very good competency standards’ around family violence, and suggested that it could be ‘a useful framework’

⁶⁵ Mrs Leonie Hazelton, Individual Advocate, People with Disability Australia, *Committee Hansard*, Sydney, 31 July 2017, p. 41.

⁶⁶ Australian Association of Social Workers, *Submission 63.1*, p.1; Victorian Women Lawyers Association Inc., *Submission 54*, p. 6; Women’s Legal Service Queensland, *Submission 81*, p.7; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jeffries, Dr Helena Menih, *Submission 122*, p. 8.

⁶⁷ Australian Association of Social Workers, *Submission 63.1*, p.1; Victorian Women Lawyers Association Inc., *Submission 54*, p. 6; Women’s Legal Service Queensland, *Submission 81*, p.7; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jeffries, Dr Helena Menih, *Submission 122*, p. 8.

⁶⁸ Dr Samantha Jeffries, Senior Lecturer, School of Criminology and Criminal Justice, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 5; Dr Helena Menih, Lecturer in Criminology, School of Behavioural, Cognitive and Social Sciences, University of New England, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 5.

⁶⁹ WLSA, *Submission 6*, p. 47; Junction Australia, *Submission 23*, p. 3; Help Family Law, *Submission 18*, pp. 12-14; Sexual Assault Support Service, *Submission 32*, p. 7; Eastern Domestic Violence Service, *Submission 68*, p. 2; Women’s Legal Service Queensland, *Submission 81*, p. 12; Dr Heather Nancarrow, Chief Executive Officer, Australia’s National Research Organisation for Women’s Safety, *Committee Hansard*, Sydney, 31 July 2017, p. 6.

to model accreditation processes for family consultants. This suggestion was also echoed by other submissions to the inquiry.⁷⁰

- 8.46 Concern about training and professional development for family consultants has also been expressed by court-employees. For example, in feedback to the Community and Public Sector Union, family consultants and registrars reported a lack of opportunity and time provided to attend professional development activities.⁷¹

Monitoring and review process

- 8.47 A formal monitoring and feedback process for family consultants does not exist.
- 8.48 Both the Family Court and the Federal Circuit Court websites advise that ‘the appropriate venue’ for complaints about, and challenges to, the contents of family reports is via cross-examination during the hearing process. If the complaint is about family consultant conduct and is not addressed via cross-examination, it can be directed to a Regional Dispute Resolution Coordinator, or senior family consultant. If the matter is before the Court, there are no other opportunities to make complaints.⁷²
- 8.49 In many cases, families experiencing family violence are self-represented, and challenging the contents of a family report through cross examination can prove very difficult, particularly when standing up against trained professionals such as psychologists or doctors.⁷³ Most self-represented litigants do not have the training or knowledge that is required to cross-examine effectively and objectively.⁷⁴
- 8.50 The complaints process outside of the courts may be just as difficult. The Australian Association of Social Workers (AASW) specifies that they are unable to receive or respond to complaints about social worker if those complaints relate to the proceedings of the Family Court or Federal Circuit

⁷⁰ WLSA, *Submission 6*, p. 47; Legal Aid NSW, *Submission 90*, p. 28.

⁷¹ CPSU, *Submission 70*, p. 9.

⁷² WLSA, *Submission 6*, p. 46; Family Court of Australia, *Complaints about family reports and family consultants*, May 2017; Federal Circuit Court of Australia, *Complaints Policy*, May 2016.

⁷³ The Hon. Professor Neave, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 6.

⁷⁴ Ms Zoe Rathus AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 6.

Court, or to the content of a report prepared for court proceedings.⁷⁵ The AASW further explains that if the complaint is not directly related to the content of the report then it can be addressed by the AASW, but any complaint relating to report contents should be addressed through the court processes.⁷⁶

- 8.51 The Family Court and Federal Circuit Court provide the *Australian Standards of Practice for Family Assessment and Reporting*, and *Family Violence Best Practice Principles* to provide minimum standards and best practice guidelines for family reports. The *Best Practice Principles* state that they are ‘a voluntary source of assistance’ for decision makers in the Court, to be used at the professional’s discretion.⁷⁷ Similarly, the *Standards of Practice* are not binding for family consultants.⁷⁸ The language used indicates that the standards are recommendations and advice for appropriate practice, rather than obligations.
- 8.52 A key concern regarding family consultants is the lack of an official monitoring process. To address this, Women’s Legal Services Australia recommended the establishment of an oversight mechanism and complaints process, to monitor and review family consultants. Similar recommendations were made by a number of other submissions.⁷⁹ Monash University Castan Centre for Human Rights suggested the establishment of a non-court complaints process.⁸⁰

Box 8.3 Monitoring of family consultants

The following is a selection of responses to the Committee’s questionnaire:

‘Any report writer must be an expert in domestic and family violence and

⁷⁵ Australian Association of Social Workers, *Complaints relating to social workers and the Family Court of Australian and Federal Circuit Court of Australia*.

⁷⁶ Australian Association of Social Workers, *Complaints relating to social workers and the Family Court of Australian and Federal Circuit Court of Australia*.

⁷⁷ Family Court of Australia and Federal Circuit Court, *Family Violence Best Practice Principles*, December 2016, p. 5.

⁷⁸ Family Law Council, *Families with complex needs and the intersection of the family law and child protection systems*—Final Report, 2016, p. 31; WLSA, *Submission 6*, p. 46.

⁷⁹ Statewide Children’s Resource Program, *Submission 3*, p. 3; Help Family Law, *Submission 18*, p. 15; CPSU, *Submission 70*, p. 9; No To Violence, *Submission 82*, p. 14; Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jeffries, Dr Helena Menih, *Submission 122*, p. 8.

⁸⁰ Castan Centre for Human Rights Law, *Submission 57*, p. 13.

have to pass courses each year before they can write any reports’.

— *Respondent from Queensland*

‘Make family reporters more accountable for ... errors in their reports. Our most recent report states [that] I ‘demonised’ the father, with no evidence given for this. It also states [that] I said things that I absolutely did not say and that are inflammatory to the father ... She was paid \$6,600 for a report that was rushed, full of errors and inaccuracies’.

— *Respondent from New South Wales*

‘Court report writers and family consultants [should be] held accountable for their reports and a new set of guidelines be established to govern over these reporters so that they must only report on fact and evidence’.

— *Respondent from Victoria*

- 8.53 As noted in Chapter 6, some evidence to the inquiry suggested that family consultants should be employed by courts only, to ensure consistency in reports, to regulate costs for families accessing the courts, and as it is more cost effective for the courts.⁸¹ It has been suggested that the quality of reports by external family consultants can vary significantly and that court-based family consultant reports ‘tend to be of higher quality’, as the Court is responsible for the standard of family reports written by its own employees.⁸² Ms Rathus expressed support for this suggestion, stating that this would be ‘the most controlled system’.

Independent children’s lawyers

- 8.54 Under section 68 of the Family Law Act, an Independent Children’s Lawyer (ICL) is required to represent the child’s best interests in parenting arrangement matters. ICLs are requested by the courts, and appointed by the respective state or territory Legal Aid Commission. The ICL then independently investigates the best interests of the child for the Court, and

⁸¹ CPSU, *Submission 70*, p.9.

⁸² Ms Zoe Rathus AM, Senior Lecturer, Griffith Law School, Griffith University, *Proof Committee Hansard*, Canberra, 24 October 2017, p. 10; CPSU, *Submission 70*, p. 8; see also Professor Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jeffries, Dr Helena Menih, *Submission 122*, p. 19.

may include meeting with the child/young person, seeking relevant evidence and assisting in case management and settlement negotiations.⁸³

- 8.55 Each Legal Aid Commission requires that ICLs have completed the Independent Children’s Lawyer Training Program.⁸⁴ Additionally, the *Guidelines for Independent Children’s Lawyer* state that the ICL is ‘expected to be familiar with’ family violence provisions in the Family Law Act, the Family Law Rules, and the *Family Violence Best Practice Principles*.⁸⁵ However, this training does not appear to be mandatory. Further, apart from the initial national training program, ICLs are not always required to complete ongoing professional development. This is decided by the state and territory Legal Aid Commissions. Currently, Victoria is the only state or territory that requires ICLs to attend ongoing ICL training.⁸⁶
- 8.56 Given that the caseload of an ICL is generally ‘dominated by concerns about family violence and child abuse’,⁸⁷ stakeholders expressed concern that no formal or ongoing training is required regarding family violence and the impact on children, particularly in relation to child responses to family violence, including the impact of trauma.⁸⁸
- 8.57 Significantly, a recent report by the Australian Institute of Family Studies (AIFS) found that most ICLs expressed a need for more ongoing training and felt that ‘they did not have sufficient training to elicit, and more importantly, interpret children’s views’.⁸⁹
- 8.58 Training for ICLs was included in the Family Law Council’s recommendation that learning packages provide for minimum competencies and in depth content. A number of submissions referred to and supported

⁸³ *Family Law Act 1975 (Cth)*, s 68L; see also VLA, *Submission 60*, p. 21; Attorney-General’s Department, *Submission 89*, p. 11.

⁸⁴ Australian Institute of Family Studies, *Independent Children’s Lawyers Study – Final report*, 2014, p. 87. This training is presented by the Family Law Section of the Law Council of Australia in conjunction with National Legal Aid.

⁸⁵ Family Court of Australia, *Guidelines for Independent Children’s Lawyer*, 2013.

⁸⁶ Australian Institute of Family Studies, *Independent Children’s Lawyers Study – Final report*, 2014, p. 91.

⁸⁷ Australian Institute of Family Studies, *Independent Children’s Lawyers Study – Final report*, 2014, p. 145.

⁸⁸ Australian Paralegal Foundation, *Submission 8*, p. 8; Help Family Law, *Submission 18*, p. 16.

⁸⁹ Australian Institute of Family Studies, *Independent Children’s Lawyers Study – Final report*, 2014, p. 38.

the recommendation.⁹⁰ It was suggested that such training include the impacts of family violence, how family violence affects parenting ability, trauma in children, and all types of abuse.⁹¹

- 8.59 The Department advised that, in response to the AIFS report finding that there were inadequate training and development arrangements in place for ICLs, funding has been provided for National Legal Aid to redevelop the National Training Program for ICLs. The program will comprise nine modules and one day of face-to-face training, and will include updates and improvements to the family violence module. The training will remain a pre-requisite for applying to join ICL practitioner panels.⁹²

Family dispute resolution practitioners

- 8.60 As mentioned in Chapter 4, separating families are required to attend FDR before applying for parenting orders in court. FDR practitioners assist families to resolve disputes relating to the separation process, through a process of mediation.
- 8.61 A high number of families presenting to FDR have experiences of family violence. For example, Relationships Australia estimates that across their family relationship centres providing FDR, at least 50 per cent of families presenting for FDR have family violence involved in their case.⁹³ Given the high likelihood of family violence impacting a family, it is important for FDR practitioners to be well-trained in understanding the dynamics of family violence including its unique forms, how to assess for family violence, the impact on the family, and the potential risks involved with proceeding with FDR.
- 8.62 FDR practitioners must be accredited under the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*.⁹⁴ The accreditation process includes holding a degree in social science or the law, and the completion of a

⁹⁰ WLSA, *Submission 6*, p. 11; FRSA, *Submission 80*, p. 19; Sexual Assault Support Service, *Submission 32*, p. 2.

⁹¹ WLSA, *Submission 6*, p. 11; FRSA, *Submission 80*, p. 19; Sexual Assault Support Service, *Submission 32*, p. 2.

⁹² Attorney-General's Department, *Submission 89*, p. 11.

⁹³ Relationships Australia, *Submission 55.1*, p. 2.

⁹⁴ *Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth)*.

Graduate Diploma in Family Dispute resolution, or equivalent, a component of which is family violence related.⁹⁵

- 8.63 Although the mandatory training for FDR practitioners includes a core competency in family violence, evidence to the inquiry suggested that ongoing and more in depth training would be beneficial. Such training would include a deeper understanding of the ‘nature and dynamics’ of family violence, assessing family violence and eliciting disclosure, abuse of process, cultural awareness, and how to determine when family violence could be emerging during the mediation process.⁹⁶

Resourcing

- 8.64 Resourcing of the family law system was a key theme in evidence to the inquiry, with some stakeholders identifying that the system is ‘overburdened and under resourced’⁹⁷ causing significant delays for families in family law proceedings. These concerns were particularly directed at resourcing of the courts to hear matters, and resourcing for family consultants and independent children’s lawyers to provide expert advice to the Court in determining matters.

Box 8.4 Resourcing

The following is a selection of responses to the Committee’s questionnaire:

‘The law system needs more people and more time. Everything is so rushed that small but important issues for the parents and children are being dismissed. I have a disability, and just getting into the courts was a nightmare. Finding carparks close by, and sitting for hours waiting for your case to be called up is overwhelming’.

— Respondent from South Australia

‘More family consultants and court writers need to be available to reduce

⁹⁵ Mr Ross Butler, Senior Manager, Family Dispute Resolution, Interrelate Ltd, *Committee Hansard*, Sydney, 31 July 2017, p. 13.

⁹⁶ Ms Joanna Fletcher, Chief Executive Officer, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 17; Relationships Australia, *Submission 55*, p. 8; CPSU, *Submission 70*, p. 11; NfVPLSE, *Submission 78*, p. 15; FRSA, *Submission 80*, p. 17.

⁹⁷ Legal Aid NSW, *Submission 90*, p. 12.

wait times, the longer these things take the more angst builds’.

— *Respondent from New South Wales*

‘The Courts ... need more judges, magistrates and support staff to minimise time frames it takes to get a matter heard and dealt with’.

— *Respondent from New South Wales*

‘There needs to be greater resourcing of the Courts so matters can be resolved earlier. Financial hardship in part is caused by the length of the matters. More judges and judges with expertise in family law and family violence need to be appointed. I also think there is some merit in an expedited small property pool scheme and the division of some property early/ spousal maintenance based on an allegation of [family violence] rather than a finding’.

— *Respondent from New South Wales*

‘The majority of the problems posed in the system at the court end could be addressed by additional resourcing’.

— *Respondent from the Australian Capital Territory*

The Courts

8.65 The Law Council of Australia reported that across the capital cities in Australia, there are delays of nine to 24 months between filing an application and commencement of a trial in the Family Court and the Federal Circuit Court.⁹⁸ The result of such long delays is that families experiencing family violence can be placed at an increased risk of harm.⁹⁹

8.66 At the same time, however rushing family violence matters through the family law system can also place families at greater risk of harm. National Family Violence Legal Services Forum explained:

⁹⁸ Law Council of Australia, *Submission 85.1*, p. 1.

⁹⁹ Legal Aid NSW, *Submission 90*, p. 12; Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 2; Ms Joanna Fletcher, Chief Executive Officer, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 17.

It would be terrific for people to have their crisis of family violence upon separation, for example, dealt with in the one court that is looking at its intervention order where that same court can make some decisions regarding children. But that would only be if there were adequate resources and adequate time and not people being barrelled through ... [the] crisis situation is [not] the right time to be making decisions that have a long-term impact.¹⁰⁰

- 8.67 A number of submissions suggested that the delays in the courts arise from a lack of judges, and delays in replacing retiring judges. It was further advocated that there are insufficient judges to meet the workload of the courts, leading to significant delays for families seeking support and protection.¹⁰¹ This was acknowledged by the Family Court, which stated in a submission to the inquiry that 'it is vitally important that the courts have adequate resources to enable them to deal with cases in a timely way'.¹⁰²
- 8.68 As a result of resourcing implications, families often have limited time before a judge, and the pressure on judges to make hurried decisions on cases increases.¹⁰³ When judges need to make decisions quickly, 'family violence matters cannot be given the attention they require'.¹⁰⁴ Stakeholders were of the view that, in such circumstances, the ability of judges to review cases thoroughly and make appropriate responses is reduced.¹⁰⁵ In addition, the high workload of judges and the nature of family law cases involving family violence may lead to judges experiencing vicarious trauma or burnout which, in turn, can impact appropriate decision making in family law cases involving family violence.¹⁰⁶

¹⁰⁰ Ms Helen Matthews, Director, Legal and Policy, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 31.

¹⁰¹ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 4; Ms Joanna Fletcher, Chief Executive Officer, Women's Legal Service Victoria, Women's Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 21; InTouch, *Submission 13*, pp. 6-7.

¹⁰² Family Court of Australia, *Submission 44*, p. 12.

¹⁰³ Victorian Women Lawyers Association Inc., *Submission 54*, p. 3; Legal Aid NSW, *Submission 90*, p. 12.

¹⁰⁴ The Hon. Professor Marcia Neave, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 2.

¹⁰⁵ Victorian Women Lawyers Association Inc., *Submission 54*, p. 3; Legal Aid NSW, *Submission 90*, p. 12.

¹⁰⁶ The Deli Centre, *Submission 67*, p. 8; HRCLS, *Submission 76*, p. 4.

8.69 To address these concerns, multiple submissions recommended appointing more judicial officers and ensuring timely replacements for resigning or retiring judicial officers.¹⁰⁷ However, Professor Patrick Parkinson AM suggested that appointing more judges may not be practical or sufficient to alleviate the problem.¹⁰⁸ Rather, Professor Parkinson recommended procedural reform to reduce the number of matters that proceed to court, as noted in Chapter 4.¹⁰⁹

Family consultants and Independent Children's Lawyers

8.70 A lack of sufficient family consultants and independent children's lawyers can lead to delays, which result in families being within the court system for longer periods and at greater risk of harm. Importantly, National Legal Aid were of the view that increased ICL appointments, alongside more family consultants, could help to facilitate early and appropriate investigation in family law cases.¹¹⁰

8.71 Some stakeholders reported that long delays can exist for families who need to see family consultants for a family report.¹¹¹ Workload pressures, caused by a limited number of available family consultants, can affect the family consultant's ability to respond effectively to matters involving family violence.¹¹² As noted in Chapter 6, family consultants often have high caseloads, and limited time to complete the assessments and report for each case. The Community and Public Sector Union reported that it is 'not uncommon' for family consultants to work on multiple cases at the same time.¹¹³ This leaves little capacity for family consultants to conduct appropriate assessments, read relevant documents such as subpoenas, reflect on current best practice, or attend professional development opportunities.¹¹⁴

¹⁰⁷ InTouch, *Submission 13*, p. 7; VLA, *Submission 60*, p. 5; CPSU, *Submission 70*, p. 7; National Legal Aid (NLA), *Submission 88*, p. 3; Legal Aid NSW, *Submission 90*, p. 12; Ms Miranda Kaye, *Submission 95*, p. 2; Dr Renata Alexander, *Submission 108*, p. 5.

¹⁰⁸ Professor Patrick Parkinson AM, *Submission 64*, p. 4.

¹⁰⁹ Professor Patrick Parkinson AM, *Submission 64*, p. 5.

¹¹⁰ NLA, *Submission 88*, p. 3.

¹¹¹ InTouch, *Submission 13*, p. 8; CPSU, *Submission 70*, p. 9.

¹¹² CPSU, *Submission 70*, p. 9.

¹¹³ CPSU, *Submission 70*, p. 9.

¹¹⁴ CPSU, *Submission 70*, p. 9.

- 8.72 Multiple stakeholders suggested that these issues may be alleviated by the provision of more family consultants.¹¹⁵ This could reduce time pressures on family consultants and allow time for proper risk assessment, proper interviewing of families, and reading relevant documents.¹¹⁶
- 8.73 Some submissions recommended that additional funding be made available for more ICLs.¹¹⁷ The Law Council of Australia explained that Victoria Legal Aid applies a quota for ICLs every month, and that there have been times when ‘the quota of the number of ICLs that would be funded would be filled in the first week’, resulting in some cases involving family violence and child abuse not receiving an ICL at all.¹¹⁸

Committee comment

Skills and capacity

- 8.74 The Committee is of the strong view that a better family law system that supports and protects families from family violence will only be as effective as the capacity of the professionals that work within that system.
- 8.75 The Committee was provided with a number of examples where the capacity, skills and knowledge of family law professionals has made a significant difference in protecting and supporting families recover from family violence. However, the Committee also received evidence that indicates there are gaps in the capacity of some family law professionals which is compromising the safety of families.
- 8.76 The recommendations made below will be vital to achieving a family law system that is accessible, equitable, responsive and prioritises the safety of families.
- 8.77 Although the most serious cases of child sexual or physical abuse or family violence are reserved for the Family Court,¹¹⁹ the presence of child abuse or

¹¹⁵ InTouch, *Submission 13*, p. 8; VLA, *Submission 60*, p. 5; Hume Riverina Community Legal Service, *Submission 76*, p. 7; NLA, *Submission 88*, p. 8.

¹¹⁶ VLA, *Submission 60*, p. 5.

¹¹⁷ VLA, *Submission 60*, p. 5; NLA, *Submission 88*, p. 3

¹¹⁸ Ms Wendy Kayler-Thomson, Chair, Family Law Section, Law Council of Australia, *Committee Hansard*, Canberra, 30 May 2017, p. 7.

¹¹⁹ The Family Court of Australia and Federal Circuit Court of Australia, *Submission to the Royal Commission into Family Violence*, August 2015, p. 2.

family violence is not always identified early in a case. This is compounded by data that indicates the vast majority of family law matters are heard in the Federal Circuit Court. It is therefore particularly concerning that judges appointed to the Federal Circuit Court may not have expertise in family law or identifying the presence of family violence or child abuse, prior to presiding over such cases.

- 8.78 The Committee notes that judicial officers cannot be compelled to attend or participate in training once appointed.¹²⁰ It is therefore critical that judges with family law and family violence expertise are appointed to the federal family courts, and for current and up-to-date training to be made available to judicial officers. Given the high family law caseload in the Federal Circuit Court, it is fundamental that the professional experience of the judicial appointees to the Federal Circuit Court possess sufficient expertise to reflect that caseload.
- 8.79 The Committee welcomes the additional resourcing for training for judicial officers to complement the National Bench Book, and suggests that both the National Bench Book and accompanying training are reviewed regularly to ensure that best practice is adopted in guidance and training. The Committee additionally recommends that the AVERT training program be evaluated, with consideration of its content, format, uptake, reach and effectiveness.
- 8.80 The Committee is also encouraged to learn about two family law specific training packages for state and territory magistrates, covering parenting matters and property matters. The Committee also welcomes the current redevelopment of the national training program for Independent Children's Lawyers.
- 8.81 Nevertheless, the Committee is concerned about the inconsistencies in the capacity of family law professionals to work with families experiencing family violence. The Committee recognises that the majority of stakeholders have linked these inconsistencies to a lack of training of professionals and have advocated to this inquiry that improved training is necessary for all family law professionals.

¹²⁰ Ms Jane Mevel, Manager, Research and Policy, Judicial College of Victoria, *Committee Hansard*, Melbourne, 25 July 2017, p. 13.

Recommendation 27

8.82 The Committee recommends that the Australian Government develops a national and comprehensive professional development program for judicial officers from the family courts and from states and territory courts that preside over matters involving family violence. The Committee recommends that this program includes content on:

- the nature and dynamics of family violence;
- working with vulnerable clients;
- cultural competency;
- trauma informed practice;
- family law; and
- ‘The Safe and Together Model’ for understanding the patterns of abuse and impact of family violence on children.

Recommendation 28

8.83 The Committee recommends that the Australian Government develops a national, ongoing, comprehensive, and mandatory family violence training program for family law professionals, including court staff, family consultants, Independent Children’s Lawyers, and family dispute resolution practitioners. The Committee recommends that this program includes content on:

- the nature and dynamics of family violence;
- working with vulnerable clients;
- cultural competency;
- trauma informed practice;
- the intersection of family law, child protection and family violence; and

- **‘The Safe and Together Model’ for understanding the patterns of abuse and impact of family violence on children.**

Recommendation 29

- 8.84 The Committee recommends the Australian Government undertakes an evaluation of the Addressing Violence: Education, resources and training (AVERT) family violence training program, with consideration of its content, format, uptake, reach and effectiveness.**

Accreditation system for family consultants

- 8.85 The Committee is deeply concerned by the significant body of evidence to the inquiry that highlighted the substantial inadequacies of many family consultants. Often family reports are the key piece of evidence that a judge can use to make recommendations about parenting arrangements, and the Committee was deeply concerned to hear that family consultants are not required to have training in family violence, or meet minimum accreditation standards. The Committee is also concerned by the lack of monitoring of family consultants, and the barriers to appealing the content of a family report.
- 8.86 The Committee recognises the recommendations of a large number of stakeholders for family consultants to be trained appropriately and subject to accreditation and monitoring processes, and understands the need for these processes. The Committee believes that the current accreditation system for family dispute resolution practitioners can provide an effective model for an accreditation system for family consultants.

Recommendation 30

- 8.87 The Committee recommends that the Australian Government develops a national accreditation system with minimum standards and ongoing professional development for family consultants modelled on the existing accreditation system for family dispute resolution practitioners. This system should include a complaints mechanism for parties when family consultants do not meet the required professional standards.**
- 8.88 The Committee also appreciates the substantial concerns of families who are provided with inaccurate family reports. The Committee identifies that its previous recommendation for the abolition of private practitioners developing family reports, and for family consultants to only be engaged

in-house by the courts, will provide an appropriate mechanism for the Court to ensure the quality and processes employed to develop family reports.

Resourcing

- 8.89 The Committee acknowledges that the family courts are overburdened, and that this results in long delays for families within in the court system. The Committee understands that for families experiencing family violence, such delays can increase the risk of harm and cause further trauma. The Committee also acknowledges that the time pressures placed on family law professionals within the family law system can compromise the quality of service delivery, and can lead to suboptimal decisions that place families experiencing family violence at risk of harm.
- 8.90 The Committee welcomes the recent announcement by the Attorney-General of new judicial appointments to replace outgoing judicial officers, and the provision of \$10.7 million for the family courts to engage additional family consultants.
- 8.91 Notwithstanding, the Committee is very concerned about the current backlog in the federal family courts and believes that additional resources are required to address this situation as a matter of priority.

Recommendation 31

- 8.92 **The Committee recommends that the Australian Government considers the current backlog in the federal family courts and allocates additional resources to address this situation as a matter of priority.**
- 8.93 The Committee notes evidence to the inquiry about other recent announcements, including the Family Advocacy and Support Services and the pilot of parent management hearings will assist to alleviate these challenges. The Committee will monitor with interest the impact of these additional resources. The Committee also notes the importance of judicial appointments which reflect the diversity of the communities they serve.
- 8.94 While access to justice is determined by a number of factors in the family law system, such as case management, the Committee is concerned that the family law system must be appropriately funded to provide access to justice in a timely matter. Resourcing of the Courts, including an appropriate number of judicial officers, appropriate funding of legal aid and community legal centres should be continually reviewed. The Committee also notes that it has received evidence about the importance of replacing all judicial

officers in a timely manner upon their retirement or cessation of their appointment.

9. Ongoing support services

- 9.1 Family violence may have flow on effects into all aspects of a family's life including employment, housing, transport, education, financial security and physical and mental health. Further, families affected by violence are not free from risk once family law matters are resolved. Families may still be vulnerable to violence, fear and intimidation from a violent family member;¹ a lack of support services, including housing and employment, can also result in families returning to violent relationships.²
- 9.2 Ongoing support services are therefore critical to ensuring their safety and wellbeing, and securing a future free from violence. Significantly, families who have experienced violence require a holistic system that adequately supports them before, during and after engagement with the family law system.³
- 9.3 Key support services raised in evidence include housing support, economic support, and behaviour change programs for perpetrators. Each is addressed briefly below, with the Committee's comment and recommendation appearing at the end of the chapter.

Box 9.1 Support services

The following is a selection of responses to the Committee's questionnaire:

¹ Queensland Domestic Violence Services Network, *Submission 30*, p. 2.

² Alice Springs Women's Shelter, *Submission 121*, pp. 2-3.

³ Access Community Services, *Submission 12*, pp. 8-9; Family Law Practitioners of Western Australia, *Submission 53*, p. 1; Australia's National Research Organisation for Women's Safety (ANROWS), *Submission 73*, pp. 13-14; Family and Relationship Services Australia, *Submission 80*, p. 16; Alice Springs Women's Shelter, *Submission 121*, pp. 2-3.

‘Provide [people who have experienced family violence] with support (legal support, counselling, financial support, emergency housing). It is important to centralise this process and establish organisations that can assist’.

— *Respondent from Victoria*

‘There is a ... disconnect between the family law system and the support services established to support victims of family violence. These services will most often not intervene while a matter is before the Court. ... [This] leaves the victim at risk and adds to the trauma’.

— *Respondent from the Australian Capital Territory*

‘Support people [are needed] to transition to safe, affordable housing in an area that they are comfortable in’.

— *Respondent from New South Wales*

‘No support services were offered [to me]’.

— *Respondent from Queensland*

‘When I sought refuge, no facilities were available. More support services are needed for temporary housing’.

— *Respondent from the Australian Capital Territory*

‘[We need a] proper referral system at intervention points’.

— *Respondent from Queensland*

‘[We need] more links [and] referrals to community support services’.

— *Respondent from Queensland*

Court-based support services

- 9.4 As noted in Chapter 4, some specialist family violence courts provide for the co-location of support services, and make active use of the ability to refer parties to those co-located services.

- 9.5 A number of participants in the inquiry discussed the importance of co-located services in courts,⁴ with The Deli Women and Children’s Centre highlighting that appearing at court can be ‘the peak ... of a victim’s vulnerability’.⁵
- 9.6 For example, former Commissioner of the Victorian Royal Commission into Family Violence, the Hon. Professor Marcia Neave AO, commented that the co-location of services within courts, particularly specialist family violence courts, could assist in the de-escalation of matters and of risk:
- [In] some of the specialist courts have got an applicant worker, a respondent support worker. So when these people come, and often it is the first time they have had any contact with support services, the applicant support worker gets support—not legal support; just help. It might be something like sitting in a court. It might be finding her a place she can go to be safe. It might be referring her to a family violence service. And the perpetrator also is referred—gets a hot referral. He's not just told, 'Ring up this number.' He is actually supported to go and get help. Also, there is linkage with the men's behaviour change programs ... You have all of this ... built in the Magistrates' Court.⁶
- 9.7 The Northern Rivers Community Legal Centre recommended the establishment of an integrated service delivery model including wraparound legal and non-legal support services embedded in local courts, children’s courts and courts exercising family law jurisdiction (both federal family courts and state and territory magistrates courts). The Centre commented that a holistic and seamless service would ensure that families affected by family violence have access to the following:
- a specialist domestic violence support worker;

⁴ Northern Integrated Family Violence Services, *Submission 11*, p. 1; Micah Projects, *Submission 24*, pp. 6-7; People with Disability Australia, *Submission 25*, p. 6; Public Health Association of Australia (PHAA), *Submission 27*, p. 4; Australian Women Against Violence Alliance, *Submission 49*, p. 3; Northern Rivers Community Legal Centre, *Submission 83*, pp. 4-5; Ms Gayathri Paramasivam, Associate Director, Family Law, Victoria Legal Aid, *Committee Hansard*, Melbourne, 24 July 2017, p. 33; Mrs Ashleigh Newnham, Senior Community Development Worker, Springvale Monash Legal Service, *Committee Hansard*, Melbourne, 24 July 2017, p. 34; Mr Michael Brandenburg, Strategy Manager, No To Violence and Men’s Referral Service, *Committee Hansard*, Melbourne, 24 July 2017, p. 39; The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 5.

⁵ The Deli Women and Children’s Centre, *Submission 67*, p. 3.

⁶ The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 25 July 2017, p. 5.

- a child protection practitioner;
- a female solicitor;
- a culturally and linguistically diverse or Aboriginal and Torres Strait Islander specialist worker; and
- perpetrators are referred to an accredited behaviour change program.⁷

Housing and homelessness after family violence

9.8 As noted in Chapters 5 and 7, relationship breakdown is well recognised as a contributing cause of poverty and homelessness in Australia. The Public Health Association of Australia (PHAA) noted that more than 30 per cent of people seeking assistance from homelessness services are doing so due to family violence, with only nine per cent able to find long-term accommodation from their initial request for assistance.⁸ Consequently,

... there is insufficient emergency housing available, and women fleeing family violence end up not in secure shelters, but motels, cars and boarding houses offering little or no protection.⁹

9.9 The Alice Springs Women's Shelter operates a 30-bed crisis accommodation service for women and children in Alice Springs, describing the critical safety services it provides as a 'homicide prevention service'. The Shelter described its services and limitations:

A woman and children could come into the shelter when they're escaping violence, and that could be anywhere from being part of a woman's safety plan to a woman being stabbed ... We exit women as soon as we can, as soon as that danger has gone. That doesn't mean that we actually exit them to somewhere; we exit a lot of women to homelessness. There is nowhere for them to go ... When we say 'homelessness', that can mean anything from going to live in an overcrowded place to staying in someone's front yard, to the riverbed, to families in cars or families just being there. We try our best and we often have overcrowding—but, for every one of them, domestic violence is the driving force of their homelessness.¹⁰

⁷ Northern Rivers Community Legal Centre, *Submission 83*, p. 4.

⁸ PHAA, *Submission 27*, p. 4; see also Australia Institute of Health and Welfare, *Domestic and family violence and homelessness 2011-12 to 2013-14*, 2016.

⁹ PHAA, *Submission 27*, p. 4.

¹⁰ Mrs Dianne Gipey, Chief Executive Officer, Alice Springs Women's Shelter, *Committee Hansard*, Alice Springs, 22 August 2017, p. 5.

- 9.10 Nationally, one in 200 people are homeless in Australia,¹¹ with rates in the Northern Territory 15 times the national average. Significantly, the Committee heard that homelessness forces victims back to unsafe environments ‘where they must measure the level of violence that they will experience in order to stay safe by relying on safety planning’.¹²
- 9.11 Families affected by violence may also be forced into homelessness following a ‘black-listing’ on the private rental market as a result of damage done to the property by the perpetrator.¹³
- 9.12 Family Law Practitioners of Western Australia recommended alternative housing for perpetrators so that victims are not displaced from their home.¹⁴ The PHAA similarly advocated that outreach services provide ‘real options for women and children ... to remain safety in their home’.¹⁵
- 9.13 Safe and secure accommodation is not only important in the critical post-separation stage, but also for long-term stability and recovery of families leaving violent relationships. At both stages, housing must be accessible, available and affordable in order to prevent homelessness and aid families’ recoveries.¹⁶

Economic support

- 9.14 The Department of Social Services advised that families affected by family violence are able to access an income support payment (known as a Crisis Payment), of an amount equivalent to half their fortnightly rate of payment or access to a portion of their future payment as an Urgent Payment.¹⁷

¹¹ Mrs Dianne Gipey, Chief Executive Officer, Alice Springs Women’s Shelter, *Committee Hansard*, Alice Springs, 22 August 2017, p. 1.

¹² Mrs Dianne Gipey, Chief Executive Officer, Alice Springs Women’s Shelter, *Committee Hansard*, Alice Springs, 22 August 2017, pp. 1-2.

¹³ Centacare Brisbane, *Submission 22*, p. 4; Queensland Domestic Violence Services Network, *Submission 30*, p. 5; see also Ms Laura Vines, Manager, Strategy and Police, Aboriginal Family Violence Prevention Legal Service Victoria, *Committee Hansard*, Melbourne, 24 July 2017, p. 37.

¹⁴ Family Law Practitioners of Western Australia, *Submission 53*, p. 1.

¹⁵ PHAA, *Submission 27*, p. 4.

¹⁶ Council of Single Mothers and their Children Victoria, *Submission 42*, p. 5; ANROWS, *Submission 73*, p. 14.

¹⁷ Department of Social Services, *Submission 116*, p. 1.

Eligible families are required to submit a claim for a crisis payment seven days after a relevant event.¹⁸

- 9.15 The National Council of Single Mothers and their Children (NCSMC) stated that the crisis payment ‘has the potential to provide some much needed financial support at a particularly poignant time’. However, it stated that the seven-day window to lodge a claim had prevented otherwise eligible women from accessing the payment.¹⁹
- 9.16 The NCSMC recommended a review of the crisis payment, commenting that the existing payment does not reflect the needs of women.²⁰
- 9.17 More broadly, ANROWS also recommended specialist financial education programs and advice support, designed to:
- ... help victims rebuild, know their rights, form better alliances with consumer credit and financial services ... as well as secure property and funds, and prevent loss upon separation ... Providing such services requires drawing on expert support and implementing close collaboration between the family law system and professional counsellors and crisis service workers at the early stages of separation and/or crisis, but also post-crisis and/or post-separation in the longer-term.²¹
- 9.18 ANROWS also supported the provision of crisis relief payments where there is a need to act quickly.²²

Behaviour change programs

- 9.19 Responding effectively to perpetrators of family violence is crucial to ensuring the safety of adults and children subjected to family violence, and contributing to their recovery and ongoing wellbeing.²³ A number of participants discussed behaviour change programs (BCPs) and the role they can play in ongoing safety of families.²⁴

¹⁸ National Council of Single Mothers and their Children, *Submission 39*, p. 17.

¹⁹ National Council of Single Mothers and their Children, *Submission 39*, p. 17.

²⁰ National Council of Single Mothers and their Children, *Submission 39*, pp. 4-6.

²¹ ANROWS, *Submission 73*, p. 14.

²² ANROWS, *Submission 73*, p. 14.

²³ No To Violence/Men’s Referral Service (No To Violence), *Submission 82*, p. 3.

²⁴ Statewide Children’s Resource Program, *Submission 3*, p. 2; Access Community Services, *Submission 12*, p. 6; Northern Rivers Community Legal Centre, *Submission 83*, p. 3.

- 9.20 BCPs are predominantly group-based programs varying in duration from 12 to 26 weeks, with some programs referring participants to ongoing support groups. Although the methodologies employed by these programs vary, most BCPs use a combination of psycho-education and cognitive behavioural therapy techniques.²⁵
- 9.21 The National Outcome Standards for Perpetrator Interventions establish a set of standards which BCP providers must comply. The Standards were supported by the Council of Australian Governments as a key action under the National Plan to Reduce Violence Against Women and their Children.²⁶
- 9.22 No To Violence/Men's Referral Service (No To Violence) is the peak body in Victoria and New South Wales for services and practitioners which work with perpetrators of family violence. It engages with more than 10,000 perpetrators a year.²⁷ For No To Violence, the goal of such programs is to improve the safety of families affected by violence:

We would argue that if a woman or child is safer because we are working with a man in our program that would be a success. People want to measure change. I can understand that ... We argue that some men will change, some men will start the journey and some men will not change ... They leave our programs and go back to a community that continues to support inequality. I think we have to be realistic about how much we can achieve on a small scale when we need a larger scale change to happen within our culture.²⁸

- 9.23 The Hon. Professor Marcia Neave AO, former Commissioner of the Victorian Royal Commission into Family Violence, reported that the Royal Commission had received evidence about the positive impact of BCPs and ongoing family safety:

We did hear some very moving evidence from a man in one case who went off and did behaviour change 10 years previously. In fact, his wife rang us and

²⁵ No To Violence, *Submission 82*, p. 5.

²⁶ Council of Australian Governments, *National Outcome Standards for Perpetrator Interventions*, 2015, available at <http://plan4womenssafety.dss.gov.au/wp-content/uploads/2015/04/nospi_coag_paper.pdf>, last accessed 6 December 2017; see also No To Violence / Men's Referral Service, *Submission 82*, p. 7.

²⁷ No To Violence, *Submission 82*, p. 3.

²⁸ Mr Michael Brandenburg, Strategy Manager, No To Violence and Men's Referral Service, *Committee Hansard*, Melbourne, 24 July 2017, pp. 41-42.

said it had transformed their lives and she thought we should hear from him as an advocate. She was an advocate for it because it had worked for them..²⁹

- 9.24 The minimum standard in Victoria for BCPs is a 24 hour program over 12 weeks. No To Violence recommended this be increased to a 48 hour minimum,³⁰ explaining:

No-one is going to change in 12 weeks or 24 sessions. In some ways, the best our programs can do in lots of ways is to, I guess, present the ideas, the challenges around what change looks like and encourage men to make change. So the longer we can keep a man engaged in our service system, the better..³¹

- 9.25 Similarly, Springvale Monash Legal Service stated that these programs are ‘often short term in nature, and cannot be expected to achieve strong outcomes within their current timeframes’.³² The Service advised that the design of BCPs needs to be culturally appropriate for Aboriginal and Torres Strait Islander and culturally and linguistically diverse perpetrators.³³ Professor Neave also supported long-term BCPs to reduce recidivism.³⁴

Court-ordered attendance and referral mechanism

- 9.26 Referrals to BCPs can be from individuals, community organisations, child protection agencies and the police. Referrals may also come from the courts (both state and territory magistrates’ courts and the federal family courts),³⁵

²⁹ The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 24 July 2017, p. 11.

³⁰ Mr Michael Brandenburg, Strategy Manager, No To Violence and Men’s Referral Service, *Committee Hansard*, Melbourne, 24 July 2017, p. 39.

³¹ Mr Michael Brandenburg, Strategy Manager, No To Violence and Men’s Referral Service, *Committee Hansard*, Melbourne, 24 July 2017, p. 40.

³² Springvale Monash Legal Service, *Submission 47*, p. 5.

³³ Mrs Ashleigh Newnham, Senior Community Development Worker, Springvale Monash Legal Service, *Committee Hansard*, Melbourne, 24 July 2017, p. 34.

³⁴ The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 24 July 2017, pp. 10-11.

³⁵ Mr Michael Brandenburg, Strategy Manager, No To Violence and Men’s Referral Service, *Committee Hansard*, Melbourne, 24 July 2017, p. 38; Ms Patricia Occelli, Chief Executive Officer, Interrelate Limited, *Committee Hansard*, Sydney, 31 July 2017, p. 14.

though these referrals appear to occur more frequently when magistrates or judges are aware of such programs.³⁶

- 9.27 However, a number of organisations supported a stronger and structured referral mechanism from the courts and a greater use of court-ordered attendance.³⁷ No To Violence recommended a court referral system for BCPs and a range of other intervention services, modelled on a court-referral and report back requirements in British courts.³⁸
- 9.28 In the United Kingdom, approximately one-third of referrals to BCPs are made through the Family Court, where the Court orders perpetrators to participate in programs prior to decision in parenting matters. The referrals are managed through the Children and Family Court Advisory and Support Service (CAFCASS), which, as noted in Chapter 4, is independent of the Court.
- 9.29 During participation, and at its conclusion, the BCP provider reports back to CAFCASS concerning the risk that the perpetrator poses to the family. CAFCASS uses the BCP provider's assessment, together with any other relevant information, to make a recommendation regarding parenting matters before the Court.
- 9.30 In recommending the CAFCASS program for Australian courts, No To Violence advocated that BCPs can be 'an important source' of information to the Court in decision-making in parenting matters and any ongoing risk that a perpetrator presents to a family.³⁹ No To Violence stated that court-referred attendance in BCPs provide an important opportunity to improve the safety of families:

This is a major untapped source of referrals for family violence perpetrators, at a time where women are at high risk of being forced, through the family law system, to provide higher levels of perpetrator access to their children than

³⁶ Mr Michael Brandenburg, Strategy Manager, No To Violence and Men's Referral Service, *Committee Hansard*, Melbourne, 24 July 2017, p. 38.

³⁷ Access Community Services, *Submission 12*, p. 6; No To Violence, *Submission 82*, p. 7; Mr Michael Brandenburg, Strategy Manager, No To Violence and Men's Referral Service, *Committee Hansard*, Melbourne, 24 July 2017, p. 38; Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 12; Northern Rivers Community Legal Centre, *Submission 83*, p. 8.

³⁸ Mr Michael Brandenburg, Strategy Manager, No To Violence and Men's Referral Service, *Committee Hansard*, Melbourne, 24 July 2017, p. 38.

³⁹ No To Violence, *Submission 82*, p. 5.

what might be in the child's best interest in terms of their safety, stability and development.⁴⁰

- 9.31 The adoption of a court-referral and report-back model was supported by a number of other participants in the inquiry. Professor Neave recommended referrals from the Court and supported the adoption of the approach in the British courts, though cautioned that there may be difficulties with enforcement.⁴¹ The Central Australian Aboriginal Family Legal Unit stated:

[W]hen we're developing, for example, parenting plans or parenting orders and it's by consent, for example, then there should be some expectation of the man, the offender, engaging in a men's behaviour change program or having [domestic violence] counselling. This shouldn't be simply lip-service; this should be part of the requirement. He should be submitting ... his certificates of completion to the Court for consideration.⁴²

- 9.32 The Northern Rivers Community Legal Centre supported improving the integration of BCPs into the family law system, however noted that existing court orders referring perpetrators to anger management courts (as distinct from behaviour change programs) 'does not reflect best-practice in this area'.⁴³ The Centre recommended:

It is our recommendation that referrals to accredited [behaviour change programs] becomes systematised, with model orders being designed for this purpose, in line with the National Domestic and Family Violence Bench Book and that, if court ordered, assessment reports be made available to the Court reflecting whether the perpetrator has engaged effectively and participated positively in the program.⁴⁴

- 9.33 Access Community Services also supported a mechanism whereby BCP providers would provide feedback to the Court on the 'readiness of participants to exit the program'.⁴⁵

⁴⁰ No To Violence, *Submission 82*, p. 5.

⁴¹ The Hon. Professor Marcia Neave AO, Private Capacity, *Committee Hansard*, Melbourne, 24 July 2017, p. 11.

⁴² Ms Kim Margaret Raine, Legal Practitioner, Central Australian Aboriginal Family Legal Unit, *Committee Hansard*, Alice Springs, 22 August 2017, p. 12.

⁴³ Northern Rivers Community Legal Centre, *Submission 83*, p. 8.

⁴⁴ Northern Rivers Community Legal Centre, *Submission 83*, p. 8.

⁴⁵ Access Community Services, *Submission 12*, p. 6.

Committee comment

- 9.34 The Committee is of the view that holistic and ongoing support services are paramount to the recovery of families following family violence. These support services can also be critical to families' ongoing safety and wellbeing.
- 9.35 However, the terms of reference for this inquiry limit the Committee's comments for reform to reform of the family law system. As such, the Committee will limit its comments to those matters falling within the terms of reference, that is, court referral to behaviour change programs and the design of such programs.
- 9.36 Nonetheless, the Committee anticipates that the previous recommendations contained in this report, particularly those relating to property division and financial recovery, will be of some assistance to families rebuilding their lives following family violence.

Court-based support and referrals

- 9.37 Whilst inspecting the Specialist Family Violence Division of the Victorian Magistrates' Court at Heidelberg, the Committee witnessed the clear benefits of wrap-around services and co-located services within the Court building.
- 9.38 In Chapter 4, the Committee noted the benefits of court-based support in specialist family violence courts that operate in certain states and territories, and recommended the Attorney-General work with state and territory counterparts to expand the number of specialist family violence courts.
- 9.39 The Committee sees merit in the federal family courts adopting a similar approach to court-based support for both legal and non-legal support services. The Committee notes the introduction of the Family Advocacy Support Services (FASS) program which, based on early reports, is assisting families with their legal and non-legal support needs. The Committee believes that this could be further extended, as has been operating in the states and territories' specialist family violence courts.

Recommendation 32

- 9.40 The Committee recommends the Attorney-General works to introduce 'wrap-around' services co-located in the federal family courts, modelled on the provision of these legal and non-legal support services in the specialist family violence courts of the states and territories.**

- 9.41 As discussed in earlier chapters of this report, the Committee strongly supports the early results from the FASS, and believes these early successes can be built upon, including a more structured approach to referrals to BCPs from the Court, managed by the FASS program.
- 9.42 The Committee believes this referral to BCPs would be an expansion of the FASS program, and could be modelled on the CAFCASS in British courts.
- 9.43 Availability and accessibility of these programs is critical to the ongoing safety of families. The Committee is keenly aware of the need to ensure well regarded and accessible services are available to support a strong and systematic court-referral mechanism, including in rural and regional areas.

Recommendation 33

- 9.44 The Committee recommends the Attorney-General works to establish a systematic court referral mechanism to evidence-based, evaluated, best practice behaviour change programs, through an expanded Family Advocacy and Support Services program, which includes systematic reporting from behaviour change program providers to advise the Court on ongoing risks to families' safety. Further, the Committee recommends that the Attorney-General work with state and territory counterparts to ensure adequate funding of evidence-based, evaluated, best practice behaviour change programs to support the mechanism.**

Ms Sarah Henderson MP

Chair

5 December 2017

A. Recommendations from other reports

Family Law Council – *Families with Complex Needs and the Intersection of Family Law and Child Protection* – Interim Report (2015) and Final Report (2016)

Interim Report recommendations

Recommendation 1

- 1 That section 69J and section 69N of the *Family Law Act* be amended to remove any doubt that children’s courts, no matter how constituted, are able to make family law orders under Part VII of the *Family Law Act* in the same circumstances that are currently applicable to courts of summary jurisdiction.
- 2 That the government consider the appropriate process of appeal from family law decisions made by state and territory courts.

Recommendation 2

That Part VII of the *Family Law Act* be amended to provide a simplified decision-making framework for interim parenting matters.

Recommendation 3

That the *Family Law Act* be amended to enable judicial officers to deliver ‘short form’ judgements in interim proceedings.

Recommendation 4

That the Government implement the relevant part of Recommendation 16—5 of the Australian and New South Wales Law Reform Commissions' 2010 report, namely that:

Section 68T of the *Family Law Act 1975* (Cth) should be amended to provide that, where a state or territory court, in proceedings to make an interim protection order under state or territory family violence legislation, revives, varies or suspends a parenting order under section 68R [...] that parenting order has effect until:

- a. the date specified in the order;
- b. the interim protection order expires' or
- c. further order of the court.

Recommendation 5

The Attorney-General raise the following matters at the COAG level:

- 1 The development of a national database of court orders to include orders from the Family Court of Australia, the Family Court of Western Australia, the Federal Circuit Court of Australia, state and territory children's courts, state and territory magistrates courts and state and territory mental health tribunals, so that each of these jurisdictions has access to the other's orders.
- 2 The convening of regular meetings of relevant stakeholder organisations, including representatives from the children's courts, child protection departments, magistrates courts, family courts, legal aid commissions, and the Attorney-General's Departments, to explore ways of developing an integrated approach to the management of cases involving families with multiple and complex needs.
- 3 Amending the prohibition of publications provisions in state and territory child protection legislation to make it clear that these provisions do not prevent the production of reports prepared for children's court proceedings in family law proceedings.
- 4 The entry into Memoranda of Understanding by state and territory child protection agencies and the federal family courts to address the recommendations of Professor Chisholm's reports.
- 5 The co-location of state and territory child protection department practitioners in federal family court registries.

- 6 The development of dual competencies for Independent Children’s Lawyers to achieve continuity of representation for children where appropriate.

Recommendation 6

- 1 The Family Law Council has previously made recommendations in relation to a number of issues that are covered by the present terms of reference in its 2009 report, *Improving Responses to Family Violence in the Family Law System*. These include

Recommendation 7.3.1:

The adoption of consistent terminology in orders relating to children across relevant State and Commonwealth legislation so that orders are more readily understood by parents and carers of children and those working in family law and child protection, including law enforcement.

Recommendation 9.3:

The Attorney-General facilitate the development of protocols for the collaborative exchange of information between the family courts and child protection departments, police and mental health services.

Council recommends that these matters be placed on the COAG agenda.

- 2 The Family Law Council has previously made recommendations in relation to the issue of Aboriginal and Torres Strait Islander family liaison officers in its 2012 report, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*. These include:

Recommendation 6:

The Australian Government provides funding for further positions for Indigenous Family Consultants and Indigenous Family Liaison Officers (identified positions) to assist the family law courts to improve outcomes for Aboriginal and Torres Strait Islander families.

Council recommends the Government implement this recommendation.

Final Report

Recommendation 1: Family safety services

The Australian Government consider ways incorporating the expertise of specialist family violence services into the family law system to improve responses to families where there are issues of family violence or other safety concerns for children. This may include a combination of:

- 1 Funding family violence services that provide embedded services in state and territory courts to continue to support clients with family violence issues when they move to the family law system to seek parenting or other orders;
- 2 Embedding workers from specialist family violence services in the family courts and Family Relationship Centres; and
- 3 Creating a dedicated family safety service within the family law system.

Recommendation 2: Early whole of family risk assessments

Having regard to the issues of abuse, neglect and family violence and the need for such evidence to be broadly available to protect children, the Australian Government should incorporate a whole-of-family risk assessment process into the family law system that is non-confidential and admissible.

Recommendation 3: Family lawyers and risk identification

The Australian Government consult with the Family Law Section of the Law Council of Australia, legal practitioner regulation bodies, including National Legal Aid, and family law practitioners more broadly, to support the development of:

- 1 A simplified risk identification mechanism for parents and children for use by the legal profession;
- 2 Protocols and guidelines to assist practitioners to utilise strategies to ensure that risk is identified and managed effectively, including through warm referrals to specialised family violence services;
- 3 The development of a strategy to support the implementation of these measures among legal practitioners who practice family law in the context of their professional obligations to their clients, their ethical responsibilities as legal practitioners and the professional indemnity issues that responses to risk raise.

Recommendation 4: Family dispute resolution practitioners and risk management strategies

The Australian Government consult with key stakeholders, including Family and Relationship Services Australia, to identify how best to support a systematic approach to meeting client needs once an assessment that family dispute resolution should not proceed is made or risk is identified. The following options should be considered:

- 1 An amendment to Regulation 25 of the *Family Law (Family Dispute Resolution Practitioners) Regulation 2008* to extend the obligations of

family dispute resolution practitioners to their clients to encompass the following steps as required:

- a. preparation of a safety plan and referral to a specialised family violence support service;
 - b. referral for legal advice on personal protection orders and options for addressing parenting arrangements;
 - c. referral for therapeutic support for affected parents and children;
 - d. referral to a men's behaviour change program and other referrals in relation to other support needs, such as housing, mental health or substance misuse needs.
- 2 Amendments to relevant funding agreements to support this extension of obligations.

Recommendation 5: Judicial risk assessments and court ordered programs

The *Family Law Act 1975* be amended to facilitate the making of court orders for observational assessment reports where the court orders a party to attend a post-separation parenting program or a men's behaviour change program.

Recommendation 6: A court-based integrated services model

- 1 To provide evidence and a better structured system in a more child-focused way, the Australian Government should consider establishing a client-centred integrated service model to trial collaborative case management approaches to families with complex needs, to be piloted initially in one court registry and evaluated pending further roll out. Part of that trial should include the development of effective information sharing protocols.
- 2 In order to support the development of effective information sharing protocols, Council recommends the government clarify the confidentiality status of family dispute resolution intake assessments.

Recommendation 7: Case managed integrated services in the family relationships sector

To better address the complex nature of children's disputes, the Australian Government consult with Family & Relationship Services Australia with a view to further developing a case managed integrated services approach attached to family dispute resolution and men's behaviour change programs across the whole family relationship sector.

Recommendation 8: Self-represented litigants with complex needs

The Australian Government explore the viability of piloting a Counsel Assisting model in cases with self-represented litigants and allegations of family violence or other safety concerns for children.

Recommendation 9: Support services for families in rural and regional areas

Given the needs in regional areas for access to courts and court services:

- 1 The Australian Government provide funding to the family courts and family relationship services for improved technology to enable more video appearances and conferencing.
- 2 The Australian Government provide increased funding to the Federal Circuit Court and state and territory magistrates courts to enable the Federal Circuit Court to expand its regional circuits.

Recommendation 10: Collaboration between family law and state and territory courts

The Australian Government explore through COAG or LCCSC the possibilities for increasing circuiting of Federal Circuit Court judicial officers and registry staff in state and territory magistrates courts, including specialist family violence courts and community justice centres.

Recommendation 11: Family violence competency

The ability of professionals working in the family law system to understand family violence dynamics be strengthened by training programs and, more specifically:

- 1 The Australian Government develop, in partnership with other stakeholders, a learning package for professionals working in the family law system that provides both minimum competencies and in-depth and technical content designed for a range of roles, including family dispute resolution practitioners, family report writers and family lawyers.
- 2 There should be a specific family violence and child sexual abuse modules in the National Family Law Specialist accreditation scheme at the examination phase, professional development phase and re-accreditation phase as a compulsory requirement of being accredited.
- 3 That Legal Aid Commissions across Australia should consider requiring their in-house lawyers as well as all legal practitioners on their family law practitioner panels to demonstrate a sound awareness of family violence, trauma informed practice and an ability to work with victims of family violence.

Recommendation 12: Joint professional development

- 1 To ensure there is a consistent and national training, the National Judicial College of Australia develop a continuing joint professional development program for judicial officers from the family courts and state and territory courts in which judicial officers preside over matters involving family violence to strengthen understanding of family law and family violence and the impact of trauma.
- 2 The Australian Government engage with relevant professional bodies within the child protection, family law and family violence systems with a view to encouraging collaboration in designing and delivering joint training opportunities aimed at strengthening cross-professional understanding.

Recommendation 13: Children's views and experiences

- 1 The Australian Government establish a young person advisory panel to assist in the design of child-focused family law services that build on an understanding of children's and young people's views and experiences of the family law system's services.
- 2 The Australian Government consult with children and young people as key stakeholders in developing guidelines for judges who may choose to meet with children in family law proceedings.

Recommendation 14: Family dispute resolution and confidentiality

- 1 The Australian Government consider ways to improve understanding among family dispute resolution practitioners of the nature of their confidentiality and admissibility obligations in order to reduce any perceived barriers to information sharing.
- 2 The word 'imminent' be removed from section 10H(4)(b) of the *Family Law Act 1975*.
- 3 The Australian Government clarify the admissibility status of family dispute resolution intake assessments.

Recommendation 15: State and territory courts exercising family law jurisdiction

- 1 The National Judicial College of Australia develop continuing joint professional development program in family law for judicial officers from the family courts and state and territory children's courts and magistrates courts.
- 2 If the Australian Government accepts Recommendation 15.1, then Council recommends amendment of the *Family Law Act 1975* to increase

the monetary limit for property division by courts of summary jurisdiction.

- 3 Council recommends an increase in Commonwealth funding to state and territory courts of summary jurisdiction to enable them to take on more family law work.

Recommendation 16: Aboriginal and Torres Strait Islander families

- 1 The Australian Government implement the recommendations made by the Family Law Council in its 2012 report, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*.
- 2 Part VII of the *Family Law Act 1975* be amended to provide for the preparation of Cultural Reports, which may be included in Family Reports for Aboriginal and Torres Strait Islander children where a cultural issue is relevant, and for the Family Report to include a cultural plan which sets out how the child's ongoing connection with kinship networks and country may be maintained.
- 3 The Australian Government implement a process, including through amendments to the *Family Law Act 1975*, to support the convening of family group conferences for Aboriginal and Torres Strait Islander families in appropriate family law matters to assist informed decision-making in the best interests of the child, to allow them to be cared for within their own families and communities wherever possible, based on the Aboriginal and Torres Strait Islander Child Placement Principles.
- 4 The Australian Government consider a pilot of a specialised court hearing process in family law cases that involve an Aboriginal or Torres Strait Islander child to enhance cultural safety for Aboriginal and Torres Strait Islander families, including through the participation of Elders or Respected Persons who can provide cultural advice to the Court in relation to the child or young person and a specially reconfigured courtroom design.
- 5 The Australian Government consult with Aboriginal and Torres Strait Islander representative institutions in the development of any reforms arising from Council's work that affects Aboriginal and Torres Strait Islander children.

Recommendation 17: Culturally and linguistically diverse families

- 1 The Australian Government implement the recommendations made by the Family Law Council in its 2012 report, *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds*.
- 2 The Australian Government ensure that workers from Culturally and Linguistically Diverse-specific services are incorporated into the development of any court-based and family relationship sector-based integrated services model as recommended by Council in Recommendations 6 and 7.
- 3 The Australian Government implement a process, including through amendments to the *Family Law Act 1975*, to support the convening of a family group conferences for families from culturally and linguistically diverse backgrounds in appropriate family law matters to assist informed decision-making in the best interests of the child, to allow children to be cared for within their own families and communities wherever possible.

Recommendation 18: Court support workers

The Australian Government increase funding and resources to provide family violence trained court support workers, including workers from, or who have been appropriately trained to work with, Aboriginal and Torres Strait Islander and Culturally and Linguistically Diverse clients.

Recommendation 19: Self-represented litigants and misuse of process

- 1 The Australian Government commission research that would support an understanding of how and to what extent the intentional and unintentional misuse of legal processes, such as the request for subpoenas, and other agencies and services relevant to family breakdown (family law services and courts, the child support system, child protection systems and civil family violence protection order systems) occurs and how this may be prevented.
- 2 The Australian Government commission research that would support an understanding of the extent, experience and dynamics of self-representation in family law matters involving families with complex needs, including matters where there are family violence and mental health issues.

Recommendation 20: Crossover cases

The Australian Government commission research to examine the extent to which the client bases of state and territory police and justice systems overlap those of the

family courts to support the development of strategies to respond to these cases more effectively.

Recommendation 21: Consent parenting orders

The Australian Government commission research to examine the dynamics of matters that resolve by consent, including the extent to which the arrangements consented to respond to any matters of risk that have been raised prior to the consent orders being made, and the extent to which orders made by consent are followed by further litigation.

Recommendation 22: Legislative reform

The Australian Government instigate a review of Part VII of the *Family Law Act 1975* with a view to supporting expeditious decision-making in matters involving risk to the child or other complex characteristics.

Victorian Royal Commission into Family Violence (2016)

In February 2015 the Victorian Government launched the Royal Commission into Family Violence (Royal Commission). The Royal Commission was tasked with finding effective ways to prevent family violence, better support victim survivors, and make perpetrators accountable.

The Royal Commission's final report included 227 recommendations for improvements to the way Victoria responds to family violence. The recommendations included endorsements of, and ways to improve, existing strategies to address family violence, as well as new approaches. The key recommendations relating to federal jurisdiction are reported below.

Recommendation 69

The Victorian Government, through the Council of Australian Governments Law, Crime and Community Safety Council, pursue the expansion of resourcing for legal services including Victoria Legal Aid and community legal centres, to resolve the current under-representation by and over-burdening of duty lawyer services in family violence matters [within 12 months].

Recommendation 105

The Victorian Government, through the Council of Australian Governments, encourage the Commonwealth Government to consider a Medicare item number for family violence counselling and therapeutic services distinct from a general practitioner mental health treatment plan. In the longer term consideration should

be given to establishing a Medicare item number or a similar mechanism that will allow medical practitioners to record a family violence-related consultation or procedure and so more accurately ascertain the public cost of family violence [within 12 months].

Recommendation 108

The Victorian Government, through the Council of Australian Governments, encourage the Commonwealth Government [within 12 months] to:

- 1 Amend the National Credit Code to include family violence as a ground for financial hardship and develop an awareness campaign to ensure both consumers and credit providers are aware of their rights and responsibilities.
- 2 Work with the Australian Communications and Media Authority and its relate representative bodies and associations to amend the Telecommunication Consumer Protections Code to:
 - a. List minimum eligibility criteria for access to hardship programs,
 - b. Make family violence an express eligibility criterion,
 - c. Incorporate a requirement for specific policies for customers experiencing family violence to clarify consent requirements for payment plans when an account is jointly held,
 - d. Include grounds for splitting jointly held debt and removing an account holder's name if family violence has occurred.

Recommendation 111

The Victorian Government encourage the Australian Bankers' Association, through its Financial Abuse Prevention Working Group, to develop a family violence-specific industry guideline [within 12 months]. This should be supported by training and education for relevant banking staff, to help them understand, identify and deal with economic abuse associated with family violence.

Recommendation 129

The Secretary of the Department of Justice and Regulation liaise with the Secretary of the Commonwealth Attorney-General's Department on a continuing basis to advocate for the adoption of family law reforms that reduce fragmentation of jurisdictions in cases involving family violence.

Recommendation 131

The Victorian Government, through the Council of Australian Governments Law, Crime and Community Safety Council, pursue amendments to the *Family Law Act 1975* (Cth) [within 12 months] to:

- 1 Provides that a breach of an injunction for personal protection is a criminal offence,
- 2 Increase the monetary limit on the jurisdiction of the Magistrates' Court of Victoria to divide the property of parties to a marriage or a de facto relationship (section 46),
- 3 Make it clear that the Children's court of Victoria can make orders under Part VII of the Family Law Act in the same circumstances as the Magistrates' Court of Victoria (sections 69J and 69N).

Recommendation 134

The Victorian Government, through the Council of Australian Governments Law, Crime and Community Safety Council, pursue [within two years]:

- 1 The creation of a single database for family violence, child protection and family law orders, judgments, transcripts and other relevant court documentation that is accessible to each of the relevant state, territory and Commonwealth courts and other agencies as necessary.
- 2 The development of a national family violence risk assessment framework and tool and consistent use of such a framework or tool by state, territory and Commonwealth courts, lawyers, government and non-government service providers.

Recommendation 154

The Victorian Government, through the Council of Australian Governments, encourage the Commonwealth Government [within 12 months] to:

- 1 Ensure that the Human Resource Management Standard in the Community Care Common Standards Guide specifies that workers delivering services must have successfully completed certified training in identifying family violence and responding to it.
- 2 Review the existing Community Services Training Package courses relevant to providing ageing support to ensure that each course has a core, rather than elective, unit that adequately covers all manifestations of family violence.

Recommendation 162

The Victorian Government, through the Council of Australian Governments, encourage the Commonwealth Government to broaden the definition of family violence in the *Migrations Regulations 1994* (Cth) so that it is consistent with the *Family Violence Protection Act 2008* (Vic) and to ensure that people seeking to escape violence are entitled to crisis payments (regardless of their visa status) [within 12 months].

Recommendation 165

Faith leaders and communities establish processes for examining the ways in which they currently respond to family violence in their communities and whether any of their practices operate as deterrents to the prevention or reporting of, or recovery from, family violence or are used by perpetrators to excuse or condone abusive behaviour.

Recommendation 173

The Victorian Government, through the Council of Australian Governments Disability Reform Council, encourage the Commonwealth Government and the National Disability Insurance Agency to ensure that all disability services workers involved in assessing needs and delivering services have successfully completed certified training in identifying family violence and responding to it. This could include further developing and mandating the units on family violence and responding to suspected abuse in the Community Service training Package [within five years].

Recommendation 179

The Victorian Government encourage the National Disability Insurance Agency, in the transition to the National Disability Insurance Scheme, to provide flexible packages that are responsive to people with disabilities experiencing family violence. These packages should incorporate crisis supports and assistance for rebuilding and recovering from family violence [within two years].

Recommendation 208

The Australian Association of Social Workers amend the Australian Social Work Education and Accreditation Standards to require that a 'working with family violence' subject be required as a component of the core curriculum in all social work undergraduate degrees [within two years].

Recommendation 210

The Victorian Government encourage the Commonwealth Government to extend the HECS-HELP benefit scheme to graduates employed in specialist family

violence services and associated services (such as community legal services that provide legal services to victims of family violence) [within 12 months].

Special Taskforce on Domestic and Family Violence in Queensland–*Not Now Not Ever* Report (2015)

The Queensland Special Taskforce into domestic and family violence (the Taskforce) was announced by the Premier on 10 August 2014. The Taskforce was led by former Governor-General, The Honourable Quentin Bryce AD CVO. The final report was provided to the Premier of Queensland on 28 February 2015.

Recommendation 96

The Queensland Government establishes specialist domestic violence courts in legislation with jurisdiction to deal with all related domestic and family violence and criminal/breach proceedings.

Recommendation 97

Specialist courts should include specialist divisions or programs and utilise specialist Magistrates with specialised expertise in domestic, family and intimate partner sexual violence to improve the efficacy of responses to domestic and family violence. This Recommendation is to be considered in combination with other recommendations in this Report and in particular recommendations 116 (interpreters), 124 (court support workers), 126 (duty-lawyers) and 80 (perpetrator interventions).

Recommendation 100

The Queensland Government utilises trained and specialist circuit Magistrates, in areas where a specialist court is not feasible (e.g. rural and remote areas), with good knowledge of the relevant legislation and knowledge and understanding of domestic and family violence and its impact on victims of the violence, including children who witness the violence.

Australian Institute of Family Studies–*Evaluation of the 2012 Family Law Act Amendments* (2015)

In October 2015 the Australian Institute of Family Studies (AIFS) released a report of the evaluation of the 2012 amendments made to the *Family Law Act 1975* (Cth). The amendments were aimed at removing disincentives for families to disclose family violence to the courts and at making the safety of children the priority in family violence situations.

The report, a synthesis of the findings of three AIFS research projects,¹ indicated that the amendments were a positive step towards improving the response to family violence. However, the data also suggested that only minor improvements in screening for family violence had occurred since the reforms; that families reports feeling that the issues of family violence and child abuse were still not dealt with effectively; and that there has been minimal impact on parenting arrangement outcomes.

Productivity Commission–*Access to Justice Arrangements Inquiry (2014)*

The Productivity commission was asked to undertake an inquiry into ‘Australia’s system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law’.²

The Commission’s report, released in December 2014, proposes broad reforms to the civil justice system. In relation to family law these reforms are aimed at:

- a. Improving access to legal information and services;
- b. Reducing the time and costs associated with reaching effective resolutions;
- c. Improving collaboration between the family law system and related authorities; and
- d. Improving data collection and evaluation.

Since the release of the report the Government has implemented many of the recommendations but will not implement all recommendations.³

Australian Law Reform Commission and NSW Law Reform Commission–*Family Violence – A National Legal Response (2010)*

¹ The Responding to Family Violence Survey, the Experiences of Separated Parents Study, and the Court Outcomes Project.

² Productivity Commission, *Access to Justice Arrangements*, 2014, Volume 1, p. iv.

³ For a detailed explanation of the Australian Government response to this report see: <<https://www.ag.gov.au/LegalSystem/Documents/Government-respose-to-Productivity-Commissions-report.pdf>>.

In 2009, the federal Attorney-General referred the Australia Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC) to conduct a wide-ranging review of family violence laws and legal frameworks.

Family Violence – A National Legal response presented 186 recommendations aimed at making the legal framework seamless for those engaging with it; creating better access to legal and non-legal services for victims of family violence; ensuring legal responses are fair, safe, and just; and providing effective support for victims of family violence.

The Government considered 56 of the recommendations to be appropriate for the Commonwealth to respond to, and considered the remaining recommendations appropriate to be address by States and Territories, and national organisations.⁴

Relevant recommendations to this report are included below.

Recommendation 16: Family Law Interactions: Jurisdiction and Practice of State and Territory Courts

- 1 Family Violence legislation in each state and territory should require judicial officers making or varying a protection order to consider, under s 68R of the *Family Law Act 1975* (Cth), reviving, varying, discharging or suspending and inconsistent parenting order.
- 2 Application forms for protection orders under state and territory family violence legislation should include an option for an applicant to request the court to revive, vary, discharge or suspend a parenting order.
- 3 The *Family Law Act 1975* (Cth) should be amended to allow state and territory courts, when making or varying a protection order, to make a parenting order until further order.
- 4 Section 60CG of the *Family Law Act 1975* (Cth) – which requires a court to ensure that a parenting order does not expose a person to unacceptable risk of family violence and permits the court to include in the order any safeguards that it considers necessary for the safety of a person affected by the order – should be amended to provide that the court should give primary consideration to the protection of that person over the other factors that are relevant to determining the best interests of the child.

⁴ For a detailed explanation of the Australian Government response to this report see: <<https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Documents/AusGovernmentResponsetotheAusandNSWLRCReportFamilyViolence-anationallegalresponse.PDF>>.

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- 5 Section 68T of the *Family Law Act 1975* (Cth) should be amended to provide that, where a state or territory court, in proceedings to make an interim protection order under state or territory family violence legislation, revives, varies, or suspends a parenting order under s 68R, or makes a parenting order in the circumstances set out in Rec 16-3, that parenting order has effect until:
 - a. The date specified in the order;
 - b. The interim protection order expires; or
 - c. Further order from the court.
 - 6 State and territory family violence legislation should provide that courts not significantly diminish the standard of protection afforded by a protection order for the purpose of facilitating consistency with a parenting order.
 - 7 Application forms for protection orders under state and territory family violence legislation should include an option for applicants to indicate their preference that there should be no exception in the protection order for contact required or authorised by a parenting order made under the *Family Law Act 1975* (Cth).
 - 8 Australian courts and judicial education bodies should provide education and training, and prepare material in bench books, to assist judicial officers in state and territory courts better to understand and exercise their jurisdiction under the *Family Law Act 1975* (Cth). This material should include guidance on resolving inconsistencies between orders under the *Family Law Act* and protection orders to ensure the safety of victims of family violence.
 - 9 Australian, state and territory governments should collaborate to provide training to practitioners involved in protection order proceedings on state and territory courts' jurisdiction under the *Family Law Act 1975* (Cth).
 - 10 Application forms for protection orders under state and territory family violence legislation should clearly seek information about property orders under the *Family Law Act 1975* (Cth) or any pending application for such orders.
 - 11 State and territory family violence legislation should require courts, when considering whether to make personal property directions in protection order proceedings, to inquire about and consider any

property orders under the *Family Law Act 1975* (Cth), or pending application for such orders.

- 12 State and territory family violence legislation should provide that personal property directions made in protection order proceedings are subject to orders made by a federal family court or other court responsible for determining property disputes.
- 13 State and territory family violence legislation should provide that personal property directions do not affect ownership rights,

Recommendation 17: Family Law Interactions –Jurisdiction and Practice of Federal Family Courts

- 1 The ‘additional consideration’ in s 60CC(3)(k) of the *Family Law Act 1975* (Cth), which directs courts to consider only final or contested protection orders when determining the best interests of a child, should be amended to provide that a court, when determining the best interests of the child, must consider evidence of family violence given, or findings made, in relevant family violence protection order proceedings.
- 2 The Australian Government should initiate an inquiry into how family violence should be dealt with in property proceedings under the *Family Law Act 1975*(Cth).
- 3 The *Family Law Act 1975* (Cth) should be amended to provide separate provisions for injunctions for personal protection.
- 4 The *Family Law Act 1975* (Cth) should be amended to provide that a breach of an injunction for personal protection is a criminal offence.
- 5 The *Family Law Act 1975* (Cth) should be amended to provide that, in proceedings to make or vary a protection order under state or territory family violence legislation, a state or territory court may revive, vary, discharge, or suspend a *Family Law Act* injunction for personal protection of a party to a marriage.
- 6 Section 114(2) of the *Family Law Act 1975* (Cth), which permits a court to make an order relieving a party to a marriage from any obligations to perform marital services or render conjugal rights, should be repealed.

Recommendation 19: The Intersection of Child Protection and Family Laws

- 1 Federal, state and territory governments should, as a matter of priority, make arrangements for child protection agencies to provide investigatory and reporting services to family courts in cases involving

children's safety. Where such services are not already provided by agreement, urgent consideration should be given to establishing specialist sections within child protection agencies to provide those services.

- 2 State governments should refer powers to enable the Australian Government to make laws allowing family courts to confer parental rights and duties on a child protection agency in cases where there is no other viable and protective carer. Family courts should have the power to join a child protection agency as a party in this limited class of cases.
- 3 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.
- 4 The *Family Law Act 1975* (Cth) should be amended to give children's courts the same powers as magistrates courts.
- 5 Federal, state and territory governments should ensure the immediate and regular review of protocols between family courts, children's courts and child protection agencies for the exchange of information to avoid duplication in the hearing of cases, and that a decision is made as early as possible about the appropriate court.

Recommendation 21: Family Dispute Resolution

- 1 The Australian Government Attorney-General's Department should continue to collaborate with the family dispute resolution sector to improve standards in identification and appropriate management of family violence by family dispute resolution practitioners.
- 2 The Australian Government Attorney-General's Department should:
 - a. Promote and support high quality screening and risk assessment frameworks and tools for family dispute resolution practitioners;
 - b. Include these tools and frameworks in training and accreditation of family dispute resolution practitioners;

- c. Include these tools and frameworks in the assessment and evaluation of family dispute resolution services and practitioners; and
 - d. Promote and support collaborative work across sectors to improve standards in the screening and assessment of family violence in family dispute resolution.
- 3 The Australian Government Attorney-General's Department, family dispute resolution service providers, and legal education bodies should ensure that lawyers who practise family law are given training and support in screening and assessing risks in relation to family violence and making appropriate referrals to other services.
 - 4 The Australian Government Attorney-General's Department should continue to provide leadership, support and coordination to improve collaboration and cooperation between family dispute resolution practitioners and lawyers.
 - 5 The Australian Government Attorney-General's Department should take a comprehensive and strategic approach to support culturally responsive family dispute resolution, including screening and risk assessment processes.

Recommendation 22: Confidentiality and Admissibility

- 1 Sections 10D(4)(b) and 10H(4)(b) of the *Family Law Act 1975* (Cth) should be amended to permit family counsellors and family dispute resolution practitioners to disclose communications made during family counselling or family dispute resolution, where they reasonably believe that disclosure is necessary to prevent or lessen a serious threat to a person's life, health or safety.
- 2 The Australian Government Attorney-General's Department, in consultation with family dispute resolution practitioners and family counsellors, should develop material to guide family dispute resolution practitioner's and family counsellors in determining the seriousness of a threat to an individual's life, health or safety, and identifying when a disclosure may be made without consent. Such guidance should also encourage family dispute resolution practitioners and family counsellors to address the potential impact of disclosure on the immediate safety of those to whom the information relates, and for that purpose:
 - a. Refer those at risk to appropriate support services; and

- b. Develop a safety plan, where appropriate, in conjunction with them.
- 3 Bodies responsible for the education and training of family dispute resolution practitioners and family counsellors should develop programs to ensure that provisions in the *Family Law Act 1975* (Cth) and in state and territory child protection legislation regulating disclosure of information relating to actual or potential abuse, harm or ill-treatment of children are understood and appropriately acted on.
- 4 The Australian Government Attorney-General's Department should coordinate the collaborative development of education and training – including cross-disciplinary training– for family courts' registry staff, family consultants, judicial officers and lawyers who practise family law, about the need for screening risk assessment where a certificate has been issued under s 60I of the *Family Law Act 1975* (Cth), indicating a matter is inappropriate for family dispute resolution.

Recommendation 23: Intersections and Inconsistencies

- 4 State and territory courts should ensure that the terms of a family violence protection order indicate that participation in family dispute resolution, as ordered or directed by family court, or provided under the *Family Law Act 1975* (Cth), is not precluded by a family violence protection order.
- 5 State and territory courts should ensure that parties to family violence protection order proceeding are information that, if involved in proceedings or family dispute resolution under the *Family Law Act 1975* (Cth):
 - a. They may be exempt from requirements to participate in family dispute resolution under the *Family Law Act 1975* (Cth);
 - b. They should inform a family dispute resolution practitioner about any family violence protection orders or proceedings; and
 - c. They should inform family courts about any family violence protection orders or proceedings, where family court proceedings are initiated.
- 6 The Australian Government Attorney-General's Department and state and territory governments should ensure that family violence screening and risk assessment frameworks indicate the importance of including questions in screening and risk assessment tools about:
 - a. Past or current applications for protection orders;

- b. Part or current protection orders; and
 - c. Any breaches of protection orders.
- 7 Family dispute resolution service providers should ensure that:
- a. Tools used for family violence screening and risk assessment include questions about past and current protection orders and applications, and any breaches of protection orders; and
 - b. Parties are asked for copies of protection orders.
- 13 The Australian Government Attorney-General's Department and state and territory governments should collaborate with Family Relationship Services Australia, legal aid commissions and other alternative dispute resolution service providers, to explore the potential of resolving family law parenting and child protection issues relation to the same family in one integrated process.

Recommendation 26: Reporting and pre-trial processes

- 3 Federal, state and territory governments and relevant education, professional and service delivery bodies should ensure ongoing and consistent education and training for judicial officers, lawyers, prosecutors, police and victim support services in relation to the substantive law and the nature and dynamics of sexual assault as a form of family violence, including its social and cultural contexts.

Recommendation 29: Integrated Responses

- 2 The Australian, state and territory governments, in establishing or further developing integrated responses to family violence, should ensure ongoing and responsive collaboration between agencies and organisations, supported by:
- a. Protocols and memorandums of understanding;
 - b. Information-sharing arrangements;
 - c. Regular meetings; and
 - d. Where possible, designated liaison officers.
- 3 The Australian, state and territory governments should prioritise the provision of, and access to, culturally appropriate victim support services for victims of family violence, including enhanced support for victims in high risk and vulnerable groups.

- 4 The Australian, state and territory governments should prioritise the provision of, and access to, legal services for victims of family violence, including enhanced support for victims in high risk and vulnerable groups.

Recommendation 30: Information Sharing

- 1 The *Initiating Application (Family Law)* and *(Initiating Application (Family Law) Response* forms should clearly seek information about past and current family violence protection and child protection orders obtained under state and territory family violence and child protection legislation and past, pending or current proceedings for such orders.
- 2 The *Initiating Application (Family Law)* and *Initiating Application (Family Law) Response* forms should be amended to include a question seeking more general information, for example, 'Do you have any fears for the safety of you or your child or children that the court should know about?'
- 3 Non-publication provisions in state and territory family violence legislation should expressly allow disclosure of information in relation to protection orders and related proceedings that contains identifying information in appropriate circumstances, including disclosure of family violence protection orders to the federal family courts under s60CF of the *Family Law Act 1975* (Cth).
- 4 State and territory child protection legislation should not prevent child protection agencies from disclosing to federal family courts relevant information about children involved in federal family court proceedings in appropriate circumstances.
- 5 Federal family courts and state and territory child protection agencies should develop protocols for:
 - a. Dealing with requests for documents and information under s69ZW of the *Family Law Act 1975* (Cth); and
 - b. Responding to subpoenas issued by federal family courts.
- 6 State and territory family violence legislation should require courts exercising jurisdiction under that legislation to inquire about existing parenting orders under the *Family Law Act 1975* (Cth), or pending proceedings for such orders.
- 7 Application forms for family violence protection orders , in all states and territories including applications for variation of protection orders,

should clearly seek information about existing parenting orders under the *Family Law Act 1975* (Cth).

- 8 Federal family courts should provide state and territory courts dealing with family violence and child protection matters –and others with a proper interest in such matters, including police and child protection agencies – with access to the Commonwealth Courts Portal to ensure that they have reliable and timely access to relevant information about existing federal family court orders and pending proceedings for such orders.
- 9 The Australian, state and territory governments should ensure that privacy principles regulating the handling of personal information in each jurisdiction expressly permit the use or disclosure of information where agencies and organisations reasonably believe it is necessary to lessen or prevent a serious threat to an individual's life, health or safety.
- 10 The Australian, state and territory governments should consider amending secrecy laws that regulate the disclosure of government information to include an express exception to allow the disclosure of information in the course of a government officer's functions and duties.
- 11 State and territory family violence legislation should expressly authorise the use or disclosure of personal information for the purpose of ensuring the safety of a victim of family violence or an affected child.
- 14 The Australian, state and territory governments should develop guidelines to assist agencies and organisations working in the family violence and child protection systems to better understand the rules relation to the sharing of information.
- 16 Federal family courts, state and territory magistrates courts, police and relevant government agencies should develop protocols for the exchange of information in relation to family violence matters. Parties to such protocols should receive regular training to ensure that the arrangements are effectively implemented.
- 17 Federal family courts and state and territory child protection agencies should develop protocols for the exchange of information in those jurisdictions that do not yet have such arrangements in place. Parties to such protocols should receive regular training to ensure that the arrangements are effectively implemented.

- 18 A national register should be established. At a minimum, information on the register should:
 - a. Include interim, final and police-issued protection orders made under state and territory family violence legislation; child protection orders made under state and territory child protection legislation; and related orders and injunctions made under the *Family Law Act 1975* (Cth); and
 - b. Be available to federal, state and territory police, federal family courts, state and territory courts that hear matters related to family violence and child protection, and child protection agencies.
- 19 The national register recommended in Rec 30-18 should be underpinned by a comprehensive privacy framework and a privacy impact assessment should be prepared as part of developing the register.

Recommendation 31: Education and Data Collection

- 2 The Australian, state and territory governments should collaborate with relevant stakeholders to develop and maintain a national bench book on family violence, including sexual assault, having regard to the Commissions' recommendations in this Report in relation to the content that should be included in such a book.
- 5 The Australian, state and territory governments should collaborate in conducting a national audit of family violence training conducted by government and on-government agencies in order to:
 - a. Ensure that existing resources are best used;
 - b. Evaluate whether training meets best practice principles; and
 - c. Promote the development of best practice in training.

Recommendation 32: Specialisation

- 1 State and territory governments, in consultation with relevant stakeholders, should establish or further develop specialised family violence courts within existing courts in their jurisdictions
- 2 State and territory governments should ensure that specialised family violence courts are able to exercise powers to determine: family violence protection matters; criminal matters related to family violence; and family law matters to the extent that family law jurisdiction is conferred on state and territory courts.

- 3 State and territory governments should ensure that specialised family violence courts have, as a minimum:
 - a. Specialised judicial officers and prosecutors;
 - b. Regular training on family violence issues for judicial officers, prosecutors, lawyers and registrars;
 - c. Victim support, including legal and non-legal services; and
 - d. Arrangements for victim safety.
- 4 State and territory governments should, where possible, promote the following measures in all courts dealing with family violence matters, including courts in regional and remote communities:
 - a. Identifying and listing on the same day, protection order matters and criminal proceedings related to family violence, as well as related family law and child protection matters;
 - b. Training judicial officers in relation to family violence;
 - c. Providing legal services for victims and defendants;
 - d. Providing victim support on family violence list days; and
 - e. Ensuring that facilities and practices secure victim safety at court.

Professor Richard Chisolm –*Family Courts Violence Review* (2009)

The Chisolm review assessed ‘the appropriateness of the legislation, practice and procedures’ that apply in family violence cases, and whether improvements could be made.

The review provided 22 recommendations and included suggestions for improvements in court procedures, legislative amendments, funding for legal and non-legal services, and training/qualification requirements for family law professionals.

The Australian Government response to this review was implementing amendments to the *Family Law Act 1975* (Cth) in 2012 to change the definitions of family violence and child abuse, remove the ‘friendly parent’ provision, and promote the ‘need to protect a child from harm’ as more important than a relationship with both parents.

B. Australian Law Reform Commission - Review of the family law system

Terms of Reference

I, Senator the Hon. George Brandis QC, Attorney-General of Australia, having regard to:

- the fact that, despite profound social changes and changes to the needs of families in Australia over the past 40 years, there has not been a comprehensive review of the *Family Law Act 1975* (Cth) (the Act) since its commencement in 1976;
- the greater diversity of family structures in contemporary Australia;
- the importance of ensuring the Act meets the contemporary needs of families and individuals who need to have resort to the family law system;
- the importance of affording dignity and privacy to separating families;
- the importance of public understanding and confidence in the family law system;
- the desirability of encouraging the resolution of family disputes at the earliest opportunity and in the least costly and harmful manner;
- the paramount importance of protecting the needs of the children of separating families;
- the pressures (including, in particular, financial pressures) on courts exercising family law jurisdiction;

- the jurisdictional intersection of the federal family law system and the state and territory child protection systems, and the desirability of ensuring that, so far as is possible, children's matters arising from family separation be dealt with in the same proceedings;
- the desirability of finality in the resolution of family disputes and the need to ensure compliance with family law orders and outcomes;
- the benefits of the engagement of appropriately skilled professionals in the family law system

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to ss 20(1) of the *Australian Law Reform Commission Act 1996* (Cth), a consideration of whether, and if so what, reforms to the family law system are necessary or desirable, in particular in relation to the following matters:

- the appropriate, early and cost-effective resolution of all family law disputes;
- the protection of the best interests of children and their safety;
- family law services, including (but not limited to) dispute resolution services;
- family violence and child abuse, including protection for vulnerable witnesses;
- the best ways to inform decision-makers about the best interests of children, and the views held by children in family disputes;
- collaboration, coordination, and integration between the family law system and other Commonwealth, state and territory systems, including family support services and the family violence and child protection systems;
- whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children, and the opportunities for less adversarial resolution of parenting and property disputes;
- rules of procedure, and rules of evidence, that would best support high quality decision-making in family disputes
- mechanisms for reviewing and appealing decisions
- families with complex needs, including where there is family violence, drug or alcohol addiction or serious mental illness;
- the underlying substantive rules and general legal principles in relation to parenting and property;
- the skills, including but not limited to legal, required of professionals in the family law system;
- restriction on publication of court proceedings;

- improving the clarity and accessibility of the law; and
- any other matters related to these Terms of Reference.

I further request that the ALRC consider what changes, if any, should be made to the family law system; in particular, by amendments to the Family Law Act and other related legislation.

Scope of the reference

The ALRC should have regard to existing reports relevant to:

- the family law system, including on surrogacy, family violence, access to justice, child protection and child support; and
- interactions between the Commonwealth family law system and other fields, including family law services, the state and territory domestic and family violence, child protection, and child support systems, including the ALRC Family Violence Report 114.

Consultation

The ALRC should consult widely with family law, family relationship and social support services, health and other stakeholders with expertise and experience in the family law and family dispute resolution sector. The ALRC should produce consultation documents to ensure experts, stakeholders and the community have the opportunity to contribute to the review.

Timeframe for reporting

The ALRC should provide its report to the Attorney-General by 31 March 2019.

C. List of submissions

- 1 Australian Institute of Family Studies
- 2 Non-Custodial Parents Party (Equal Parenting)
- 3 Statewide Children’s Resource Program
- 4 Australasian Centre for Human Rights and Health
- 5 National Child Protection Alliance
- 6 Women’s Legal Services Australia
 - 6.1 Supplementary
- 7 Women’s Council for Domestic and Family Violence Services
- 8 Australian Para-legal Foundation
 - 8.1 Supplementary
- 9 Australian Pro Bono Centre
- 10 Medibank
- 11 Northern Integrated Family Violence Services
- 12 Access Community Services LTD
- 13 InTouch Multicultural Centre Against Family Violence
 - 13.1 Supplementary
- 14 Office of the Children’s eSafety Commissioner
- 15 Interrelate Limited
- 16 Women Everywhere Advocating Violence Elimination
- 17 Lone Fathers Association of Australia Inc.

- 18 Help Family Law
- 19 Australian Childhood Foundation
- 20 Divorce Partners
 - 20.1 Supplementary
 - 20.2 Supplementary
- 21 Cara House
- 22 Centacare Brisbane (FRS)
- 23 Junction Australia
- 24 Micah Projects Inc.
- 25 People with Disability Australia Incorporated
- 26 Victim Survivors' Advisory Council
- 27 Public Health Association of Australia
- 28 Baptist Care Australia
- 29 Domestic Violence Crisis Service
- 30 Queensland Domestic Violence Services Network
- 31 Australian Law Reform Commission
- 32 Sexual Assault Support Service
- 33 ACT Human Rights Commission
- 34 Safe Steps Family Violence Response Centre
- 35 One in Three Campaign
 - 35.1 Supplementary
- 36 Judicial College of Victoria
- 37 The Humanitarian Group
- 38 Queensland Law Society
- 39 National Council of Single Mothers & their Children Inc.
- 40 Sole Parent Alliance
- 41 Mallee Family Care
- 42 Council of Single Mothers and their Children, Victoria
- 43 Capricorn Community Development Association Inc.

-
- 44 Family Court of Australia
 - 44.1 Supplementary
 - 45 Stop Male Suicide Project
 - 46 Victims of Crime Assistance League (VOCAL) Inc. NSW
 - 47 Springvale Monash Legal Service
 - 48 Domestic Violence NSW
 - 49 Australian Women Against Violence Alliance (AWAVA)
 - 50 Child Protection Party Inc.
 - 51 Jannawi Family Centre
 - 52 Southern Metropolitan Region Integrated Family Violence Executive
 - 53 Family Law Practitioners of Western Australia Inc.
 - 54 Victorian Women Lawyers
 - 55 Relationships Australia
 - 55.1 Supplementary
 - 56 Magistrates' Court of Victoria
 - 56.1 Supplementary
 - 57 Castan Centre for Human Rights Law
 - 58 Good Shepherd Australia New Zealand
 - 59 Dr Tass Holmes
 - 60 Victoria Legal Aid
 - 61 ACT Policing
 - 62 Federation of Ethnic Communities' Councils of Australia
 - 63 Australian Association of Social Workers
 - 63.1 Supplementary
 - 64 Professor Patrick Parkinson AM
 - 64.1 Supplementary
 - 65 Supriya Singh, Marg Liddell, and Jasvinder Sidhu
 - 66 Gippsland Community Legal Service
 - 67 The Deli Women and Children's Centre

- 68 Eastern Domestic Violence Service Inc.
- 69 Royal Australian and New Zealand College of Psychiatrists
- 70 Community and Public Sector Union
- 71 Women's Legal Service NSW
- 72 Parents Beyond Breakup
- 73 Australia's National Research Organisation for Women's Safety (ANROWS)
 - 73.1 Supplementary
 - 73.2 Supplementary
- 74 Salvos Legal Humanitarian
- 75 Queensland Government
- 76 Hume Riverina Community Legal Service
- 77 Legal Services Commission of South Australia
- 78 National Family Violence Prevention and Legal Services Forum
- 79 For Kids Sake
- 80 Family & Relationship Services Australia (FRSA)
- 81 Women's Legal Service Queensland (WLSQ)
- 82 No To Violence / Men's Referral Service
- 83 Northern Rivers Community Legal Centre
- 84 Bravehearts
 - 84.1 Supplementary
 - Attachment 1
 - Attachment 2
- 85 Law Council of Australia
 - 85.1 Supplementary
- 86 Kay E Hull AM
- 87 Whole of Victorian Government
- 88 National Legal Aid
- 89 Attorney-General's Department
 - 89.1 Supplementary
- 90 Legal Aid NSW

-
- 91 Eastern Community Legal Centre (ECLC)
- 92 Anti-Slavery Australia
- Attachment 1
 - Attachment 2
- 93 Dr Augusto Zimmermann
- 94 Mrs Maureen Gillard
- 95 Ms Miranda Kaye
- 96 Mr Robert Lean
- 97 Dr Dang Nguyen
- 98 Ms Anita Bentata
- 99 Mr Michael Hart
- 100 Monash School of Social Sciences
- 101 Mr Philipp Bachmann
- 102 Mr Richindera Singh
- 103 Ms Anita Plesa
- 104 Ms Lara Anstie
- 105 *Name Withheld*
- 106 Professor Belinda Fehlberg
- 107 Mr Michael Calautti
- 108 Dr Renata Alexander
- 109 Northern Territory Government
- 110 Australian Brotherhood of Fathers
- 111 Ms Emma Gierschick
- Attachment 1
- 112 *Name Withheld*
- 113 *Name Withheld*
- 114 Mr James Miller
- 115 National Association of Community Legal Centres
- 115.1 Supplementary
 - Attachment 1

- 116** Department of Social Services
 - 116.1 Supplementary
- 117** Siblings Australia Inc.
- 118** Justice for Children Australia
- 119** Tas Family Compassion
- 120** *Confidential*
- 121** Alice Springs Women's Shelter
- 122** Prof Rachael Field, Ms Zoe Rathus AM, Dr Samantha Jeffries, and Dr Helena Menih
 - 122.1 Supplementary
- 123** Adjunct Professor Nahum Mushin AM
- 124** *Confidential*
- 126** Eeny Meeny Miney Mo (EMMM) Foundation
 - Attachment 1

D. List of exhibits and additional documents

List of exhibits

- 1 *Responses of specialist DFV practitioners and services to an online survey conducted by Domestic Violence NSW , Domestic Violence NSW, (Submission 48)*
- 2 *Magistrates' Court of Victoria and Children's Court of Victoria, Submission to the Royal Commission into Family Violence, June 2015, Magistrates' Court of Victoria, (Submission 56)*
- 3 *Families With Complex Needs, Magistrates' Court of Victoria Submission to the Family Law Council Terms of Reference, April 2015 , Magistrates' Court of Victoria, (Submission 56)*
- 4 *Magistrates' Court of Victoria's Response to Proposed Amendments to Family Law Act 1975 to respond to Family Violence, February 2017, Magistrates' Court of Victoria, (Submission 56)*
- 5 *National Legal Aid submission on the exposure draft Family Law Amendment (Family Violence and Other Measures) Bill 2017, Victoria Legal Aid, (Submission 60)*
- 6 *Victoria Legal Aid's Client Safety Framework quick guide, Victoria Legal Aid, (Submission 60)*
- 7 *Case note: when there is family violence in a family law litigation, Victoria Legal Aid, (Submission 60)*
- 8 *Families with Complex Needs: VLA's first submission to the Family Law Council's inquiry into Families with Complex Needs (June 2015), Victoria Legal Aid, (Submission 60)*

- 9 *Families with Complex Needs: VLA's second submission to the Family Law Council's inquiry into Families with Complex Needs (October 2015)*, Victoria Legal Aid, (Submission 60)
- 10 *'Can There Ever Be Affordable Family Law?' – Current Issues Seminar, Supreme Court of Queensland - 9 May 2017*, Professor Patrick Parkinson AM, (Submission 64)
- 11 *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems - Interim Report (2015)*, Family Law Council
- 12 *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems - Final Report (2016)*, Family Law Council
- 13 *Victorian Royal Commission into Family Violence - Report and Recommendations (2016)*, Victorian Royal Commission
- 14 *Not Now, Not Ever (2015)*, Special Taskforce on Domestic and Family Violence in Queensland
- 15 *Victorian Coroner's Court Finding - Inquest into the Death of Luke Geffrey Batty*, Victorian Coroner
- 16 *Safety First in Family Law - A Five-Step Plan (2016)*, Women's Legal Services Australia
- 17 *Evaluation of the 2006 Family Law Reforms (2009)*, Australian Institute of Family Studies
- 18 *Evaluation of the 2012 Family Violence Amendments (2015)*, Australian Institute of Family Studies
- 19 *Family Violence - a national legal response, ALRC Report 114/NSWLRC Report 128 (2010)*, Australian Law Report Commission and New South Wales Law Reform Commission
- 20 *Abbey's Project - paper on the family law system (2016)*, Bravehearts
- 21 *Speech by Justice Alstergren, Chief Judge of the Federal Circuit Court of Australia*, Justice William Alstergren

List of additional documents

Correspondence

- 1 Advice from the Attorney-General, dated 3 August 2017
- 2 Correspondence from the Chief Executive Officer and acting Principal Registrar of the Family Court of Australia, dated 17 August 2017

E. List of public hearings

Tuesday, 30 May 2017 – Canberra

Law Council of Australia

- Ms Wendy Kayler-Thomson, Chair, Family Law Section
- Dr Natasha Molt, Senior Legal Adviser

Tuesday, 13 June 2017 – Canberra

Attorney-General's Department

- Ms Esther Bogaart, Acting Assistant Secretary, Family Violence Taskforce, Civil Justice Policy and Programmes Division
- Mr Cameron Gifford, First Assistant Secretary, Civil Justice Policy and Programmes Division
- Mr Michael Pahlow, Assistant Secretary, AusCheck
- Ms Ashleigh Saint, Acting Assistant Secretary, Family Law Branch
- Ms Sara Samios, Acting Assistant Secretary, Legal Assistance Branch

Department of Social Services

- Dr Roslyn Baxter, Group Manager, Families Group

Monday, 24 July 2017 – Melbourne

Bravehearts

- Ms Hetty Johnston AM, Founder and Executive Chair

Ms Rosie Batty

Women's Legal Services Australia

- Ms Joanna Fletcher, Chief Executive Officer
- Ms Helen Matthews, Director, Legal and Policy

National Family Violence Prevention and Legal Services Forum

- Ms Antoinette Braybrook, National Convenor
- Ms Laura Vines, Manager, Strategy and Policy

Legal Aid Victoria

- Ms Gayathri Paramasivam, Associate Director, Family Law
- Ms Emma Smallwood, Program Manager, Family Violence

Springvale Monash Legal Centre

- Mrs Ashleigh Newnham, Senior Community Development Worker
- Ms Kristen Wallwork, Executive Director

No To Violence / Men's Referral Service

- Mr Michael Brandenburg, Strategy Manager

Australian Association of Social Workers

- Ms Christine Craik, National Vice President
- Ms Angela Scarfe, Professional Officer (Social Policy and Advocacy)

InTouch Multicultural Centre Against Family Violence

- Mrs Alla Epelboym, Legal Centre Manager
- Ms Faye Spiteri, Chair of the Board
- Mrs Luba Tanevski, Migration Agent

Tuesday, 25 July 2017 – Melbourne

The Hon. Professor Marcia Neave AO

Judicial College of Victoria

- Ms Jane Mevel, Manager, Research and Policy
- Ms Kristie Dunn, Education Program Manager, Family Violence

Monday, 31 July 2017 – Sydney

Australia's National Research Organisation for Women's Safety

- Dr Heather Nancarrow, Chief Executive Officer
- Ms Michele Robinson, Director, Evidence to Action

Interrelate Limited

- Ms Patricia Occelli, Chief Executive Officer
- Mr Matthew Lawrence Stubbs, Head of Research and Service Development
- Ms Robyn Parker, Senior Manager, Research and Evaluation
- Mr Ross Butler, Senior Manager, Family Dispute Resolution

National Association of Community Legal Centres

- Mr Nassim Arrage, Chief Executive Officer

Australian Pro Bono Centre

- Mr John Corker, Chief Executive Officer

Clayton Utz

- Mr David Hillard, Pro Bono Partner

Divorce Partners Pty Ltd

- Mr David Eagle, Chief Executive Office
- Mr Mark Jones, Partner

Gilbert + Tobin

- Ms Anne Cregan, Partner
- Ms Michelle Hannon, Partner

Lander & Rogers

- Ms Rachell Davey, Special Counsel
- Ms Joanna Renkin, Partner

Law Society of New South Wales

- Ms Nerida Harvey, Principal Solicitor Community Referral Service

People with Disability Australia Incorporated

- Ms Meredith Lea, Policy Officer, Violence Prevention
- Mrs Leonie Hazelton, Individual Advocate

- Ms Paulina Gutierrez, Individual Advocate

Jannawi Family Centre

- Ms Biljana Milosevic, Director

Tuesday, 8 August 2017 – Canberra

Relationships Australia

- Dr Andrew Bickerdike, Chair of the Board
- Ms Alison Brook, National Executive Officer
- Ms Emily McDonald, General Manager

Lone Fathers Association of Australia Incorporated

- Mr Barry Williams

Tuesday, 22 August 2017 – Alice Springs

Alice Springs Women's Shelter

- Mrs Dianne Gipey, Chief Executive Officer
- Ms Sophie Broughton-Cunningham, Court Support Officer

Central Australian Aboriginal Family Legal Unit

- Ms Kim Raine, Legal Practitioner

Central Australian Aboriginal Legal Aid Service

- Ms Kirsty Bloomfield, Aboriginal Legal Support Officer
- Mr Matthew Thomas Bonson, Law and Project Manager
- Mr Simon Philip Caldwell, Family Legal Officer
- Miss Maxine Carlton, Aboriginal Field Officer
- Mr Glen Dooley, Principal Legal Officer

Central Australian Women's Legal Service

- Ms Janet Taylor, Managing Principal Solicitor
- Ms Anna Ryan, Senior Lawyer

Tuesday, 5 September 2017 – Canberra

One in Three Campaign

- Mr Greg Andresen, Senior Researcher
- Mr Andrew Humphreys, Social Worker

Tuesday, 17 October 2017 – Canberra

Professor Patrick Parkinson AM, Private capacity

Attorney-General's Department

- Mr Cameron Gifford, First Assistant Secretary, Civil Justice Policy and Programmes Division
- Ms Kathleen Denley, Assistant Secretary, Legal Assistance Branch
- Ms Sara Samios, Acting Assistant Secretary, Legal Assistance Branch
- Ms Esther Bogaart, Acting Assistant Secretary, Family Violence Taskforce
- Ms Ashleigh Saint, Acting Assistant Secretary, Family Law Branch

Department of Social Services

- Dr Roslyn Baxter, Group Manager, Families Group

Tuesday, 24 October 2017 – Canberra

Ms Zoe Rathus AM

Dr Samantha Jeffries

Dr Helena Menih

Parents Beyond Breakup

- Mr Peter Nicholls, Chief Executive Officer
- Mr Terry Valentine, Chairman
- Ms Amanda Sillars, MIDS Facilitator

F. Questionnaire findings

To facilitate input from individual members of the community, the Committee made available a questionnaire, which could be completed online or in hard copy. The questionnaire was launched in March 2017 and remained open until the end of September 2017. The questionnaire was completed by 5,490 respondents.

The questionnaire consisted of 65 questions which were a mix of closed and open questions, most of which were non-compulsory. This appendix presents a selection of quantitative results from the questionnaire. Some responses to the open text questions have been thematically integrated throughout the report.

Demographic Data

The majority of respondents were aged between 35 and 44 years, and identified as female. 3.65 per cent of respondents identified as Aboriginal or Torres Strait Islander. The majority of respondents reported speaking English as a first language, and residing in Australia.

Figure F.1 Age of Respondents

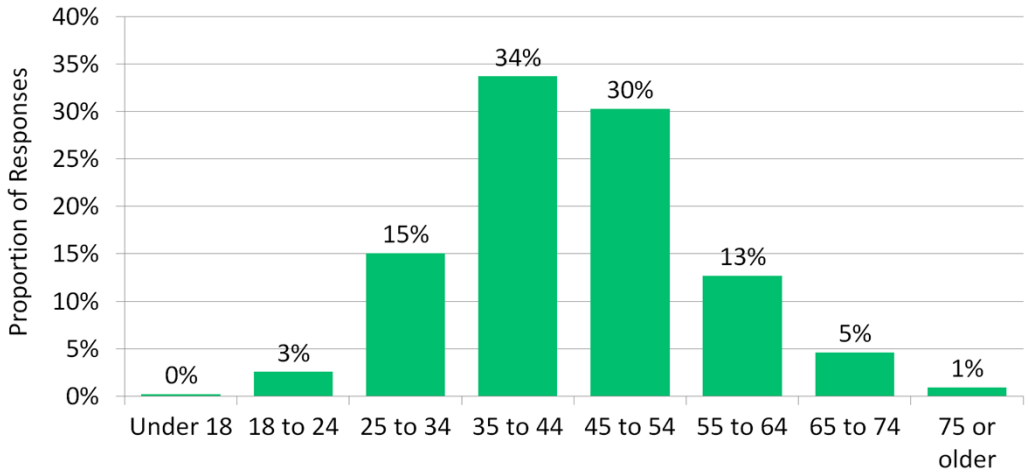


Figure F.2 Gender of Respondents

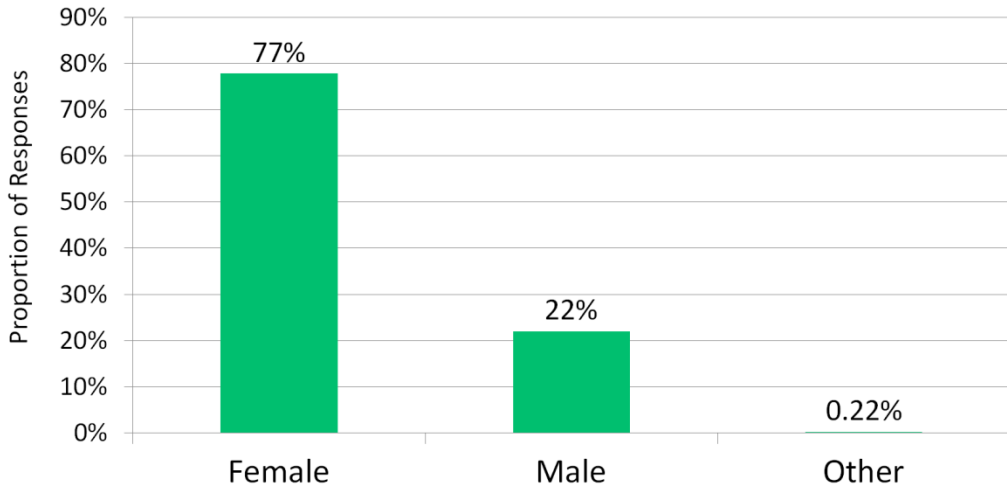


Table F.1 Aboriginal or Torres Strait Islander Status

Are you Aboriginal or Torres Strait Islander?	Responses	Percentage
Yes	182	3.65%
No	4,799	96.35%
Total	4981	100%

Table F.2 English as a first language

Is English your first language?	Responses	Percentage
Yes	4,689	94.69%
No	263	5.31%
Total	4,952	100%

Table F.3 Residential Status

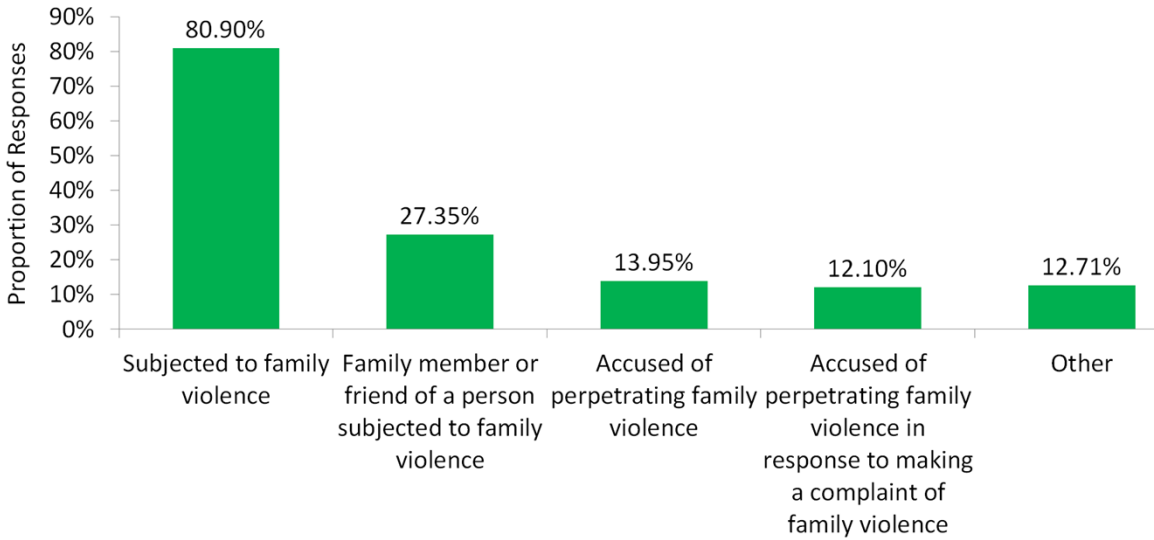
Do you live in Australia?	Responses	Percentage
Yes	4,901	98.59%
No	70	1.41%
Total	4971	100%

Experience with family violence

The majority of respondents reported having experience with family violence, or having a family member or friend who has experienced family violence.

Table F.4 Do you have experience with family violence?

	Response	Percentage
Yes	4601	91.69%
No	417	8.31%
Total	5018	100%

Figure F.3 What is the nature of your experience of family violence?

NB: Respondents were able to choose multiple answers, thus percentages will not total 100.

Involvement of Children

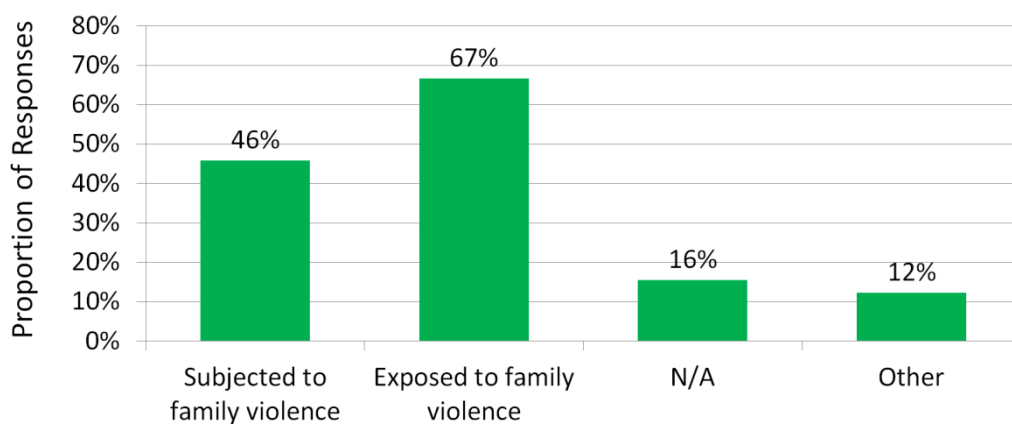
Over three quarters of respondents reported having care of one or more children. Further, three quarters of respondents also reported that the children had experienced family violence at some point. The majority of children had been exposed to family violence, or subjected to family violence personally. Interestingly, many respondents reported that their children had not been involved in the child protection system.

Table F.5 Do you care for children?

	Responses	Percentage
Yes	3,780	76.78%
No	1,143	23.22%
Total	4,923	100%

Table F.7 Have these children had experience with family violence?

	Responses	Percentage
Yes	3044	75.97%
No	963	24.03%
Total	4,007	100%

Figure F.4 What is the nature of the children's experience of family violence?**Table F.8 Have any of these children been involved in the child protection system?**

	Responses	Percentage
Yes	914	22.90%
No	3077	77.10%
Total	3991	100%

Current and previous matters before a court

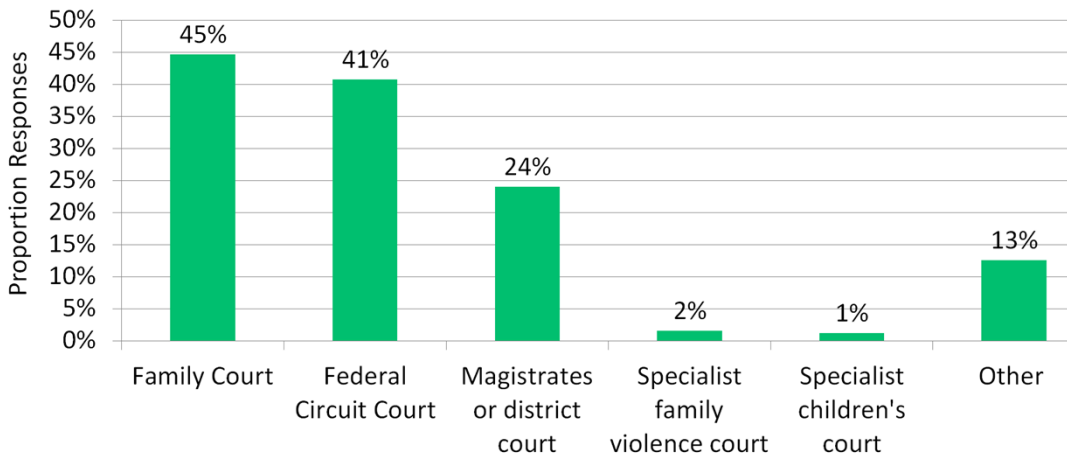
Approximately 30 per cent of respondents reported having current family law, child support or domestic violence matters presently before a court. The majority of these matters were pending before the Family Court of Australia or the Federal Circuit Court.

Over half of respondents recorded that they have been involved in previous matters before a court. Of these, the majority appeared before a Magistrates or district court.

Table F.9 Do you have any family law, child support or domestic violence matters currently pending before a court?

	Responses	Percentage
Yes	1449	30.31%
No	3331	69.69%
Total	4780	100%

Figure F.5 Before which court is your matter pending?

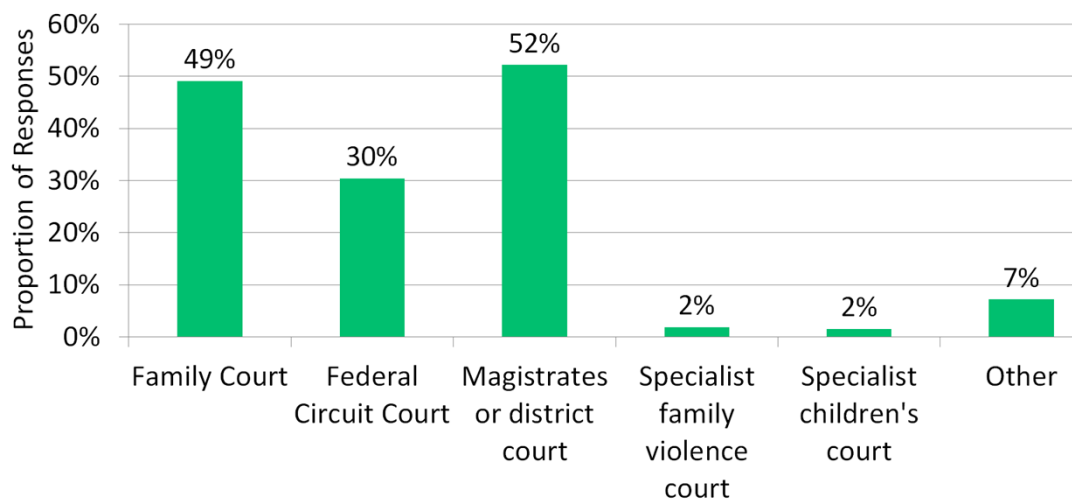


NB: Respondents were able to choose multiple answers, thus percentages will not total 100.

Table F.10 Have you previously had any family law, child support, or family violence matters before a court?

	Responses	Percentage
Yes	2824	59.77%
No	1901	40.23%
Total	4725	100%

Figure F.6 Before which court did your matter appear?

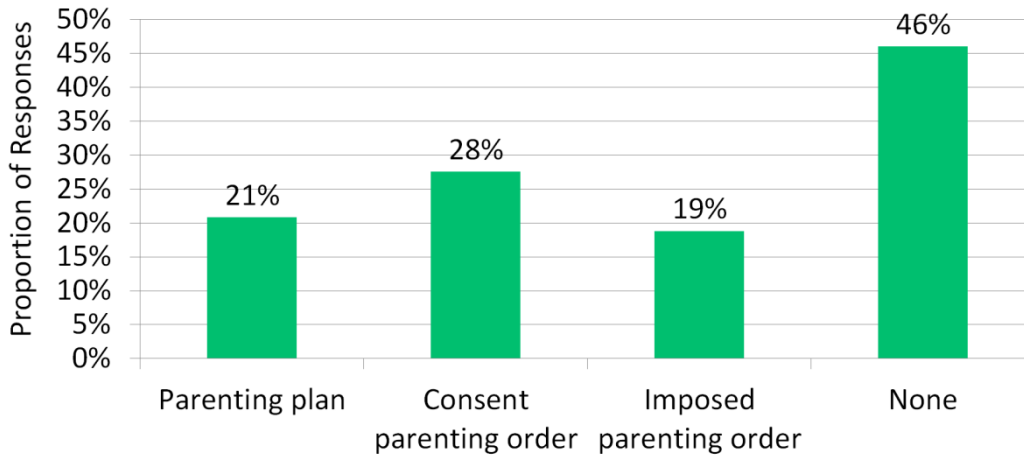


NB: Respondents were able to choose multiple answers, thus percentages will not total 100.

Parenting plans and child support assessments

Approximately one quarter of respondents had entered into a parenting plan or a parenting order by consent. Over half of respondents reported receiving a child support assessment, and over 40 per cent of respondents reported citing family violence as an issue in these assessments.

Figure F.7 Have you entered into a parenting plan or had any parenting orders?



NB: Respondents were able to choose multiple answers, thus percentages will not total 100.

Table F.11 Have you had a child support assessment?

	Responses	Percentage
Yes	2796	60.48%
No	1927	39.52%
Total	4623	100%

Table F.12 When applying for your child support assessment, did you cite family violence as an issue?

	Responses	Percentage
Yes	1426	41.26%
No	2030	58.74%
Total	3456	100%

Property or spousal maintenance orders

Most respondents had not, and were not, seeking property or spousal maintenance orders. However, for those that had or were seeking orders, 25 per cent of these were property orders.

Table F.13 Have you had or are you seeking a property order or spousal maintenance order?

	Responses	Percentage
Property order	1091	25.53%
Spousal maintenance order	276	6.46%
Neither	3114	72.86%
Total	4274	104.85%

NB: Respondents were able to choose multiple answers, thus percentages will not total 100.

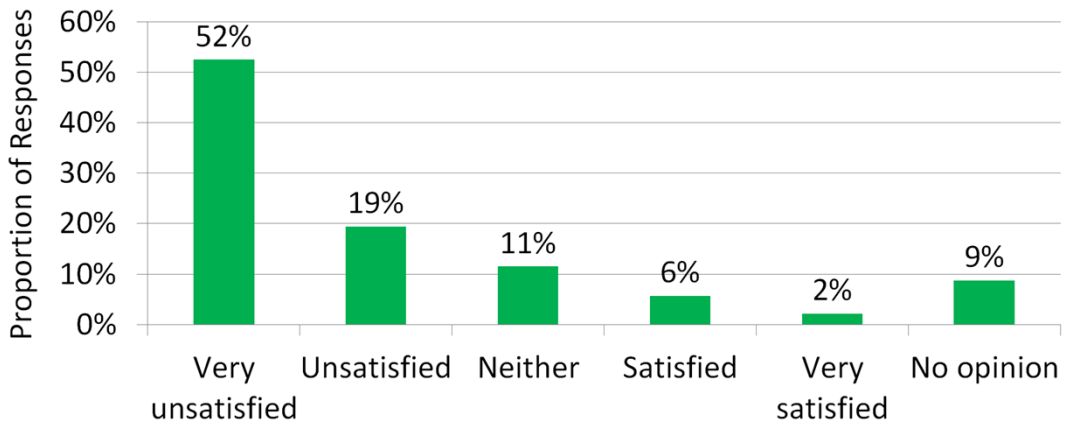
Family or alternative dispute resolution

Over half of the respondents reported having undertaken some form of formal family or alternative dispute resolution. However, less than 8 per cent of respondents were satisfied with the family or alternative dispute resolution process.

Table F.14 Have you undertaken any formal family or alternative dispute resolution?

	Responses	Percentage
Yes	2374	57.59%
No	1748	42.41%
Total	4122	100%

Figure F.8 How satisfied were you with the process of family or alternative dispute resolution?



Court appearances

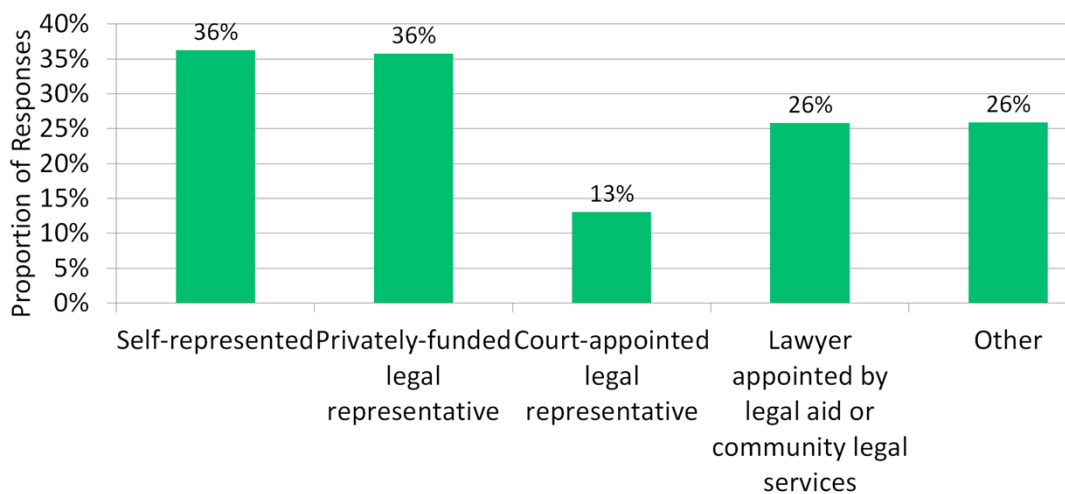
Over half of respondents reported that they had appeared before a court in relation to a family violence matter. In the majority of these cases the respondent was self-represented or represented by a privately funded legal representative. Interestingly, respondents reported that the 'other' party was mostly represented by a privately funded legal representative.

Responses to the questionnaire also indicate significant safety concerns for respondents regarding being in the courtroom. Despite this, only 24 per cent of respondents report being offered a safety plan in relation to their court appearance.

Table F.15 Have you ever appeared before a court in relation to a family violence matter?

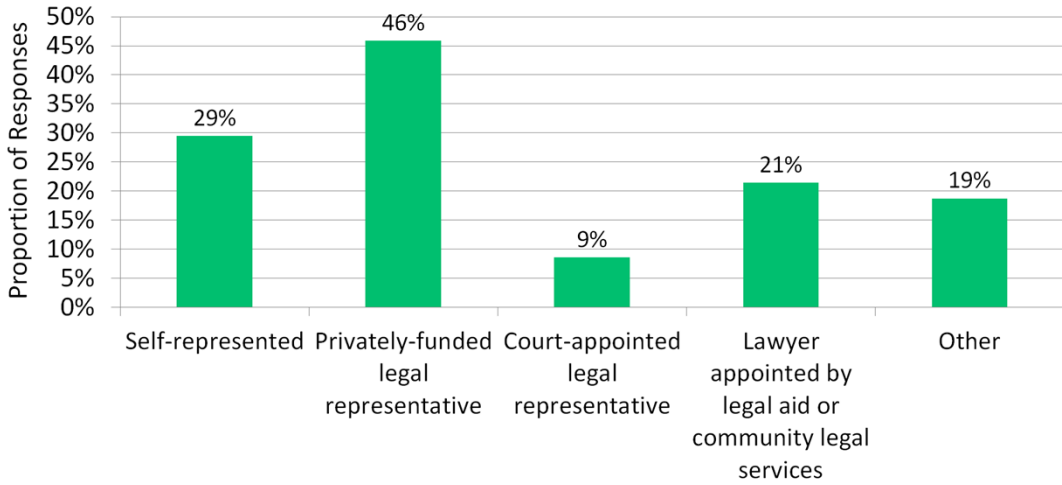
	Responses	Percentage
Yes	2379	56.82%
No	1808	43.18%
Total	4187	100%

Figure F.9 How were you represented in court?



NB: Respondents were able to choose multiple answers, thus percentages will not total 100.

Figure F.10 How was the other party represented?



NB: Respondents were able to choose multiple answers, thus percentages will not total 100.

Figure F.11 How safe did you feel during court proceedings?

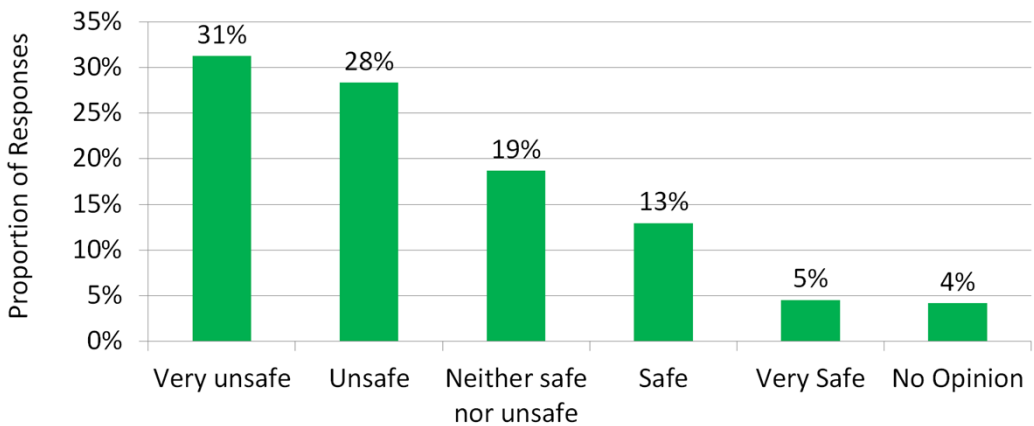


Table F.16 Were you offered a safety plan in relation to your court appearance?

	Responses	Percentage
Yes	638	24.75%
No	1940	75.25%
Total	2578	100%

Self-representation

High number of respondents who reported representing themselves in court, expressed dissatisfaction with the support and assistance provided by the courts as well as support services. However, more respondents reported being 'satisfied' or 'very satisfied' with support services, as compared to courts.

Figure F.12 If you represented yourself in court, were you satisfied with the assistance provided to you from the courts?

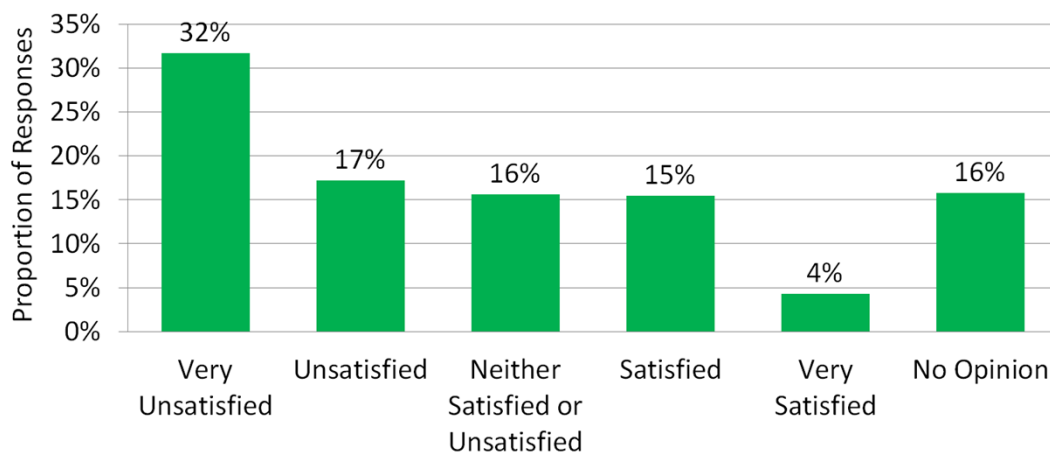
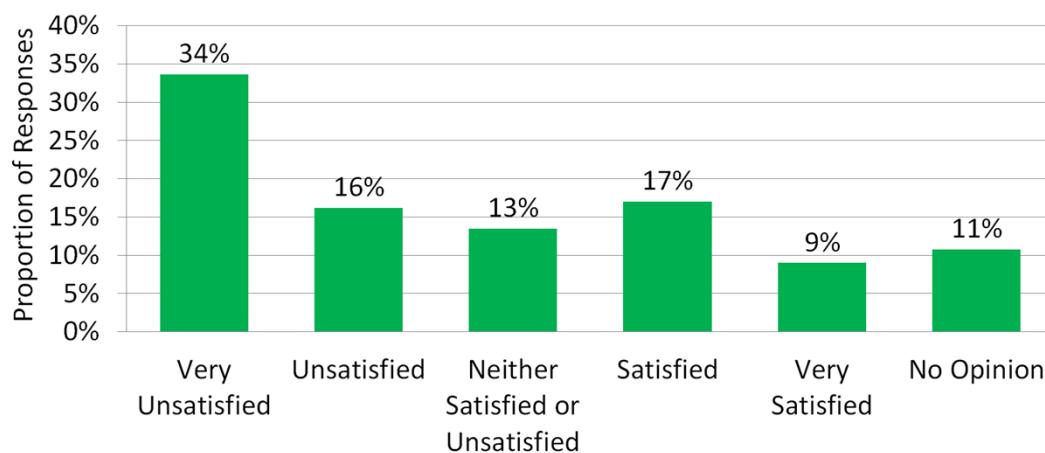


Figure F.13 If you represented yourself in court, were you satisfied with the assistance provided to you from support services?



Cross-examination

Just under half of respondents to the questionnaire stated that they had been subject to cross-examination at court. However, the majority of respondents were not cross-examined by the person accused of perpetrating family violence. Similarly, most respondents were not required to cross-examine the person accused of family violence. Regardless, 72 per cent of respondents expressed dissatisfaction with the way the court had handled the cross-examination process.

Table 6. Were you subjected to cross-examination at court?

	Responses	Percentage
Yes	1018	45.96%
No	1197	54.04%
Total	2215	100%

Table F.17 Were you directly cross-examined by a person accused of perpetrating family violence against you or a family member?

	Responses	Percentage
Yes	381	17.79%
No	1761	82.21%
Total	2142	100%

Table F.18 Were you required to directly cross-examine a person accused of perpetrating family violence against you or a family member?

	Responses	Percentage
Yes	266	12.52%
No	1858	87.48%
Total	2124	100%

Table F.19 Were you satisfied with how the cross-examination process was handled by the court?

	Responses	Percentage
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Yes	357	27.27%
No	952	72.73%
Total	1309	100%

Court Orders

The majority of respondents had obtained a court order in relation to family violence, in an attempt to keep them or their children safe. 27 per cent of respondents reported having had a court order brought against them.

Table F.20 Have you obtained any type of court order relation to domestic or family violence for your own safety or that of your children?

	Responses	Percentage
Yes	1611	72.57%
No	609	27.43%
Total	2220	100%

Table F.21 Has any court order been granted against you as a result of domestic or family violence?

	Responses	Percentage
Yes	608	27.65%
No	1591	72.35%
Total	2199	100%

Multi-jurisdictional issues

Almost half of respondents had legal proceedings occurring in more than one court and, of those, 80 per cent felt unsatisfied with the coordination between courts.

Table F.22 In relation to any family violence matters, have you been involved in legal proceedings in more than one court?

	Responses	Percentage
Yes	1078	48.89%

No	1127	51.11%
Total	2205	100%

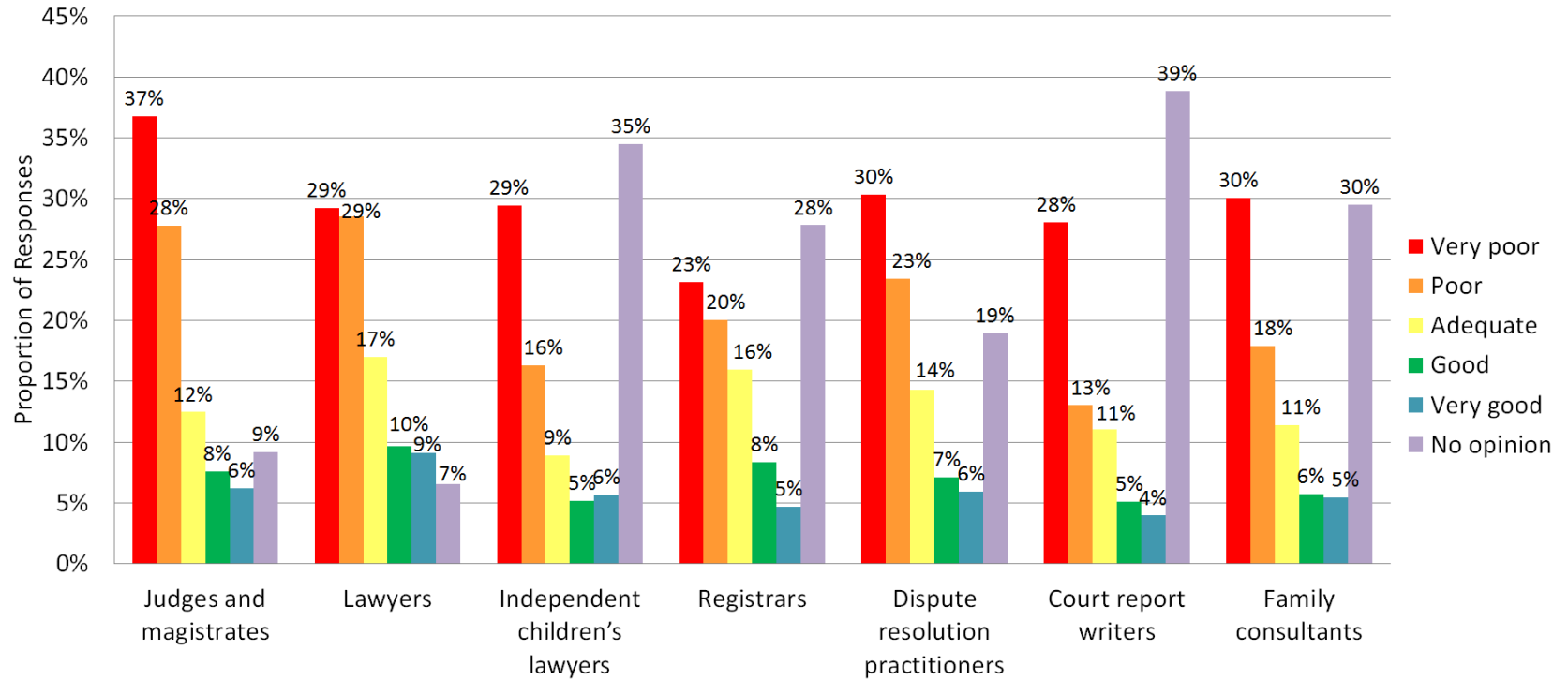
Table F.23 Were you satisfied with the level of coordination between the different courts?

	Responses	Percentage
Yes	244	19.84%
No	986	80.16%
Total	1230	100%

Capacity of family law professionals

Respondents rated most family law professionals as having very poor understanding of family violence. Less than 10 per cent of respondents rated any category of family law professionals as having more than an adequate level of understanding of family violence.

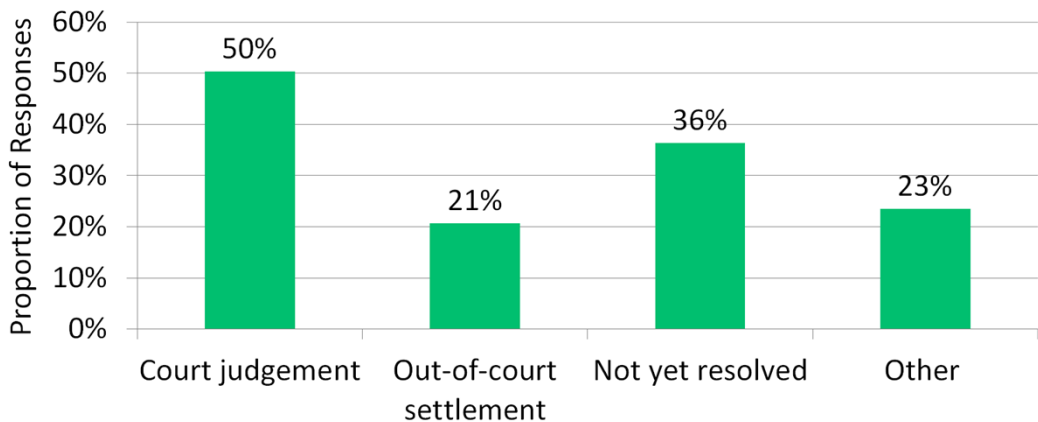
Figure F.14 Respondent's ratings of the level of understanding of family law professionals in relation to family violence.



Progress of matters before court

Approximately half of respondents reported that their matters were resolved by court judgement. Further, over 30 per cent of respondents indicated that one or more of their matters were not yet resolved, and were the subject of further proceedings.

Figure F.15 In relation to any of the matters in which you have been involved, how were these matters resolved?



NB: Respondents were able to choose multiple answers, thus percentages will not total 100.

Table F.24 Once finalised, were any of your matters the subject of further proceedings?

	Responses	Percentage
Yes	923	37.64%
No	1529	62.36%
Total	2452	100%

Financial Recovery

The majority of respondents reported suffering financial hardship as a result of family violence.

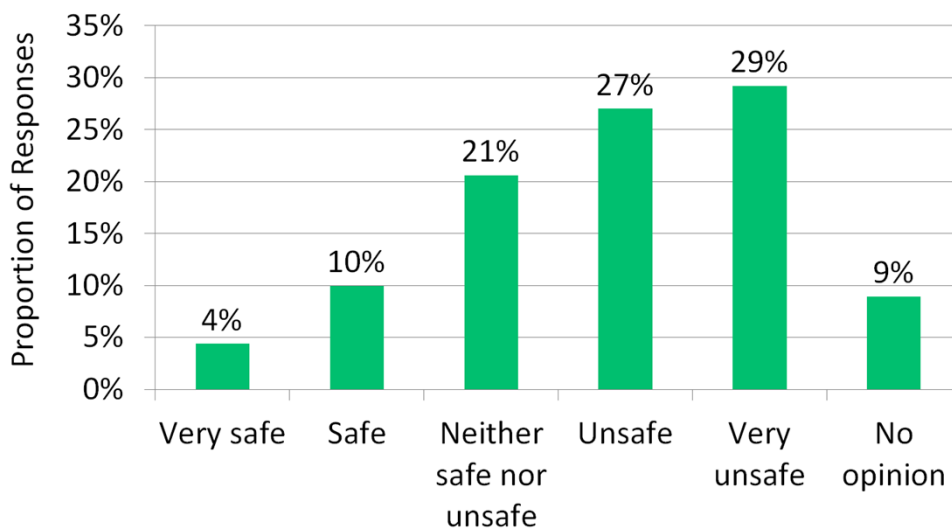
Table F.25 Have you suffered financial hardship as a result of family violence?

	Responses	Percentage
Yes	3004	84.79%
No	539	15.21%
Total	3543	100%

Safety in the family law system

The majority of respondents reported that they felt unsafe or very unsafe within the family law system. Less than 15 per cent of respondents had felt safe within the family law system.

Figure F.16 How safe did you feel, overall, during your interaction with the family law system?



Additional Comments by Labor Members

In 1975, the Family Law Act was described by then Prime Minister Gough Whitlam as ‘the most progressive and extensive social reform achieved’ during his term of Government. He said broken families under the new regime would be ‘handled in an atmosphere now of dignity and compassion, taking full account of the welfare of children and the interests and feelings of the partners’.

After more than forty years, the family law system is now struggling under the pressure of under-resourcing, the scourge of family violence, complex issues such as drug and alcohol abuse and mental illness, along with litigants appearing unrepresented in the courts. Where family violence is present, victims are remaining in unsafe situations, often with their children, while waiting for judges to find time in their over-burdened dockets to resolve their dispute. Australian families are suffering.

In addition to the commentary and recommendations outlined in the Majority Report of the Committee, Labor members wish to make the following additional comments:

Resourcing the Family Law System

Many of the difficulties experienced by Australian families seeking to resolve their family disputes are due to under-resourcing of the family law system. Delays of sometimes more than two years are being experienced in the Family Court and the Federal Circuit Court before families can have their dispute heard.¹

¹ Ms Joanna Fletcher, Chief Executive Officer, Women’s Legal Service Victoria, Women’s Legal Services Australia, *Committee Hansard*, Melbourne, 24 July 2017, p. 17.

Delays in replacing judges in a timely manner have caused additional backlogs in the Family Court and the Federal Circuit Court. It is completely unacceptable that it took 560 days to replace a Sydney Family Court judge, more than twelve months to replace a Brisbane Family Court judge, and more than seven months to replace a Federal Circuit Court judge in Newcastle. These delays are continuing to cause harm to families and children across Australia.

The family law system and support services should be properly resourced to ensure Australian families have timely access to justice so they can move on with their lives safely.

Family Law Reform

The Australian Law Reform Commission's review of the family law system is welcome. Labor members look forward to considering the recommendations when the review is completed.

However, Labor members are concerned about Government reforms that are being implemented before this review is complete. Reforms should be implemented in a transparent, considered manner.

During this Inquiry, there were significant contradictions regarding the Government's proposed Parenting Management Hearings. The evidence about the proposed model changed dramatically over the course of the Inquiry and still appears to have not been settled.

In June, the Committee was told that the Parenting Management Hearing pilot would not deal with cases where family violence is present.² In October, the architect of this model, Professor Patrick Parkinson, was asked about the same issue and stated 'Absolutely it ought to be dealing with cases involving family violence. It would be an extraordinary mistake if it didn't, because that's 60 per cent or more of the workload'.³

However, on the same day, the Committee was told by the Department that there could be no 'final comment on how family violence would be dealt with' and 'that is a final decision yet to be made by government'.⁴

² Ms Saint, Acting Assistant Secretary, Family Law Branch, Attorney-General's Department, *Committee Hansard*, Canberra, 13 June 2017, p. 7.

³ Professor Patrick Parkinson, *Committee Hansard*, 17 October 2017, p. 6.

⁴ Ms Saint, Acting Assistant Secretary, Family Law Branch, Attorney General's Department and Mr Gifford, First Assistant Secretary, Civil Justice Policy and Programs Division, Attorney-General's Department, *Committee Hansard*, Canberra, 17 October 2017, p. 10.

In response to a Question in the Senate on 6 December, the Attorney-General asserted that if there are family violence allegations raised in Parenting Management Hearings, those matters will be referred back to the courts.⁵

Labor is concerned about this seeming lack of agreement about the fundamental guiding principles underpinning the reform.

Family law reform should be a considered process. This reform will have enormous impact on the families that are involved in the pilot.

Labor members cannot give unqualified support to a reform that is clearly in its developmental infancy, is yet to be implemented and, as such, lacks any formal evaluation.

We seek further detail from the Government on the development, implementation and evaluation of this program.

There was also conflicting evidence given to the Committee about the impact of less formal proceedings for families where family violence is present.

For instance, Dr Nancarrow from Australia's National Research Organisation for Women's Safety, said that the 'adversarial system does not seem to be very effective where you have a power imbalance'.⁶ However, Ms Rathus from the Griffith Law School, said that 'one of the things we do know is that informality can work to the disadvantage of women who have experienced family violence'.

The rule of law underpins our Australian legal system. It enshrines the principles of a fair trial, access to justice, the presumption of innocence and equality before the law. Australia's legal system is adversarial. The adversarial system of justice ensures that evidence is tested and an impartial adjudicator will make a decision based on facts which are proven.

The Australian Law Reform Commission (ALRC) has been tasked with a review of the family law system. One of the terms of reference is to inquire whether the adversarial court system offers the best way to support the safety of families and resolve matters in the best interests of children.

Labor members support this review and will be interested in any recommendations made by the Commission. However, the Attorney-General has said that the Government is open to 'radical change'.⁷ Labor members consider it

⁵ Senate Hansard, 6 December 2017.

⁶ Dr Nancarrow, Chief Executive Officer, Australia's National Research Organisation for Women's Safety, *Committee Hansard*, Sydney, 31 July 2017, p. 6.

⁷ Attorney-General, Senator the Hon. George Brandis, speech, *Joint swearing-in ceremony to welcome The Hon Chief Justice John Pascoe AC CVO, as Chief Justice of the Family Court of Australia, and The*

would be premature for any 'radical change' to be implemented by the Government prior to the completion of the ALRC review.

Judges Appearing Before Parliamentary Committees

It is vitally important that Committees can freely hear from all stakeholders when inquiring into important issues affecting Australian families. Labor members were disappointed that this Committee was prevented from inviting the Heads of Jurisdiction to give evidence in person on the basis of unprecedented advice from the Attorney General.⁸

This approach represents a drastic and detrimental departure from a time-honoured and effective practice of the Parliament.

Judges have previously appeared as witnesses before House committees on a voluntary basis. They have given evidence about matters of policy and law.⁹

The Chief Justice of the Family Court and the Chief Judge of the Federal Circuit Court would each have unique perspectives about how the family courts could better assist families and children. This Committee has not had the benefit of those opinions being invited.

Labor members recommend that the Committee and the Attorney-General seriously reconsider their position on this issue.

Conclusion

Labor notes the government's recent announcement that it plans to make sweeping reforms to the family law system in the coming year. We also note the short time-frame for this reform, with the deadline understood to be Chief Justice Pascoe's retirement date in December 2018.

Given the complexity of the issues in family law, and the vulnerability of those people who are involved in the family law system, it is imperative that this reform process is not rushed and any changes are evidence-based.

Hon Chief Judge William Alstergren, as chief judge of the Federal Circuit Court of Australia and a judge of the Family Court, 20 October 2017.

⁸ Additional Documents – Advice from the Attorney-General, dated 3 August 2017
https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Additional_Documents

⁹ House of Representatives, 'Parliamentary Committees', *House of Representatives Practice*, 6th edition, 2012, p. 682.

We call on the government to proceed cautiously, and ensure any proposed changes are done in careful consultation with Labor, other political parties, stakeholders, advocacy groups and users of the court system.

It is undeniable that some changes may need to be made. But this change should not be ideologically driven or made at the behest of special interest groups.

Importantly, major change cannot be made without serious consideration of resourcing issues. Much of the strain that is currently placed on the Family Court system is due to lack of proper resourcing and failure to replace retired judges. This issue must be considered alongside any reform.

Ms Sharon Claydon MP

Deputy Chair

Dr Mike Freeland MP

Member

Ms Emma Husar MP

Member