

21 May 2018

The Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
Sydney NSW 2001  
By email: [info@alrc.gov.au](mailto:info@alrc.gov.au)

Dear Sir/Madam,

**Re: Australian Law Reform Commission's Family Law Review - Issues Paper**

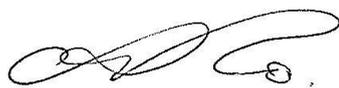
I write to endorse the submission of our peak body, the National Aboriginal Family Violence Prevention Legal Services Forum ('National FVPLS Forum') to the Australian Law Reform Commission's Family Law Review Issues Paper.

Djirra (formerly the Aboriginal Family Violence Prevention and Legal Service Victoria) would be pleased to consult directly with the Australian Law Reform Commission as appropriate throughout the next stages of the inquiry.

For the Commission's reference we attach a description of our organization and the work we do as a family violence specialist, Aboriginal Community Controlled Organisation with state-wide reach across Victoria.

Should you have any questions, please do not hesitate to contact our Manager, Strategy and Policy, Laura Vines, at [lvines@djirra.org.au](mailto:lvines@djirra.org.au).

Kind Regards



**Antoinette Braybrook**  
CEO  
Djirra



## About Djirra

Established over 15 years ago, Djirra is an Aboriginal Community Controlled Organisation which provides culturally safe and holistic assistance to Aboriginal victims/survivors of family violence and sexual assault.

Djirra provides frontline legal assistance and early intervention/prevention, including through providing community legal education to the Aboriginal community, the legal, Aboriginal and domestic violence sectors. With support from philanthropic sources, Djirra also undertakes policy and law reform work to identify systemic issues in need of reform and advocate for strengthened law and justice outcomes for Aboriginal victims/survivors of family violence and sexual assault.

Djirra is open to Aboriginal men, women and children who have experienced or are at risk of family violence or sexual assault, as well as non-Aboriginal carers of Aboriginal children who are victims/survivors of family violence. Djirra is not gender specific, however at last count 93% of our clients were Aboriginal women. In 2016-17, Djirra provided 1265 legal services and 515 non-legal support services to Aboriginal victims/survivors across Victoria. Our early intervention and prevention programs reached 990 women across the State.

Djirra's legal services include advice, court representation and ongoing casework in the areas of: family violence intervention orders; child protection; family law; victims of crime assistance; and, where resources permit, other civil law matters connected with a client's experience of family violence such as: police complaints, housing, Centrelink and infringement matters.

Djirra has a holistic, intensive client service model where each client is assisted by a lawyer and paralegal support worker to address the multitude of interrelated legal and non-legal issues our clients face. Djirra's paralegal support workers, many of whom are Aboriginal women, provide additional emotional support, court support and referral to ensure our clients are linked into culturally safe counseling and support services to address the underlying social issues giving rise to the client's legal problem and experience of family violence. This may include for example assistance with housing, drug and alcohol misuse, social and emotional wellbeing, parenting, financial and other supports.

As an Aboriginal Community Controlled Organisation, Djirra is directed by an Aboriginal Board and has a range of systems and policies in place to ensure we provide culturally safe services in direct response to community need.

# NATIONAL FAMILY VIOLENCE PREVENTION LEGAL SERVICES

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

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

## **REVIEW OF THE FAMILY LAW SYSTEM ISSUES PAPER**

**May 2018**

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## Introduction

The National Aboriginal Family Violence Prevention Legal Services Forum (**'National FVPLS Forum'**) welcomes the opportunity to provide this submission in response to the Issues Paper of the Australian Law Reform Commission's review of the family law system (**'the Issues Paper'**).

This submission is drawn from the lived experiences of the Aboriginal and Torres Strait Islander people across Australia with whom Family Violence Prevention and Legal Services (**'FVPLSs'**) work. FVPLSs support Aboriginal and Torres Strait Islander people – predominantly women – who are experiencing family violence or have in the past. Accordingly, this submission focuses on the interaction between family violence and the family law system.

Aboriginal and Torres Strait Islander people experience family violence at disproportionately higher rates than other Australians – with women and children representing the overwhelming majority of Aboriginal and Torres Strait Islander victims/survivors. Aboriginal and Torres Strait Islander women have been found to be the most legally disadvantaged group in Australia.<sup>1</sup> In comparison with other Australian women, Aboriginal and Torres Strait Islander women are 32 times more likely to be hospitalised as a result of family violence<sup>2</sup> and 10 times more likely to be killed as a result of violent assault.<sup>3</sup>

While Aboriginal and Torres Strait Islander victims/survivors of family violence are over-represented in child protection, criminal and civil jurisdictions, Aboriginal and Torres Strait Islander people typically under-utilise the family law system. Despite the markedly higher levels of family violence against Aboriginal and Torres Strait Islander people, statistics from both the Family Court and the Federal Circuit Court indicate the numbers of Aboriginal and Torres Strait Islander people accessing family court processes are disproportionately low<sup>4</sup> FVPLSs observe that for many Aboriginal and Torres Strait Islander communities there is a perception that the family law system is culturally insensitive and the fear of child protection intervention acts as a major barrier to Aboriginal and Torres Strait Islander victims/survivors accessing the family law system.

In order for the Family Law system to meet the needs of Aboriginal and Torres Strait Islander people affected by family violence – predominantly women and children – the system needs to understand and be responsive to the historical and ongoing inter-generational trauma experienced by Aboriginal and Torres Strait Islander people since first colonisation. This includes the profound intergenerational grief and trauma caused by the Stolen Generations and ongoing disproportionate rates of forced child removal within Aboriginal and Torres Strait Islander families. The ongoing association or conflation of the family law system with 'welfare' or child protection jurisdictions, and the fear of child removal as a result of family law proceedings, creates an enormous barrier to Aboriginal and Torres Strait Islander families accessing the family law system.

FVPLSs provide culturally safe and specialised services and supports, including frontline legal assistance to Aboriginal and Torres Strait Islander victims/survivors of family violence through our holistic, wrap-

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<sup>1</sup> Aboriginal and Torres Strait Islander Commission, Submission to the Senate Legal and Constitutional References Committee, Parliament of Australia, Inquiry into Legal Aid and Access to Justice, 13 November 2003, 4.

<sup>2</sup> Australian Institute of Health and Welfare, Family, domestic and sexual violence in Australia 2018, page 93, available at <https://www.aihw.gov.au/getmedia/d1a8d479-a39a-48c1-bbe2-4b27c7a321e0/aihw-fdv-02.pdf.aspx?inline=true>

<sup>3</sup> The Australian Productivity Commission, Overcoming Indigenous Disadvantage – Key Indicators 2014, 2014, page 4.93, table 4A.11.22 available at <http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/key-indicators-2014/key-indicators-2014-report.pdf> 2 Australian Institute of Health and Welfare, Family Violence among Aboriginal and Torres Strait Islander people, 2006, page 66 available at <http://www.aihw.gov.au/publication-detail/?id=6442467912>.

<sup>4</sup> Family Court of Australia, *Indigenous Australians and Family Law Litigation: Indigenous perspectives on access to justice*, 2011, p. 8, available at: <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/reports/2011/indigenous-australians-and-family-law-litigation>

around service model. Family law is a key practice area for many FVPLSs, along with family violence and child protection law. For our clients, family law matters arise in the context of family violence which presents unique barriers and challenges to accessing the family law system.

Western Australian FVPLSs have a unique interaction with the Family law system. A state-based Family Court operates in Western Australia which seeks to deliver a “unified jurisdiction”<sup>5</sup> under the operation of both the federal legislation of the *Family Law Act 1975* as well as the state *Family Court Act 1997*.

Family law disputes related to Aboriginal and Torres Strait Islander children where family violence is a factor are generally complex, lengthy, and always involve cultural considerations. Culturally appropriate and specialised legal assistance and support, such as that provided by FVPLSs, is therefore critical to improve accessibility and outcomes for Aboriginal and Torres Strait Islander clients moving through the family law system.

The following submission does not attempt to respond to every element of the Issues Paper. Instead, this submission respectfully encourages the ALRC to consider a number of key issues of importance to Aboriginal and Torres Strait Islander victims/survivors of family violence, predominantly women and their children, accessing and navigating the family law system. We also note that we have made many of these recommendations before, and we refer you to past submissions where relevant.

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<sup>5</sup> Peel, S and Croucher, R.F. (2011) Mind(ing) the Gap: Law reform recommendations responding to child protection in a federal system, *Family Matters*, No.89, 23.

## Summary of recommendations

The National FVPLS Forum makes the following recommendations:

**Recommendation 1:** Ensure all Aboriginal and Torres Strait Islander victim/survivors of family violence have access to ongoing culturally safe legal representation, from specialist Aboriginal and Torres Strait Islander legal service providers with family violence expertise throughout their engagement with the family law system. This recommendation should be supported by legislative amendment to FLA and associated resourcing, practice directions and referral pathways.

**Recommendation 2:** Increase long-term and secure resourcing of FVPLSs, including national coverage, to enable FVPLSs to meet increasing demand for specialist, holistic and culturally safe legal assistance and effectively address the multitude of barriers experienced by Aboriginal and Torres Strait Islander victims/survivors within the family law system.

**Recommendation 3:** Implement the Productivity Commission's 2014 recommendation for Federal, state and territory governments to increase legal assistance funding, specifically by providing an additional \$200 million per year for legal assistance services, including FVPLSs.

**Recommendation 4:** Implement strategies to attract, recruit and accredit more Aboriginal and Torres Strait Islander interpreters, including adequate resourcing for family law training to upskill interpreters and the prioritisation of face-to-face interpretation for all Aboriginal and Torres Strait Islander parties.

**Recommendation 5:** Ensure adequate, secure and long-term resourcing for culturally safe community legal education and outreach programs, designed and delivered by Aboriginal and Torres Strait Islander community controlled organisations at a regional level to increase awareness and understanding of family law issues in Aboriginal and Torres Strait Islander communities. This must include appropriate resourcing for specific community legal education and outreach programs targeting Aboriginal and Torres Strait Islander victim/survivors of family violence, predominantly women, which are designed and delivered by specialist Aboriginal and Torres Strait Islander legal service providers with family violence expertise, such as FVPLSs.

**Recommendation 6:** Review and strengthen existing referral pathways for all Aboriginal and Torres Strait Islander people engaged with the family law system to culturally safe services and supports, including the development of specific referral protocols to FVPLSs for Aboriginal and Torres Strait Islander victim/survivors of family violence who access the family law system.

**Recommendation 7:** Employ Aboriginal and Torres Strait Islander Family Consultants within family law courts to ensure that Aboriginal and Torres Strait Islander children and parties have the opportunity for meaningful and culturally safe participation in family law proceedings and the Court is enabled with proper evidence to fully consider, promote and protect the cultural rights of Aboriginal and Torres Strait Islander children.

**Recommendation 8:** Develop and implement a practice direction which specifies that in cases involving Aboriginal or Torres Strait Islander parties or children there is a strong preference for the Family Consultant engaged in the matter to be an Aboriginal or Torres Strait Islander professional. Where this is not possible, enact a requirement that family reports in these cases must only be prepared by Family Consultants who have undergone cultural awareness training and who have experience working with Aboriginal and Torres Strait Islander children. A form of accreditation should also be considered.

**Recommendation 9:** Employ Aboriginal and Torres Strait Islander Liaison Officers within Family Law Courts to provide culturally competent support and referrals and to act as a conduit for communication in a culturally appropriate manner for all Aboriginal and Torres Strait Islander family law clients.

**Recommendation 10:** Develop and implement strategies for increasing Aboriginal and Torres Strait Islander employment and leadership across family law courts, including the recruitment of Aboriginal and Torres Strait Islander Registrars.

**Recommendation 11:** Establish Aboriginal and Torres Strait Islander hearing days and/or a specialist Indigenous List for matters involving Aboriginal and Torres Strait Islander children, with a provision enabling any Aboriginal or Torres Strait Islander party to the matter to opt out if desired.

**Recommendation 12:** Increase Federal and state and territory legal aid funding for counsel to attract and retain skilled and culturally competent barristers to represent Aboriginal and Torres Strait Islander parties in family law matters.

**Recommendation 13:** Redraft and simplify all family law forms to make initiating and engaging in proceedings more accessible, particularly for persons who have difficulties reading and writing and or speak English as a second or subsequent language.

**Recommendation 14:** Reinstate and/or increase the circuiting of Federal Circuit across rural, regional and remote areas.

**Recommendation 15:** Establish safe rooms at all family law courts, with consideration given to making all safe rooms culturally safe and child friendly.

**Recommendation 16:** Consider developing child-care facilities at all family law courts that are available to parties at no charge.

**Recommendation 17:** Increase measures enabling victims/survivors to be able to give evidence from a remote location, both within the Court complex or off-site.

**Recommendation 18:** Ensure any family law reforms directly impacting Aboriginal and Torres Strait Islander people are made in genuine partnership and consultation with Aboriginal and Torres Strait Islander communities and their representative organisations, including recognition of the unique expertise of Aboriginal and Torres Strait Islander community controlled organisations that specialise in supporting victim/survivors of family violence.

**Recommendation 19:** Implement the relevant Aboriginal and Torres Strait Islander-specific recommendations in the 2012 and 2016 Family Law Council Final Reports, subject to the caveats and pre-conditions outlined within this submission at page 27.

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

**Recommendation 21:** Improve measures of early identification of family violence by family law courts, including through the preparation of a separate family violence report at an early stage in proceedings by an independent and culturally competent professional with appropriate qualifications in family violence.

**Recommendation 22:** Remove the presumption of equal shared parental responsibility and the language of equal shared time from Part VII of the *Family Law Act 1975*.

**Recommendation 23:** Include a provision in the Family Law Act that recognises that a parent ‘may include a person who is regarded as a parent of a child under Aboriginal tradition or Torres Strait Islander custom’.

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

**Recommendation 25:** Consider a requirement for parties to file a notice on commencing family law proceedings if the child involved is Aboriginal or Torres Strait Islander, to ensure that the court is aware of its responsibility to take into account the child’s cultural rights from the earliest stage. At a minimum, the filing of such a notice should ensure that:

- wherever possible, Aboriginal or Torres Strait Islander Family Consultants are allocated to cases involving Aboriginal or Torres Strait Islander children;
- parties are prompted to consider and provide evidence in relation to the child’s cultural background and needs, and ensure parenting proposals put to the court will promote and protect the child’s cultural rights;
- a cultural report forms part of the family report in all cases involving Aboriginal and Torres Strait Islander children; and
- cultural experts are engaged as expert witnesses as required.

**Recommendation 26:** Amend Part VII of the *Family Law Act 1975* to provide for the preparation of a Cultural Plan, which sets out how the child’s ongoing connection with cultural identity, kinship networks and country may be maintained, to be developed any time parenting orders are made for an Aboriginal and Torres Strait Islander child.

**Recommendation 27:** Adopt all fifteen recommendations in Women’s Legal Service Victoria’s ‘Small Claims, Large Battles’ report.

**Recommendation 28:** Develop practices and procedures that ensure:

- all Aboriginal and Torres Strait Islander victims/survivors of family violence have access to culturally safe and holistic advice and representation from an appropriately resourced and specialised Aboriginal and Torres Strait Islander legal service providers, such as FVPLSs, prior to, during and following participation in legally-assisted Family Dispute Resolution;
- all Aboriginal and Torres Strait Islander clients are offered a referral to a suitably specialised Aboriginal Community Controlled legal service provider prior to family dispute resolution screening and/or on accessing a Family Relationship Centre, whichever is earliest; and
- any entry by Aboriginal and Torres Strait Islander victim/survivors of family violence into family dispute resolution is facilitated through an Aboriginal legal service provider with expertise in family law and supporting victims/survivors of family violence (such as an FVPLS).

**Recommendation 29:** Ensure any development of Aboriginal and Torres Strait Islander-specific family dispute resolution processes take place in genuine partnership and consultation with Aboriginal and Torres Strait Islander communities and Community Controlled Organisations with expertise in

supporting victims/survivors of family violence. This should be a condition of any funding contracts related to developing, piloting and delivering such models.

**Recommendation 30:** Consider an option for the court to compel perpetrators of family violence to attend behaviour change programs, case management or family violence counselling programs, including, where available, a referral for Aboriginal and Torres Strait Islander perpetrators to a culturally safe men’s behaviour change program run by or in partnership with an Aboriginal and Torres Strait Islander provider.

**Recommendation 31:** Implement Women’s Legal Services Australia’s recommendations:

- *“fund training for state and territory police officers on family law and family violence to ensure there is a consistent national understanding of these matters. Training should include the formation of a national risk assessment and response framework that can be used by police nationally when responding to a family violence incident. Such a framework could, for example, draw upon the Victorian CRAF or the NSW DVSAT;*
- *work through COAG to encourage all state and territory police to introduce and enact consistent (or alternatively one national) Code of Practice for the Investigation of Family Violence, as in Victoria and NSW; and*
- *clarify the interaction between the criminalisation of breaches of family law safety injunctions and the proposed national DVO scheme.”<sup>6</sup>*

**Recommendation 32:** Enact a requirement for all Independent Children’s Lawyers to meet face to face with children prior to representing their best interests in family court, unless this would be contrary to the children’s best interests.

**Recommendation 33:** Develop a national accreditation system with minimum standards and ongoing professional development for Independent Children’s Lawyers which encompasses cultural safety, family violence and trauma informed training, including a specific focus on the unique needs and experiences of Aboriginal and Torres Strait Islander children and young people. This system should include a complaints mechanism for parties when Independent Children’s Lawyers do not meet the required professional standards.

**Recommendation 34:** Develop and implement a practice direction which specifies a preference for family consultants to meet more than once with children and parents, unless this would be contrary to the children’s best interests.

**Recommendation 35:** Consider processes to better include children and young peoples’ views and perspectives in culturally safe legally-assisted Family Dispute Resolution, ensuring appropriate safeguards to mitigate the risk of further harm to children.

**Recommendation 36:** Amend the *Family Law Act 1975* to include a requirement, supported by appropriate investment, for comprehensive and in-depth cultural awareness, trauma-informed and family violence sensitivity training for all family law professionals (including Judges, Independent Children’s Lawyers, Family Consultants, Family Dispute Resolution practitioners, court staff, lawyers and allied services such as child contact centres), including specific content on the unique experiences and needs of Aboriginal and Torres Strait Islander victim/survivors of family violence and the particular barriers faced by Aboriginal and Torres Strait Islander women in accessing justice through the family law system.

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<sup>6</sup> Women’s Legal Services Australia, Submission to the ALRC Family Law Review Issues Paper, May 2018, p. 35

**Recommendation 37:** Amend processes for judicial appointment to and administration of the Federal Circuit Court to require that any judicial officers appointed to hear family law matters must have previously practiced in family law and be otherwise subject to the eligibility requirements of the Family Court of Australia, namely “a person must also by reason of training, experience and personality, be a person suitable to deal with matters of family law”.<sup>7</sup>

**Recommendation 38:** Mandate consideration of and reference to the National Domestic and Family Violence Bench Book in all Family Court judgements involving family and domestic violence and make necessary provision for the National Domestic and Family Violence Bench Book to be relied upon in evidence by either party or their legal representative’s or the Independent Children’s Lawyer during proceedings.

**Recommendation 39:** Consider corresponding cultural awareness, family violence sensitivity and trauma-informed training for other key players with a duty to assist family law clients with complex and interlocking needs and to support the judiciary in enforcing court orders, such as child protection agencies and Australian Federal Police and police forces at state and territory levels.

**Recommendation 40:** Implement the following recommendation made by WLSA in their submission to the Issues Paper in this inquiry:

*“We recommend Family Report Writers [Family Consultants] who provide evidence in family law proceedings must be accredited. They must have clinical experience in working with victims-survivors of family violence and be bound by standards and there must be an effective mechanism for complaints.”<sup>8</sup>*

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<sup>7</sup> See: <https://www.ag.gov.au/LegalSystem/Courts/Pages/Courtappointments.aspx>

<sup>8</sup> Women’s Legal Services Australia, Submission to the ALRC Family Law Review Issues Paper, May 2018, p. 37

## About the National FVPLS Forum

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

The National FVPLS Forum was established in May 2012 and works in collaboration across its member FVPLS services to increase access to justice for Aboriginal and Torres Strait Islander victims/survivors of family violence.

National Forum members are:

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

### About the Family Violence Prevention Legal Services (FVPLS) Program

FVPLSs provide frontline legal assistance services, early intervention/prevention and community legal education to Aboriginal and Torres Strait Islander victims/survivors of family violence.

FVPLSs were established in recognition of:

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

FVPLSs have adopted holistic, wrap-around service delivery models that prioritise legal service delivery while recognising and addressing the multitude of interrelated issues that our clients face. The primary

function of FVPLSs is to provide legal assistance, casework, counselling and court support to Aboriginal and Torres Strait Islander adults and children who are victims/survivors of family violence.

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

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

FVPLSs also provide culturally safe community legal education and early intervention/prevention activities. Where resources permit, some FVPLS units also provide additional assistance in other civil law issues arising from family violence such as Centrelink, Child Support, infringements, tenancy and police complaints.

Nationally, approximately ninety per cent of FVPLS clients are Aboriginal and Torres Strait Islander women and their children. Family violence is complex and the issues our clients face are complex. Our clients live with intergenerational trauma, removal of children, family violence-driven homelessness, discrimination, poverty, mental health issues, disability, lower levels of literacy and numeracy, as well as a range of other cultural, legal and non-legal issues.

Aboriginal and Torres Strait Islander victims/survivors of family violence face a wide array of complex and compounding barriers to reporting family violence, accessing the family law system and accessing culturally safe support. Aboriginal and Torres Strait Islander legal service providers with specialist family violence expertise, such as FVPLSs, are best placed to respond to these unique and complex barriers.

FVPLSs provide vital, culturally safe legal representation and associated support to Aboriginal and Torres Strait Islander victims/survivors of family violence throughout the life of their family law matter. As such, FVPLSs play an important role within the family law system, as well as interconnected systems such as the family violence and child protection systems at the State and Territory level.

## Objectives and Principles

**Question 1** What should be the role and objectives of the modern family law system?

**Question 2** What principles should guide any redevelopment of the family law system?

It is impossible to have an effective family law system without understanding and addressing family violence. Too often, the family law system fails to protect vulnerable women and children who have experienced or are experiencing violence. Not only that, the system itself can contribute to the re-traumatisation of victim/survivors and expose children and adults to further risk of harm. Any changes to the family law system must be informed by an understanding of the prevalence and dynamics of family violence among family law litigants – including the prevalence and unique barriers for women at increased risk such as Aboriginal and Torres Strait Islander women.<sup>9</sup>

We agree in principle to the comments made at paragraph 38 of the Issues Paper that *“a modern family law system has a number of key functions, including advancing the safety, healthy development and economic support interests of children, protecting adults’ rights to physical safety and equitable distribution of resources and regulating the processes for resolving post-separation problems to ensure they are affordable and cost-effective”*.

Protecting women who have experienced or are experiencing family violence is foundational to protecting children from harm. The family law system must recognise its responsibility to prioritise the safety of adult victim/survivors as well as the safety of children. We support and endorse the following comments from the Women’s Legal Service Australia (**‘WLSA’**) in their submission to the Issues Paper:

*“We clarify that protecting adults’ rights to safety should not be limited to physical safety but also acknowledge the right to be free from coercive and controlling behaviour through psychological and emotional abuse.*

*Children’s safety and wellbeing must be a paramount principle of any redevelopment of the family law system. When focusing on the issue of children’s safety, it is important to recognise that children’s exposure to family violence cannot be isolated from the family violence perpetrated against their caregivers. Harm perpetrated against the adult victim is also harm perpetrated against the child.<sup>10</sup> There are significant impacts on children exposed to family violence.”<sup>11</sup>*

We strongly support the proposition that ‘safety’ should encompass more than physical safety. For Aboriginal and Torres Strait Islander children, cultural safety must be an essential principle alongside emotional, psychological and physical safety. Given the disproportionately high levels of family violence experienced by Aboriginal and Torres Strait Islander women, a key objective of the family law system must also be to ensure accessible and culturally safe support for Aboriginal and Torres Strait Islander women and their children.

There can be no one-size-fits-all approach to redeveloping the family law system. The family law system is founded on a Western colonial and adversarial legal framework that largely does not

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<sup>9</sup> As outlined on page 2 above, in comparison with other women in Australia, Aboriginal and Torres Strait Islander women are 32 times more likely to be hospitalised as a result of family violence and 10 times more likely to be killed as a result of violent assault.

<sup>10</sup> R. Thiara & C. Harrison, *Safe not sorry: Supporting the campaign for safer child contact. Key issues raised by research on child contact and domestic violence*, Women’s Aid, UK, 2016, p5 accessed at: <https://warwick.ac.uk/study/cll/research/swell/ourwork/final-safe-not-sorry-for-web-jan-2016.pdf>; Women’s Aid, *Nineteen Child Homicides: What must change so children are put first in child contact arrangements and the family courts*, (UK), 2015, 21-22.

<sup>11</sup> Women’s Legal Services Australia, Submission to the ALRC Family Law Review Issues Paper, May 2018, 5-6.

recognise or respond to the unique dynamics or needs of Aboriginal and Torres Strait Islander families. All changes to the family law system must aim to create a system that is more culturally safe and responsive. What this looks like can only be determined by Aboriginal and Torres Strait Islander people. Any changes and reforms directly impacting Aboriginal and Torres Strait Islander people must be made in genuine partnership and consultation with Aboriginal and Torres Strait Islander communities and their representative bodies including Aboriginal and Torres Strait Islander Community Controlled Organisations, ensuring that the voices and unique perspectives of Aboriginal and Torres Strait Islander women are heard and understood.

This requires system-wide change. For a whole of system approach to family law reform to be successful, there must be change at every level of the family law system: from legislation to implementation, from staff recruitment and training to court design. To ensure that any changes to the family law system are responsive to the experiences and needs of Aboriginal and Torres Strait Islander victim/survivors and their children, the National FVPLS Forum recommends embedding the following principles:

- Culturally safe
- Trauma-informed
- Family violence sensitive

In working towards a more culturally safe, family violence sensitive and trauma-informed family law system, the unique experiences and needs of Aboriginal and Torres Strait Islander women and their children who have experienced or are experiencing family violence must be kept at the centre of any redevelopments. Aboriginal and Torres Strait Islander women face complex and compounding barriers to disclosing family violence and accessing support and justice through the family law system and other avenues on the basis of their gender and Aboriginality. As such, these principles cannot be seen as discrete but must be understood as overlapping and mutually reinforcing.

## Access and Engagement

Inter-generational trauma from the legacy of Australia's colonial history, including oppression through legal and government systems, the Stolen Generations and policies of forced assimilation, have led to a profound mistrust in the legal system among Aboriginal and Torres Strait Islander communities. We welcome the Issue Paper's acknowledgement that *"questions relating to access to family law services and the courts for Aboriginal and Torres Strait Islander families are inseparable from the history of colonisation, dispossession of land and forced removal from country and the separation of children from families through historic government policies of child removal"* (page 24).

Within the context of persistent and systemic discrimination, Aboriginal and Torres Strait Islander victim/survivors of family violence, predominantly women and their children, face a number of specific, complex and compounding barriers to accessing the family law system. In this section, we outline a number of these barriers, followed by our key considerations and recommendations to improve access and engagement with the family law system for Aboriginal and Torres Strait Islander victim/survivors of family violence.

### Fear of child removal

The disproportionate and escalating rates of Aboriginal and Torres Strait Islander children being forcibly removed from their families and communities contributes to the ongoing fear of child protection intervention initiated by family law proceedings. This is especially the case given family violence is a leading driver of child removals.<sup>12</sup> Indeed, nationally Aboriginal and Torres Strait Islander children are almost 10 times more likely to be removed from their families than non-Indigenous children<sup>13</sup>, with indicative data in Victoria showing that family violence is the primary driver in up to 88% of Aboriginal and Torres Strait Islander children entering out-of-home care.<sup>14</sup>

For many Aboriginal and Torres Strait Islander people there is an ongoing association between family law and 'welfare' (child protection) which raises legitimate fears that children will be removed as a result of engaging with Family Court processes. Indeed, many Aboriginal and Torres Strait Islander victims/survivors of family violence – predominantly women – may decline engagement in family law proceedings to their detriment for fear of child protection intervention. Aboriginal and Torres Strait Islander women may also fear/experience community pressure or backlash for 'breaking up the family' or for utilising the Western legal system which, for many, is intrinsically linked with the over-policing and over-incarceration of Aboriginal and Torres Strait Islander peoples and the removal and cultural dislocation of Aboriginal and Torres Strait Islander children from their families and communities.

### Lack of cultural safety and family violence sensitivity

In the experience of our clients, the Family Courts are often perceived as non-culturally safe environments with minimal respect for or understanding of Aboriginal and Torres Strait Islander culture. Many Aboriginal and Torres Strait Islander victims/survivors have a well-founded mistrust of the capacity of mainstream legal and support services to understand and respect their needs,

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<sup>12</sup> Australian Institute of Health and Welfare, 'Child Protection Australia 2014-15, 2016', page 54, table 5.4, available at <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129554973>.

<sup>13</sup> Australian Institute of Family Studies, 'Child protection and Aboriginal and Torres Strait Islander children', 2017, Table 2, available at <https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children>

<sup>14</sup> Commission for Children and Young People, 2016, 'Always was always will be Koori children - systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria, p 47, available at <http://www.ccp.vic.gov.au/downloads/always-was-always-will-be-koori-children-inquiry-report-oct16.pdf>

autonomy and wishes, particularly regarding cultural issues. Many Aboriginal and Torres Strait Islander women may be unwilling to disclose family violence to non-Aboriginal and Torres Strait Islander people, including family law professionals as well as related services. For example, family consultants may place significant weight upon whether a woman has previously reported violence, without consideration of the barriers that Aboriginal and Torres Strait Islander women face to reporting violence to the police or child protection agencies given the lack of cultural competency and entrenched discrimination across the mainstream support sector.

#### Risk of re-traumatisation and further violence

The highly formal, technical and time-consuming nature of family law courts poses a significant barrier for all Aboriginal and Torres Strait Islander people, however family court proceedings can be particularly intimidating for Aboriginal and Torres Strait Islander victims/survivors of family violence. The imperative to retell and relive experiences of violence in order to complete extensive affidavits can be particularly re-traumatising. Many family law matters drag on for years, during which time women and their children are frequently exposed to continuing or escalating violence.

As expressed in our submission to the Parliamentary Inquiry into a better family law system to protect those affected by family violence:

*“Our frontline experience informs us that family law proceedings can be a trigger for the re-emergence or escalation of family violence and can create unsafe situations for Aboriginal and Torres Strait Islander women. Family law proceedings can instigate threats, abuse and/or violent assaults during changeovers pursuant to parenting orders, as well as instances of family violence intended to intimidate Aboriginal and Torres Strait Islander women into dropping or settling their family law matters.”<sup>15</sup>*

#### Limited resourcing of specialist culturally safe services

Given these barriers, it is essential that all Aboriginal and Torres Strait Islander victim/survivors of family violence have access to culturally safe, specialised and holistic legal representation from Aboriginal and Torres Strait Islander community controlled services with expertise in family violence, such as FVPLSs. Without support and representation from FVPLSs, Aboriginal and Torres Strait Islander women and children are likely to be at greater risk of ongoing violence and traumatisation, and less able to achieve outcomes that properly enforce their rights and safety.

The National FVPLS Forum strongly recommends that all Aboriginal and Torres Strait Islander victim/survivors of family violence must be guaranteed access to ongoing culturally safe legal representation from specialist Aboriginal and Torres Strait Islander legal service providers with family violence expertise throughout their engagement with the family law system. This recommendation should be supported by legislative amendment to FLA and associated resourcing, practice directions and referral pathways.

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

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<sup>15</sup> National FVPLS Forum, Submission to the *Parliamentary Inquiry into a better family law system to protect those affected by family violence*, May 2017, p 14, available at: [http://www.nationalfvpls.org/images/files/NFVPLS\\_submission\\_family\\_law\\_parl\\_inquiry\\_-\\_final.pdf](http://www.nationalfvpls.org/images/files/NFVPLS_submission_family_law_parl_inquiry_-_final.pdf)

approximately half the Aboriginal and Torres Strait Islander population nationally. Much of this coverage in remote areas is extremely limited and often consists of only one or two days per month.<sup>16</sup>

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

In 2014, the Productivity Commission recommended that the legal assistance sector – comprised of FVPLSs, Community Legal Centres, ATSILSs and Legal Aid Commissions – receive an annual \$200 million increase in funding for civil law, including family law<sup>17</sup>. The National NFVPLS Forum calls upon the Australian Government, working together with the state and territory governments, to increase legal assistance funding, specifically by providing an additional \$200 million per year for legal assistance services, including FVPLSs. This increase in funding would allow for vitally needed, increased capacity to assist in funding for family law matters.

Increased funding must also ensure national coverage for FVPLSs, as all Aboriginal and Torres Strait victim/survivors of family violence have the right to access specialised, holistic and culturally safe legal and non-legal support, regardless of their geographic location. The National NFVPLS Forum recommends that increased, long-term and secure resourcing of FVPLSs to enable FVPLSs to meet increasing demand and effectively address the multitude of barriers faced by Aboriginal and Torres Strait Islander women and children experiencing or at risk of family violence in accessing and engaging with the family law system.

The National FVPLS Forum takes this opportunity to also emphasise the important role that state and territory governments can play in investing in specialised community controlled legal services, such as FVPLSs, as key means to increase access, safety and engagement of Aboriginal and Torres Strait Islander victims/survivors in family law proceedings and interlinked matters. Given the complex intersections and extensive jurisdictional crossover outlined below, state and territory governments have a crucial responsibility to resource FVPLSs to enable them to better address the legal and non-legal issues interrelated with family law matters.

Our member organisation in Victoria is a key example. Following the 2015 Royal Commission into Family Violence, our Victorian member organisation received significantly increased investment from the state government, which has enabled them to expand geographic coverage and extend the provision of frontline legal and non-legal services to benefit Aboriginal and Torres Strait Islander victim/survivors of family violence across the state. This resourcing has a significant impact on the capacity of FVPLSs to address legal and non-legal issues interrelated with family law matters, consequently improving accessibility to the family law system.

## Access to information about family law

**Question 3 In what ways could access to information about family law and family law related services, including family violence services, be improved?**

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<sup>16</sup> Nous Group, *Family Violence Prevention Legal Services – Research and Needs Analysis Report* (2013), 5.

<sup>17</sup> Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report - Overview*, 2014, p. 63, Recommendation 21.4.

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

In certain communities and regions within Australia, language and communication barriers are particularly challenging for Aboriginal and Torres Strait Islander people accessing the family law system. For example, our member organisation in Central Australia reports that the prescribed brochures for Aboriginal clients are often not translated into Western Arrernte or Eastern Arrernte languages. As noted in our submission to the Parliamentary Inquiry into a better family law system to protect those affected by family violence:

*“This can mean that advice received and outcomes of proceedings may not be conveyed in a way that is understood. Indeed even where Aboriginal and Torres Strait Islander people speak English fluently and/or as a first language, the complex legal language often used in legal documents and forms can lead to disengagement from the system – particularly for clients with limited education. The use of interpreters can help break down these barriers. Currently there are only a limited number of trained and qualified interpreters. [...] Hearing loss can result in the same communication barriers as those produced by language and literacy difficulties. Given the high rate at which Aboriginal and Torres Strait Islander peoples suffer from hearing loss, often resulting from high rates of middle ear infections, this is an issue that must be addressed.*

*In many remote communities where FVPLSs work, Courts and services often rely on telephone interpreter services. Given the role of non-verbal communication within many Aboriginal and Torres Strait Islander communication styles, telephone interpretation may significantly disadvantage Aboriginal and Torres Strait Islander people and lead to misunderstandings or ignorance of important client instructions or evidence. The National FVPLS Forum therefore recommends that telephone interpreter services only be used in urgent circumstances and that adequate resourcing permit courts, legal and other support services to ensure a priority for face-to-face interpretation for Aboriginal and Torres Strait Islander people.”<sup>18</sup>*

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

Instead, National FVPLS Forum members report a critical need for materials including family law brochures, publications and court documents to be available in all relevant local Aboriginal and Torres Strait Islander languages.

The National FVPLS Forum also calls for the implementation of strategies to attract, recruit and accredit more Aboriginal and Torres Strait Islander interpreters, including:

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<sup>18</sup> National FVPLS Forum, Submission to the *Parliamentary Inquiry into a better family law system to protect those affected by family violence*, May 2017, pp. 12-13 [http://www.nationalfvpls.org/images/files/NFVPLS\\_submission\\_family\\_law\\_parl\\_inquiry\\_-\\_final.pdf](http://www.nationalfvpls.org/images/files/NFVPLS_submission_family_law_parl_inquiry_-_final.pdf)

- Appropriate funding for relevant service providers and agencies involved in the legal system to promote and accommodate the use of interpreters;
- Prioritisation of face-to-face interpretation for Aboriginal and Torres Strait Islander parties, with telephone interpretation reserved for urgent circumstances;
- Greater awareness of the need for interpreters for hearing impaired Aboriginal and Torres Strait Islander people; and
- Appropriate investment in family law training to upskill interpreters currently working in other fields.

### Community legal education and outreach

Community legal education and outreach are essential to ensure that Aboriginal and Torres Strait Islander people are fully informed of their rights and available supports within the family law system. As recognised by the Family Law Council *'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems'* 2016 Final Report, tailored education programs about the family law and child protection systems for Aboriginal and Torres Strait Islander communities must be developed and resourced to enhance understanding of legal rights and awareness of how the family law system works<sup>19</sup>. In our experience, what is key is that community legal education programs build trust and understanding so that Aboriginal and Torres Strait Islander victim/survivors feel safe disclosing their experiences, empowered to engage with the family law system and able to access culturally safe and specialist services and supports. With appropriate resourcing, FVPLSs could provide vital community legal education nation-wide and significantly increase access to and understanding of the family law system for Aboriginal and Torres Strait Islander people experiencing family violence.

As such, the National FVPLS Forum cautions against excessive reliance on online forms or resources and recommends increased investment in culturally safe community legal education and outreach programs, designed and delivered by Aboriginal and Torres Strait Islander community controlled organisations at a regional level to increase awareness and understanding of family law issues in Aboriginal and Torres Strait Islander communities. This must include appropriate resourcing for specific community legal education and outreach programs targeting Aboriginal and Torres Strait victim/survivors of family violence, predominantly women, which are designed and delivered by specialist Aboriginal and Torres Strait Islander legal service providers with family violence expertise, such as FVPLSs.

### Holistic and culturally safe legal assistance

#### **Question 4 How might people with family law related needs be assisted to navigate the family law system?**

The Issues Paper notes that a new 'navigator' role could *"assist clients to identify and access services that are relevant to their needs, as well as monitor the person's engagement with these services and assist them through the court process where appropriate"* (page 22). While this may be appropriate in some contexts, the National FVPLS Forum does not support the use of a mainstream 'navigator' role for Aboriginal and Torres Strait Islander family law clients, particularly Aboriginal and Torres Strait Islander people experiencing or at risk of family violence.

While there must be choice for Aboriginal and Torres Strait Islander people to engage the service of their preference, Aboriginal and Torres Strait Islander Community Controlled Organisations ('**ACCOS**')

<sup>19</sup> Family Law Council, *'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems'* 2016 Final Report, p. 147, available at: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF>

are the preferred provider of culturally safe services for most Aboriginal and Torres Strait Islander people. The holistic, specialist and culturally safe services offered by FVPLSs provide Aboriginal and Torres Strait Islander victim/survivors of family violence, predominantly women and their children, with wraparound support as they navigate the family law system.

A key feature of the holistic FVPLS model is the employment of support workers who work alongside a lawyer to assist clients in addressing their range of legal and non-legal needs. Many FVPLS support workers are Aboriginal and Torres Strait Islander women. This relationship is key to building trust and means our clients are more likely to disclose experiences of violence and benefit from opportunities for safety planning, case management and referrals. FVPLS support workers provide vital emotional support, for example, by accompanying clients to court hearings or appointments and play a key role in assuring clients are linked into culturally appropriate counselling.

FVPLS support workers also arrange a range of practical supports to address the complex socio-economic issues giving rise to the client's legal problem and impacting their experience of family violence.<sup>20</sup> Through the assistance of FVPLS Support Workers, clients are equipped with a network of culturally safe supports needed to live safely, build resilience and heal from the trauma of violence. This may include referrals to housing and refuge services, counselling, drug and alcohol support workers, medical services, respite and parenting services.

Our holistic model of wraparound legal and non-legal support provided by an FVPLS support worker working alongside a lawyer is directed towards ensuring Aboriginal and Torres Strait Islander victims/survivors are empowered to access support services relevant to their needs and supported in their journey through the family law system. FVPLSs are best placed to support Aboriginal and Torres Strait Islander victim/survivors navigating the family law system and, with sufficient resourcing, the role of FVPLS support worker could achieve the goals of the proposed 'navigator' role in a culturally safe and trusted way. It must be recognised that this holistic and intensive model of specialist support requires greater levels of resourcing.

We note that the Family Law Council recommended in 2016 that *"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 1.2)<sup>21</sup>. We emphasise that referral to the wraparound services already provided by FVPLSs are most appropriate for Aboriginal and Torres Strait Islander victim/survivors of family violence. In place of the in-court 'navigator' role, the National FVPLS Forum recommends reviewing and strengthening existing referral pathways for all Aboriginal and Torres Strait Islander people engaged with the family law system to culturally safe services and supports, including the development of specific referral protocols to FVPLSs for all Aboriginal and Torres Strait Islander victim/survivors of family violence who access the family law system.

The following case studies demonstrate the value of the wraparound, culturally safe and family violence sensitive support offered by the FVPLS model.

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<sup>20</sup> Djirra (formerly FVPLS Victoria), Submission to the Victorian Royal Commission into Family Violence, June 2015, available at: <https://djirra.org.au/wp-content/uploads/2018/02/FVPLS-Victoria-submission-to-Royal-Commission-FINAL-15Jul15.pdf>

<sup>21</sup> Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* Final Report, June 2016, page 12

### Case study

Prior to seeking assistance from our member organisation, Ms. A, a young Aboriginal woman, had fled her ex-partner who had perpetrated extreme family violence against her - including attempting to set her house on fire - and was now living at a secret location. The perpetrator waited for her after family court so he could follow her home. He also tailgated and nearly ran her off the road while shouting threats out the window, including 'Just you wait till I find out where you live'.

Up until this point, Ms A had been represented by a mainstream service which consistently demonstrated a lack of understanding of family violence and an inability to provide culturally safe support. After this incident, she sought out the services of an FVPLS that would take the violence she was experiencing seriously and understand the importance of cultural issues and cultural rights.

Ms A was supported by an FVPLS lawyer and Paralegal Support Worker who worked with her to make appropriate safety arrangements. She was able to give instructions via phone so that she didn't have to be physically present at court unless absolutely necessary, reducing the risk of further violence and re-traumatisation that she experienced when forced to be in the same space as her perpetrator.

To further ensure her safety, the Paralegal Support Worker drove Ms A to and from family court in a work car that was not identifiable, and sat with her in a safe place external to the court while waiting for her matter to be heard. Our lawyer also supported her to complete a supplementary affidavit setting out the evidence of the ongoing violence and intimidation which had not previously been sufficiently taken into account.

This case demonstrates the critical importance of ensuring access to culturally safe, trauma-informed and family violence sensitive support and representation for all Aboriginal and Torres Strait Islander victim/survivors engaged with the family law system. It also makes clear that the holistic model of wraparound legal and non-legal services provided by FVPLSs is leading practice for supporting Aboriginal and Torres Strait Islander women and children.

### Case study

Ms. B is a young Aboriginal woman who is a single mother of one toddler. She had experienced psychological, physical and sexual family violence committed by her former partner. He also geographically and socially isolated her from her family, who all lived in another state, which contributed to a deterioration in her mental health. Initially, our member organisation assisted Ms. B to leave her violent former partner, the father of the child. We also linked her up with a psychologist to assist with her recovery.

Ms B was then party to family law proceedings which went to trial. During this time, she still experienced family violence by the child's father and another former partner. We assisted her to report these matters to Police and obtain Intervention Orders and variations, as required.

Ms B wanted to reunite with her extended family interstate, and with our support, she was ultimately successful in her relocation application. We were able to provide her with a referral and support her to engage with a financial counsellor in that state to deal with the debts created by her former partner, as well as the property damage caused by her recent partner. We also secured a Flexible Support Package which was used to enable continuity of care and education for her child during this time; to ensure her safety by fixing and registering her car; to ensure she could break her lease and fix damage to the property; and then to finally relocate safely in accordance with Court Orders.

## Culturally safe court processes

### **Question 5 How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?**

As discussed above, a core element of improving Aboriginal and Torres Strait Islander people's access to the family law system is the provision of culturally safe and holistic legal assistance from Aboriginal Community Controlled legal assistance services. For Aboriginal and Torres Strait Islander victims/survivors of family violence this is doubly important. Trusted and culturally safe legal assistance from specialist services such as FVPLSs is essential to ensure Aboriginal and Torres Strait Islander victims/survivors understand and can access their rights and options throughout the family law process. It is also essential to ensure Aboriginal and Torres Strait Islander children's cultural needs and rights are properly considered and addressed.

In addition to ensuring access to culturally safe and specialised legal representation before, during and after their family law matter, the National FVPLS Forum considers that the following recommendations would significantly improve the cultural safety of court processes.

#### Aboriginal and Torres Strait Islander Family Consultants

The National FVPLS Forum continues to advocate for the employment of Aboriginal and Torres Strait Islander Family Consultants within family law courts to ensure that Aboriginal and Torres Strait Islander children and parties have the opportunity for meaningful and culturally safe participation in family law proceedings and the Court is enabled with proper evidence to fully consider, promote and protect the cultural rights of Aboriginal and Torres Strait Islander children.<sup>22</sup>

In the experience of FVPLS lawyers, many family reports produced by non-Indigenous Family Consultants for Aboriginal and Torres Strait Islander children demonstrate a lack of cultural competency. We note that in a study of the views of Aboriginal and Torres Strait Islander family law litigants, Aboriginal Consultant Psychologist Stephen Ralph found that:

*"Of particular concern was the finding that 59 per cent of the Indigenous group did not believe that the report writer had done their best to understand and report upon the cultural issues affecting children. Collectively these comments reflect poorly on the capacity of report writers to engage with Indigenous litigants and their ability to provide a reliable evaluation of the Indigenous cultural issues bearing upon the best interests of the child. The concern of Indigenous litigants in relation to family reports was also echoed in the comments provided by family law practitioners. Fifty-three per cent of the practitioners reported that the family consultant did not effectively assess the cultural issues relevant to what would be best for the children."<sup>23</sup>*

In addition, we refer you to our former submission to the Parliamentary Inquiry into a better family law system to protect those affected by family violence:

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<sup>23</sup> Family Court of Australia, *Indigenous Australians and Family Law Litigation: Indigenous perspectives on access to justice, 2011*, available at: <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/reports/2011/indigenous-australians-and-family-law-litigation>

*“The re-introduction of Aboriginal and Torres Strait Islander family consultants is particularly important. Family Consultants (or report writers as sometimes described) have a pivotal role in family law proceedings through interviewing the parties and children and preparing a report for the Court which sets out the circumstances of the family, the wishes of the parties and the children, and makes recommendations to the Court about what arrangements would be in the best interests of the children. This is typically a key way in which children participate in family law proceedings. Given the significance of this role and the significant weight judges frequently give to the reports produced by family consultants, it is critical that these positions are not only culturally competent and free from unconscious bias, but that they have the capacity to build trust and rapport with Aboriginal and Torres Strait Islander parties to elicit and truly understand the full picture of their needs, culture, context and language or communication style. While a well-trained non-Aboriginal professional may be able to produce a culturally competent family report, there would be enormous value (for both the parties and the Court) in Aboriginal and Torres Strait Islander families having the opportunity to engage with an Aboriginal or Torres Strait Islander Family Consultant who could offer an unrivalled depth of shared understanding, accessibility and cultural insight to the entire process.”<sup>24</sup>*

As such, the National FVPLS Forum recommends developing and implementing a practice direction which specifies that in cases involving Aboriginal or Torres Strait Islander parties or children there is a strong preference for the Family Consultant engaged in the matter to be an Aboriginal or Torres Strait Islander professional. Where this is not possible, enact a requirement that family reports in these cases must only be prepared by Family Consultants who have undergone cultural awareness training and who have experience working with Aboriginal and Torres Strait Islander children. We also suggest consideration of a process of cultural safety accreditation for Family Consultants.

#### Aboriginal and Torres Strait Islander Liaison Officers

The Family Law Council ‘Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems’ 2016 Final Report, recommended embedding workers from specialist family violence services in the family courts and Family Relationship Centres (Recommendation 1.2)<sup>25</sup> This must involve the employment of Aboriginal and Torres Strait Islander Liaison Officers with training and experience in family violence located at the Family Court to assist with practical supports, make necessary legal and other referrals, and most importantly offer culturally appropriate support and information. The parameters of these liaison roles would need to be clearly defined. This should be a non-legal and culturally appropriate person to support the client not only at intake but through the family law process. Importantly, there needs to be not just one person in this role at each court, so as to avoid conflicts, risk of burnout and to be gender-appropriate where possible.

In addition, the National FVPLS Forum continues to advocate for the recruitment of Aboriginal and Torres Strait Islander staff in roles across the family law system, for example, the employment of Aboriginal and Torres Strait Islander registrars in family courts, with culturally appropriate and ongoing workforce development, training and support. We also stress the importance of Aboriginal and Torres Strait Islander people being employed in senior leadership positions across the family courts to provide culturally appropriate leadership and ensure culturally competent responses to the needs of Aboriginal and Torres Strait Islander people engaged with the family law system.

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<sup>24</sup> National FVPLS Forum, Submission to the *Parliamentary Inquiry into a better family law system to protect those affected by family violence*, May 2017, p 22, available at: [http://www.nationalfvpls.org/images/files/NFVPLS\\_submission\\_family\\_law\\_parl\\_inquiry\\_final.pdf](http://www.nationalfvpls.org/images/files/NFVPLS_submission_family_law_parl_inquiry_final.pdf)

<sup>25</sup> Family Law Council, ‘Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems’ Final Report, June 2016, p. 12

### Aboriginal and Torres Strait Islander Specialised Hearings

The Family Law Council *'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems'* 2016 Final Report, recommended consideration a pilot of a specialised court hearing process in family law cases that involve Aboriginal and Torres Strait Islander families, including through the participation of Elders who can provide cultural advice (Recommendation 16.4)<sup>26</sup>. We also support the development of a specialist Indigenous List and/or Aboriginal and Torres Strait Islander hearing days for matters involving Aboriginal and Torres Strait Islander children, provided that the Aboriginal or Torres Strait Islander party to the matter is able to opt out if desired.

We note that pilot programs for specialised Indigenous Court Lists are currently underway. The National FVPLS Forum looks forward to being consulted throughout the next stage of the development, implementation and review of these pilots and to being closely engaged in any consideration of a national model.

### Culturally competent non-Aboriginal and Torres Strait Islander professionals

It is also vital that mainstream (i.e. non-Aboriginal or Torres Strait Islander) family law professionals with whom Aboriginal and Torres Strait Islander family law clients interact are culturally competent, as discussed in the section 'Professional skills'. In addition, FVPLS lawyers regularly report the need for increased legal aid funding for counsel to attract and retain skilled and culturally competent barristers to represent Aboriginal and Torres Strait Islander parties in family law matters, along with challenges in locating culturally competent psychologists and psychiatrists to provide expert assessments particularly in regional, rural and remote areas.

### Simplified and accessible court documents

The National FVPLS Forum recommends redrafting and simplifying all family law forms to make initiating and engaging in proceedings more accessible, particularly for persons who have difficulties reading and writing and or speak English as a second or subsequent language.

## Rural, regional and remote

### **Question 9 How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?**

The Issues Paper notes that Aboriginal and Torres Strait Islander people living in rural, regional and remote areas can face additional barriers to accessing the family law system, including the limited availability of specialist and culturally safe family law services and the limited availability of interpreter services and/or the limited familiarity of interpreters with the family law system (page 34).

It is vital to increase resourcing for specialist culturally safe legal services like FVPLSs to achieve national coverage, in addition to improving the cultural competency of mainstream services in these areas. Increasing the availability and family law expertise of interpreters in rural and remote areas is also essential, with a strong preference for face to face interpretation given the nuances of non-verbal and cross-cultural communication which can be lost in telephone interpretation, as well as the risk that the ability of Aboriginal and Torres Strait Islander victims/survivors of family violence to give

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<sup>26</sup> Family Law Council, *'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems'* Final Report, June 2016, p. 16

full and accurate evidence may be severely curtailed by the alienating and potentially re-traumatising experience of giving evidence of highly sensitive and vulnerable experiences through a faceless telephone interpreter.

FVPLSs working across rural, regional and remote areas report the following challenges:

- In rural, regional and remote areas, urgent family law issues may have to go before the local Magistrates' Court where the presiding magistrate may have limited family law experience, and may be unable to give complex family law matters sufficient consideration in a crowded list with multiple, competing and urgent matters;
- Clients in rural, regional and remote areas experience the financial burden not only of family law proceedings but of travel to and accommodation in major urban centres to attend a hearing at the nearest family law court;
- In rural and remote areas where the family law court sits on circuit basis, there are often long delays in waiting for an interim determination which significantly increases risk for vulnerable parties. For example, our member organisation in Alice Springs reports that circuit court might only sit three to four times per year;
- Security issues in attending court are exacerbated in rural, regional and remote areas, where there is frequently little or no security outside the court, and no separate waiting areas; and
- Accessing culturally competent, trauma-informed and suitably qualified expert psychologists and psychiatrists in family law matters involving family violence is particularly challenging in rural, remote and regional areas.

The National FVPLS Forum strongly recommends reinstating and/or increasing the circuiting of Federal Circuit Court across rural, regional and remote areas. Other suggestions from member organisations to improve access for FVPLSs' clients in rural, regional and remote areas include:

- The option of audio-visual link facilities to provide for shorter turnaround on hearing dates (with the proviso that safety would need to be considered in exploring AVL options, for example, ensuring both parties are not in the same AVL room or venue);
- Possibility of subsidising travel expenses for those with limited financial resources to attend family court or face-to-face FDR, for example, by providing funding to FVPLSs or other legal services to distribute; and
- Increased resourcing for culturally safe legal assistance service providers like FVPLSs in rural, regional and remote areas to respond to family law legal need, and to improve outreach in geographically remote areas.

The National FVPLS Forum also takes this opportunity to note the unacceptable length of many family law proceedings and the current backlog of cases. While this is an issue across all family law courts, it is particularly pronounced in rural, regional and remote areas. We endorse and call attention to Recommendation 31 of the Parliamentary Inquiry into a better family law system to protect those affected by family violence<sup>27</sup> 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."*<sup>28</sup>

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<sup>27</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A better family law system to support and protect those affected by family violence*, December 2017.

<sup>28</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A better family law system to support and protect those affected by family violence*, December 2017, 288.

## Costs and self-represented parties

**Question 10** What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?

**Question 11** What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?

As acknowledged in the Issues Paper, self-representation has become an increasingly common feature of family law litigation, and one of the most significant reasons behind the continual growth in the number of self-represented parties is the increasing unaffordability of legal services (page 36). While it is neither feasible nor, perhaps, desirable for all family law cases to go before the courts and, in many contexts, settling matters quickly without recourse to the courts is beneficial to families in terms of the time, money and stress involved, the National FVPLS Forum takes the strong position that measures supporting increased self-representation are not appropriate for vulnerable clients such as Aboriginal and Torres Strait Islander victim/survivors of family violence.

Given the pervasive and significant barriers that Aboriginal and Torres Strait Islander women and their children face in accessing safety and justice through the family law system, culturally safe legal representation at all stages of family law proceedings is vital. We therefore raise concerns regarding the ‘unbundling’ of family law legal services and offering discrete services (legal advice, drafting documents/pleadings, court appearances) for a fee. One of the strengths of FVPLSs is our ability to assist a client throughout the life of their legal matter. Fragmentation of services is not effective for vulnerable clients and whilst choice must be available, FVPLSs’ holistic service delivery model provides best practice for Aboriginal and Torres Strait Islander victims/survivors of family violence. Increased resourcing for culturally safe legal assistance is critical and, in funding family law services, appropriate consideration must be given to the more intensive resource requirements of this work.

Without ongoing access to culturally safe legal advice and representation, Aboriginal and Torres Strait Islander victim/survivors are at increased risk of being pressured or intimidated by the perpetrator into agreeing to unsafe, unfair or unworkable arrangements, potentially leaving them and their children at risk of continuing or escalating violence. Unbundled services not only present a risk to very vulnerable clients, they are also inefficient where matters are very complex. Care must be taken to avoid a false economy of self-represented or partially self-represented clients, whose matters subsequently take more court time or are not appropriately resolved due to the clients being unprepared or misinformed. In many instances, early, culturally safe and appropriately skilled legal advice for vulnerable clients with complex needs, such as Aboriginal and Torres Strait Islander victim/survivors and their children, actually reduces the overall cost and time involved in family law proceedings.

We refer to and endorse the comments made at page 30 of the Productivity Commission Access to Justice Arrangements: Productivity Commission Inquiry Report - Overview:

*“Advocating for increases in funding (however modest) in a time of fiscal tightening is challenging. However, not providing legal assistance in these instances can be a false economy as the costs of unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection.”<sup>29</sup>*

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<sup>29</sup> Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report - Overview*, 2014, 30.

For this reason, we also raise concerns regarding the proposed expansion of low-cost family dispute resolution ('FDR') processes to the extent that it is designed for self-represented litigants. As outlined under 'Resolution and Adjudication' at page 30 of this submission, we support the expansion of legally-assisted FDR provided that all Aboriginal and Torres Strait Islander victims/survivors of family violence are guaranteed access to culturally safe and specialised legal advice and representation throughout the process.

The following case study indicates the prohibitive financial barriers to family law proceedings for victim/survivors of family violence, and the importance of legal assistance funding to increase access to the family law system for vulnerable parties.

#### Case study

Ms C is an Aboriginal woman who lives in a house that she bought over twenty years ago when it was cheap. She is unemployed and unable to find work. Ms C experienced family violence at the hands of her ex-partner, with whom she has complex family law parenting issues. Ms C is unable to afford the cost of engaging a private lawyer to resolve family law proceedings against her former partner. However, despite having no income, she is unable to get a grant from Legal Aid as she owns the property.

## The court environment

**Question 13 What improvements could be made to the physical design of the family courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children or themselves?**

In the experience of FVPLS clients, family courts are often seen as alienating environments which lack respect for Aboriginal and Torres Strait Islander culture and are not responsive to the safety and security concerns of victim/survivors of family violence and their children. National FVPLS Forum members report a number of key concerns about the safety and accessibility of family law courts.<sup>30</sup>

#### Safe rooms

There is insufficient availability of safe rooms and safe waiting areas in family law courts. When safe rooms are present, victim/survivors of family violence frequently have to navigate general court waiting areas and risk encountering their perpetrator, as illustrated by the case study below.

Where available, safe rooms present a crucial opportunity for victim/survivors to access support yet often there is little or no referral information present. There is also generally a lack of consideration for the cultural safety of such spaces.

The National FVPLS Forum recommends establishing safe rooms at all family law courts, with consideration given to making all safe rooms culturally safe and child friendly.

We also stress that increasing the accessibility and accessibility of safe rooms does not only require increased investment and redesign, it also must be supported by a change in court culture such that use of safe room is standard practice, rather than women who have experienced family violence and their lawyers needing to push to gain access to it.

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<sup>30</sup> A note on terminology – throughout this submission the phrase 'family law courts' is used to refer to both registries of the Family Court of Australia and Federal Circuit Courts.

### Case study

Ms D, an Aboriginal woman with two children, aged 9 and 11 years old, who was using the safe room at a Family Law Court prior to her matter being heard. A party in another proceeding was using the small safe room at the same time, making it claustrophobic and uncomfortable for our client and her children.

Ms D needed to give instructions to her barrister however she was not able to do so in the safe room given the presence of her children and another person. The court's child care facilities had refused to look after the children as one of them was sick, and she also couldn't take her children out of the safe room as her violent ex-partner, the children's father, was sitting in the general court waiting area.

As a result, Ms D was forced to leave her children behind in the safe room while she gave instructions to her barrister in the general court waiting room. Being separated from her children and at risk of running into her perpetrator caused our client to become incredibly upset, anxious and overwhelmed. As a result of her distress, Ms D was unable to fully engage in court proceedings and agreed to orders with unfavourable conditions.

### Case study

Ms E had an indefinite intervention order against her violent ex-partner but was still involved in ongoing family law proceedings. She requested use of the safe room at a family law court, however she was forced to walk right past her perpetrator in the general waiting area in order to reach the safe room, leaving her feeling frightened and distressed.

### Remote witness facilities

Our FVPLS members report that in most courts there is insufficient capacity to safely facilitate the participation of parties who are experiencing or have experienced family violence. This includes remote witness facilities to allow parties to give evidence off site, as well as court-based interview rooms to allow parties to wait in a separate space to the perpetrator and have secure and confidential conversations with their legal representatives.

### Court security

Significant safety risks are created where there is only one entrance to the court and/or a lack of security outside the court. FVPLS members have reported numerous incidents where perpetrators have surveilled, followed, threatened and abused clients attending family law proceedings, including in the case study provided at page 18 above. As outlined above, in many regional, rural and remote courts minimal security is provided. However, even in larger regional or urban centres where security guards and security screening is in place, the design of court buildings (such as single court entrances and secluded car park) and lack of security outside court buildings can enable violence and intimidation to occur. FVPLS members have reported cases in which perpetrators have waited until after a client has left the court to physically or verbally abuse them.

### Case study

After a family court hearing, Ms F was verbally abused by her violent ex-partner in the family court car park. As Ms F was making her way to her car, the perpetrator also threatened her and attempted to burn her with a cigarette. Fortunately, court security guards were within earshot and able to intervene.

### Court-based childcare facilities

FVPLS members also report a lack of childcare and child-friendly spaces at family law courts, which causes significant barriers given many FVPLS clients do not have access to other child care facilities or other family members to look after children while clients are required at court. Causing a victim/survivor to become isolated from family and friends and devoid of social supports is often a specific goal or feature of family violence perpetration. While we appreciate that bringing children into close contact with the court environment would generally not be in their best interests, the National FVPLS Forum recommends investigation of whether appropriately child-centred spaces and childcare facilities could be appropriately created within or close to courts to better support families in need.

### Prior Aboriginal and Torres Strait Islander-specific family law recommendations

We note that in recent years, the Family Law Council has delivered two reports which make significant recommendations concerning Aboriginal and Torres Strait Islander clients' engagement with the family law system.

As regards the 2012 Family Law Council Report *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, we note that, while progress has been made on some recommendations, many remain to be implemented. We broadly support the implementation of the recommendations in this report, provided that the following caveats are taken into account:

- Community Education and Outreach (Recommendations 1 and 4) must be developed by or in genuine partnership with ACCOs, not mainstream services, as outlined on page 15 of this submission.
- Any expansion of Family Dispute Resolution services (Recommendation 7) for Aboriginal and Torres Strait Islander people must be developed by or in genuine partnership with ACCOs including those (such as FVPLSs) with expertise in supporting victim/survivors of family violence and must ensure access to culturally safe legal assistance at all stages of the FDR process, as outlined on page 37-38 of this submission.
- In addition to family law training, Aboriginal and Torres Strait Islander interpreters also require family violence sensitivity training.

As regards the 2016 Family Law Council Final Report *Improving the Family Law System for Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, only Recommendation 16 related specifically to Aboriginal and Torres Strait Islander families. We broadly support the implementation of all the sub-recommendations with the following pre-conditions and/or caveats:

- Cultural Reports should be prepared in *all* cases involving Aboriginal and Torres Strait Islander children, not only 'where a cultural issue is relevant'. Cultural identity and cultural connection

are always relevant issues in matters involving Aboriginal and Torres Strait Islander children. As currently drafted, this recommendation grants discretion to non-Indigenous family law professionals to determine whether culture is or is not relevant in a given case. This risks jeopardising the cultural rights of Aboriginal and Torres Strait Islander children and compromising the stated aim of Cultural Reports.

- We support the development of Aboriginal and Torres Strait Islander-specific Family Group Conferences but we clarify that all alternative dispute resolution processes for Aboriginal and Torres Strait Islander people must be developed in genuine partnership and consultation with Aboriginal and Torres Strait Islander communities and organisations. We support promotion of the Aboriginal and Torres Strait Islander Child Placement Principle in making decisions about the care of children, however we stress that the safety of children – and thus the importance of family violence sensitivity and risk assessment – must remain paramount.
- We welcome the recommendation on the need to consult with Aboriginal and Torres Strait Islander representative institutions concerning all reforms affecting Aboriginal and Torres Strait Islander children, but we would hope that this extends beyond mere consultation to genuine and meaningful partnership and collaboration (as below), especially with specialist Aboriginal and Torres Strait Islander organisations with expertise working with Aboriginal and Torres Strait Islander victim/survivors of family violence.

Fundamental to all these recommendations to improve access and engagement of the family law system for Aboriginal and Torres Strait Islander people is the recognition that all family law reforms directly impacting Aboriginal and Torres Strait Islander people must be developed in genuine partnership and consultation with Aboriginal and Torres Strait Islander communities and organisations. Crucially, this must include recognition of the unique expertise of Aboriginal and Torres Strait Islander community controlled organisations that specialise in supporting victim/survivors of family violence such as FVPLSs.

## Recommendations

**Recommendation 1:** Ensure all Aboriginal and Torres Strait Islander victim/survivors of family violence have access to ongoing culturally safe legal representation, from specialist Aboriginal and Torres Strait Islander legal service providers with family violence expertise throughout their engagement with the family law system. This recommendation should be supported by legislative amendment to FLA and associated resourcing, practice directions and referral pathways.

**Recommendation 2:** Increase long-term and secure resourcing of FVPLSs, including national coverage, to enable FVPLSs to meet increasing demand for specialist, holistic and culturally safe legal assistance and effectively address the multitude of barriers experienced by Aboriginal and Torres Strait Islander victims/survivors within the family law system.

**Recommendation 3:** Implement the Productivity Commission's 2014 recommendation for Federal, state and territory governments to increase legal assistance funding, specifically by providing an additional \$200 million per year for legal assistance services, including FVPLSs.

**Recommendation 4:** Implement strategies to attract, recruit and accredit more Aboriginal and Torres Strait Islander interpreters, including adequate resourcing for family law training to upskill interpreters and the prioritisation of face-to-face interpretation for all Aboriginal and Torres Strait Islander parties.

**Recommendation 5:** Ensure adequate, secure and long-term resourcing for culturally safe community legal education and outreach programs, designed and delivered by Aboriginal and Torres Strait Islander community controlled organisations at a regional level to increase awareness and understanding of family law issues in Aboriginal and Torres Strait Islander communities. This must include appropriate resourcing for specific community legal education and outreach programs targeting Aboriginal and Torres Strait Islander victim/survivors of family violence, predominantly women, which are designed and delivered by specialist Aboriginal and Torres Strait Islander legal service providers with family violence expertise, such as FVPLSs.

**Recommendation 6:** Review and strengthen existing referral pathways for all Aboriginal and Torres Strait Islander people engaged with the family law system to culturally safe services and supports, including the development of specific referral protocols to FVPLSs for Aboriginal and Torres Strait Islander victim/survivors of family violence who access the family law system.

**Recommendation 7:** Employ Aboriginal and Torres Strait Islander Family Consultants within family law courts to ensure that Aboriginal and Torres Strait Islander children and parties have the opportunity for meaningful and culturally safe participation in family law proceedings and the Court is enabled with proper evidence to fully consider, promote and protect the cultural rights of Aboriginal and Torres Strait Islander children.

**Recommendation 8:** Develop and implement a practice direction which specifies that in cases involving Aboriginal or Torres Strait Islander parties or children there is a strong preference for the Family Consultant engaged in the matter to be an Aboriginal or Torres Strait Islander professional. Where this is not possible, enact a requirement that family reports in these cases must only be prepared by Family Consultants who have undergone cultural awareness training and who have experience working with Aboriginal and Torres Strait Islander children. A form of accreditation should also be considered.

**Recommendation 9:** Employ Aboriginal and Torres Strait Islander Liaison Officers within Family Law Courts to provide culturally competent support and referrals and to act as a conduit for communication in a culturally appropriate manner for all Aboriginal and Torres Strait Islander family law clients.

**Recommendation 10:** Develop and implement strategies for increasing Aboriginal and Torres Strait Islander employment and leadership across family law courts, including the recruitment of Aboriginal and Torres Strait Islander Registrars.

**Recommendation 11:** Establish Aboriginal and Torres Strait Islander hearing days and/or a specialist Indigenous List for matters involving Aboriginal and Torres Strait Islander children, with a provision enabling any Aboriginal or Torres Strait Islander party to the matter to opt out if desired.

**Recommendation 12:** Increase Federal and state and territory legal aid funding for counsel to attract and retain skilled and culturally competent barristers to represent Aboriginal and Torres Strait Islander parties in family law matters.

**Recommendation 13:** Redraft and simplify all family law forms to make initiating and engaging in proceedings more accessible, particularly for persons who have difficulties reading and writing and or speak English as a second or subsequent language.

**Recommendation 14:** Reinstate Family Court circuits in regions where they have ceased.

**Recommendation 15:** Establish safe rooms at all family law courts, with consideration given to making all safe rooms culturally safe and child friendly.

**Recommendation 16:** Consider developing child-care facilities at all family law courts that are available to parties at no charge.

**Recommendation 17:** Increase measures enabling victims/survivors to be able to give evidence from a remote location, both within the Court complex or off-site.

**Recommendation 18:** Ensure any family law reforms directly impacting Aboriginal and Torres Strait Islander people are made in genuine partnership and consultation with Aboriginal and Torres Strait Islander communities and their representative organisations, including recognition of the unique expertise of Aboriginal and Torres Strait Islander community controlled organisations that specialise in supporting victim/survivors of family violence.

**Recommendation 19:** Implement the relevant Aboriginal and Torres Strait Islander-specific recommendations in the 2012 and 2016 Family Law Council Final Reports, subject to the caveats and pre-conditions outlined within this submission at page 27.

## Legal principles in relation to parenting and property

In this section, we recommend a number of changes to the *Family Law Act 1975* regarding family violence that would better support the safety of children and their families, with a particular focus on ensuring more culturally appropriate outcomes for Aboriginal and Torres Strait Islander children.

### Parenting

#### **Question 14 What changes to Part VII of the Family Law Act could be made to produce the best outcomes for children?**

##### Prioritising the safety of children in parenting matters involving family violence

The National FVPLS Forum raises concerns with the existing framework in Part VII of the Family Law Act that governs decision making about the care of children. The two primary considerations the court must take into account when determining the best interests of the child are the benefit to the child of having a meaningful relationship with both parents, and the need to protect the child from harm from being subjected to, or exposed to, abuse, neglect or family violence. While the courts are required to give greater weight to the second of the primary factors, our lawyers find that this often does not happen in practice.

It is necessary to dismantle the underlying assumption in the family law system that the ultimate goal is always for the child to have a ‘meaningful relationship’ with both parents. This assumption disregards the prevalence and long-lasting impacts of family violence on both children and adults in families using the services of the family courts. In particular, there needs to be better recognition by the family law system that children’s exposure to family violence cannot be isolated from the family violence perpetrated against their caregivers, most often mothers.

As noted in WLSA’s submission to the Issues Paper:

*“The dynamic of violence is all pervasive and issues of ongoing control and manipulation of the family are a reality. Difficult, hard decisions must be made by judges to limit contact, deny contact or limit decision-making around issues of parental responsibility in families where there is violence. Assessments by professionals with clinical experience and expertise in family violence and child abuse and risk assessment need to guide the judiciary. Additionally, the long-term impacts on children being placed in the care of a perpetrator of violence must be thoroughly examined. There needs to be better recognition within the family law system that harm caused by perpetrating violence against the adult victim-survivor is also harm perpetrated against the child.”<sup>31</sup>*

FVPLSs regularly assist in cases where one party – generally the father – has a history of family violence and it is deemed inappropriate for the child to have unsupervised time with that party. However, the judge will frequently make orders for gradually increasing contact between the child and the violent parent with the goal of ultimately achieving a ‘meaningful’ and positive relationship through regular and unsupervised time together, as demonstrated in the following case study.

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<sup>31</sup> Women’s Legal Services Australia, Submission to the ALRC Family Law Review Issues Paper, May 2018, 23.

### Case study

Ms G is an Aboriginal woman with a young child. Her violent ex-partner, the child's father, initiated family court proceedings against her but then failed to appear at multiple hearings.

Ms G was ordered to attend to a Children's Contact Centre to facilitate supervised contact with the child's father, despite the fact that he is a registered sex offender and has ongoing issues with drugs and alcohol.

Ms G doesn't drive and struggled to reach the contact centre, which was over an hour away from her house by public transport, with her daughter.

In many cases of family violence, working towards a meaningful relationship between the child and the violent parent presents unacceptable risk to the child and demonstrates a lack of understanding of the emotional and psychological impact upon a child of having contact with a violent parent. It also often creates unsafe situations in which the mother is subject to ongoing harassment and controlling behaviour.

Protecting children from abuse and family violence must be prioritised in determining the best interests of the child. As noted by Kaspiew et al, this requires the family law system to recognise that *"maintaining relationships between children and abusive fathers is likely to be harmful unless the abusive behaviour ends."*<sup>32</sup> As such, ongoing and unsupervised contact with both parents should not be the ultimate goal of parenting orders within a context of ongoing family violence. Instead, it must be accepted that it is frequently necessary to protect children and reduce their exposure to further violence by making supervised, limited, or no-time arrangements.

### Early identification and understanding of family violence

The National FVPLS Forum stresses the importance of family violence being identified and responded to at the earliest possible stage in family law proceedings.

As noted in WLSA's submission to the Issues Paper:

*"The presumption of equal shared parental responsibility is not meant to apply in cases of violence and abuse [...] However, the family law system has difficulty identifying and assessing the risk of family violence early. Many victims-survivors can be unrepresented in court because of limited legal aid and many matters are settled in family dispute resolution, often without legal assistance. It is often difficult to prove violence/abuse to the satisfaction of the court because it occurs behind closed doors."*<sup>33</sup>

This highlights the systemic challenges regarding the testing of evidence in relation to family violence. Determinations about whether family violence has occurred often happen too late in the process, meaning that family violence remains an 'allegation' throughout much of the proceeding. Even when family violence is identified, FVPLS lawyers raise concerns that past family violence is frequently dismissed as 'historical', despite clients and their children experiencing the significant and ongoing

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<sup>32</sup> R Kaspiew, B. Horsfall, L. Qu, M. Nicholson, C Humphreys, K. Diemer, J Dunstan, *Domestic and family violence and parenting: Mixed method insights into impact and support needs: Final report*, (ANROWS) 2017, 13.

<sup>33</sup> Women's Legal Services Australia, Submission to the ALRC Family Law Review Issues Paper, May 2018, 22.

impacts of family-violence related trauma, including the effects that violence may have on someone's parenting capacity.<sup>34</sup>

To ensure that family violence is appropriately identified and responded to from the commencement of family court proceedings, the National FVPLS Forum proposes a separate family violence report be prepared separately by an independent and culturally competent professional with appropriate qualifications in family violence and experience working with victim/survivors.

In development of procedures and policies surrounding the preparation of an early stage family violence report, careful consideration – including through comprehensive consultation – would need to be given to:

- integration with existing family law process (for example, whether a Notice of Risk or other early stage form could be an appropriate trigger point);
- the role and qualifications of the professional preparing the report;
- the timeframe, given that it would likely be most useful if prepared prior to first hearing date;
- the contents (for example, an assessment of the extent and severity of violence and risk to both the child and adult);
- the imperative of ensuring cultural safety for Aboriginal and Torres Strait Islander parties and adequate consideration of cultural issues within the family violence report;
- the impact of complex interlocking issues potentially affecting Aboriginal and Torres Strait Islander victim/survivors and their children, such as mental health, drug and alcohol issues or foetal alcohol syndrome disorder; and
- the importance of ensuring any new procedures surrounding preparation and production of early stage family violence reports do not lead to excessive delays or additional burdens or barriers for victims/survivors seeking to initiate and safely resolving family law matters.

An early stage family violence report would assist in giving victim/survivors the assurance that their experiences and needs were being taken into account from the commencement of family law proceedings. We refer to Recommendation 7 from the 2017 Parliamentary Inquiry into a better family law system to protect those affected by family violence on the need for legislative amendments to allow for earlier determinations of family violence allegations:

*“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.”<sup>35</sup>*

While there is presently the opportunity for parties to include details of family violence in their initial application and affidavit, Aboriginal and Torres Strait Islander victim/survivors may not feel safe to disclose violence without family violence sensitive, trauma informed and culturally safe legal representation and support, highlighting the need for strong referral pathways to FVPLSs.

As stated in our previous submission:

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<sup>34</sup> Australia's National Research Organisation for Women's Safety to Reduce Violence against Women & their Children, Landscapes: Domestic and Family Violence and Parenting: Mixed Methods Insights into Impact and Support Needs: *State of Knowledge Paper* (January 2016) p. 19, available at: [https://d2c0ikyv46o3b1.cloudfront.net/anrows.org.au/s3fs-public/L1.16\\_1.8%20Parenting.pdf](https://d2c0ikyv46o3b1.cloudfront.net/anrows.org.au/s3fs-public/L1.16_1.8%20Parenting.pdf)

<sup>35</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A better family law system to support and protect those affected by family violence*, December 2017, 156.

*The early identification of family violence needs to be accompanied by the early identification of Aboriginality in family law proceedings. In addition to the barriers faced by family violence victims/survivors seeking to access the family law system, Aboriginal and Torres Strait Islander victims/survivors of family violence – predominantly women – face multiple and interrelated barriers to accessing justice. This includes a profound mistrust of the legal system and mainstream services, and an increased likelihood of disengaging from the family law system without appropriate and culturally safe supports. It is therefore critical that the early identification of Aboriginality is accompanied by strong referral pathways to specialised, culturally safe Aboriginal legal service providers such as FVPLSs.<sup>36</sup>*

The National FVPLS Forum emphasises that changes in legislation and procedure will not provide safety for victim/survivors of family violence in isolation. All proposed changes must therefore be accompanied by corresponding and ongoing training for judicial officers and other family law-related professionals in cultural safety, risk assessment and family violence, along with increased resourcing for culturally safe and specialist legal representation for victims/survivors, particularly those at increased risk such as Aboriginal and Torres Strait Islander victims/survivors, such as that provided by FVPLSs.

Further, the early identification of family violence needs to be accompanied by the early identification of Aboriginality in family law proceedings, along with associated strong referral pathways to adequately resourced, specialised, culturally safe Aboriginal legal service providers such as FVPLSs.

#### Careful consideration of shared parenting in family violence cases

The National FVPLS Forum is of the view that shared parental responsibility needs to be carefully considered in cases of family violence. In cases of family violence, shared parental responsibility can provide an avenue for a perpetrator to continue to exert control over a victim/survivor, and can place mother and child at risk. Women who are victim/survivors are generally not in a position to safely and meaningfully negotiate parental decision-making with their violent partner or ex-partner given the unequal power dynamics of family violence. FVPLS lawyers report difficulty in obtaining sole parental responsibility for victim/survivors even when there is strong evidence of the perpetrator (most often the father) perpetrating family violence towards the victim (most often the mother) in front of the child. Challenges also arise as a result of common misunderstandings within the community that equal shared responsibility means equal time and that there is a presumption of equal time for both parents.

Although the presumption of equal shared parental responsibility in Part VII is not meant to apply in cases of family violence, the difficulty in identifying/proving family violence at an early stage, as discussed above, means 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'*.<sup>37</sup> We support the recommendation made by the recent House of Representatives Committee report on family violence that the ALRC consider removing the presumption.<sup>38</sup>

While acknowledging the right of all parties to properly put their case before the court, we stress the need to prioritise safety and minimise the risks of re-traumatisation and further violence to vulnerable women and children that are caused by leaving determinations of parental responsibility to the final

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<sup>36</sup> National FVPLS Forum, Submission to the *Parliamentary Inquiry into a better family law system to protect those affected by family violence*, May 2017, p 11, available at: [http://www.nationalfvpls.org/images/files/NFVPLS\\_submission\\_family\\_law\\_parl\\_inquiry\\_-\\_final.pdf](http://www.nationalfvpls.org/images/files/NFVPLS_submission_family_law_parl_inquiry_-_final.pdf)

<sup>37</sup> House of Representatives Committee 2017, para 6.125.

<sup>38</sup> House of Representatives Committee 2017, Recommendation 19.

hearing. As such, the National FVPLS Forum calls for greater powers for the court to make determinations of parental responsibility at an earlier stage, where appropriate. This could take the form of an early hearing just on notice of risk that is dedicated to issues of family violence that triggers a decision around parental responsibility (whether interim or final) at a much earlier stage.

We also recommend consideration of a reverse presumption of no contact (at least on an interim basis) in cases of family violence, which is rebuttable on evidence. There could, for example, be a presumption that interim no-contact orders be made at the commencement of proceedings with opportunity to review upon the making of final orders. We note the risk that this reverse presumption could be misused by perpetrators and the difficulty of appealing such a decision once made. In addition, the mere existence of such a presumption if not properly drafted and implemented could silence or further marginalise victims/survivors where for example perpetrators or others threaten to employ it against a victim/survivor if she tries to leave a violent relationship or initiate family law proceedings. We reiterate the importance of specialist and culturally safe legal assistance for victim/survivors to mitigate this risk, and recommend careful consideration and consultation with family violence experts be undertaken in relation to this issue.

**Question 15 What changes could be made to the definition of family violence, or other provisions regarding family violence, in the Family Law Act to better support decision making about the safety of children and their families?**

Definition of family violence

We note that the Issues Paper flags several concerns regarding the efficacy of the definition of family violence that is used in the *Family Law Act 1975* (Cth), as below:

(1) *For the purposes of this Act, **family violence** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful.*

(2) *Examples of behaviour that may constitute family violence include (but are not limited to):*

- (a) *an assault; or*
- (b) *a sexual assault or other sexually abusive behaviour; or*
- (c) *stalking; or*
- (d) *repeated derogatory taunts; or*
- (e) *intentionally damaging or destroying property; or*
- (f) *intentionally causing death or injury to an animal; or*
- (g) *unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or*
- (h) *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*
- (i) *preventing the family member from making or keeping connections with his or her family, friends or culture; or*
- (j) *unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.<sup>39</sup>*

In our view, an alternative that could be used is the meaning of family violence employed by the *Family Violence Protection Act 2008* (Vic), as below:

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<sup>39</sup> *Family Law Act 1975* (Cth) s 4AB.

- (1) For the purposes of this Act, **family violence** is—
- (a) behaviour by a person towards a family member of that person if that behaviour—
- (i) is physically or sexually abusive; or
  - (ii) is emotionally or psychologically abusive; or
  - (iii) is economically abusive; or
  - (iv) is threatening; or
  - (v) is coercive; or
  - (vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or
- (b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

This is obviously a complex area and extensive consultation will be required, including with Aboriginal and Torres Strait Islander communities and specialist Aboriginal and Torres Strait Islander Community Controlled Organisations with family violence expertise, to ensure that considerations around lateral violence and the needs of Aboriginal and Torres Strait Islander victim/survivors are adequately taken into account.

**Question 16 What changes could be made to Part VII of the Family Law Act to enable it to apply consistently to all children irrespective of their family structure?**

Recognition of meaningful relationship beyond parents

Section 60CC(2)(a) of the Act prescribes that a primary consideration must be ‘the benefit to the child of having a meaningful relationship with both of the child’s parents’. The narrow emphasis on maintaining a relationship with the child’s parents, also reflected in s 60B(1)(a), and s 60B(2)(a) and (b) of the Act, does not does recognise or reflect the diversity of alternative kinship structures that are particularly relevant within Aboriginal and Torres Strait Islander families and communities. It may not be the child’s biological parents who have the sole, or most meaningful, relationship with a child, or who are best able to provide for the child’s safety, wellbeing and/or connection to culture.

The family law system needs a better understanding of the centrality of family in Aboriginal and Torres Strait Islander cultures. It is essential to avoid reinforcing prescriptive or stereotypical ideas about Aboriginal and Torres Strait Islander family life, but rather a recognition of the diversity of Aboriginal and Torres Strait Islander family structures and Aboriginal and Torres Strait Islander children’s best interests within this context.

While cultural awareness training for all family law professionals is imperative, it is also important for this cultural sensitivity to be embedded in the legislation. At present, while other meaningful people may be considered under the additional considerations (s 60CC(3)) judicial officers making decisions in the child’s best interests are restricted to considering the child’s relationship with both parents, rather than being able to look to the importance of other meaningful relationships in the child’s life, including alternate kinship care arrangements. In the case of Aboriginal and Torres Strait Islander families, ‘meaningful relationship’ should therefore be expanded to be capable of encompassing, where appropriate, other attachment figures and key relationships such as a child’s grandparents, aunts and uncles.

In the case of Aboriginal and Torres Strait Islander children, we support aspects of Recommendation 2 and 3 of the Family Law Council 2013 Report on Parentage and the Family Law Act. Specifically, we

support removing the term ‘both’ when references are made to ‘both of the child’s parents’ in s60B(1) of the Family Law Act in acknowledgement of diversity of families and the inclusion of a specific provision recognising that a parent ‘may include a person who is regarded as a parent of a child under Aboriginal tradition or Torres Strait Islander custom’.

While expanding the definition of ‘meaningful relationships’ beyond parents is particularly important for Aboriginal and Torres Strait Islander children, we also believe this is important for all children and would help update the family law system with respect to the diversity of modern family structures.

### Culture as primary consideration for Aboriginal and Torres Strait Islander Children

If the child is Aboriginal or Torres Strait Islander, Section 60CC3(h) requires the court to take into consideration the child's right to enjoy his or her culture (including the right to enjoy that culture with other people who share that culture) and the likely impact of any proposed parenting order on that right.

While the Act recognises that different considerations must be taken into account for Aboriginal and Torres Strait Islander children, it is insufficient for connection to culture to be just one factor among thirteen ‘additional considerations’ that the court must take into account for Aboriginal and Torres Strait Islander children. Our lawyers observe that cultural connection is frequently given less weight than other additional considerations by judicial officers – and indeed other key professionals within the family law system such as Family Consultants and legal representatives from mainstream (or non-Aboriginal or Torres Strait Islander) legal assistance services. At present, it is not uncommon for a matter involving Aboriginal and Torres Strait Islander children to reach the stage of final orders without the court even considering the Aboriginality of the children.

#### Case study

Ms. H, a young Aboriginal woman with two young children, was unrepresented through the majority of family law proceedings concerning the parenting arrangements for her children. Her violent ex-partner was also self-represented. The matter went through to final orders without the Aboriginality of the children being considered by the court in determining the best interests of the children.

In family law proceedings, judicial officers often rely heavily on information provided by family reports and family consultants in making decisions regarding the best interests of a child. However, most family consultants are currently not well placed to provide a culturally appropriate report that takes into consideration the cultural needs of Aboriginal and Torres Strait Islander children and/or the mapping of kin arrangements and possible other avenues for promoting the child’s safety, wellbeing and cultural connection. As noted by Aboriginal Consultant Psychologist Stephen Ralph:

*“Family reports have a highly influential part to play in the courts’ decision making processes. They often have a strong influence on the views of judges and magistrates and are often instrumental in shaping judicial thinking and the determination of cases. [...] In light of this it is of the utmost importance that family reports be of the highest professional standard and that all of the relevant issues be duly considered and assessed. It appears though that from the reports of Indigenous litigants and practitioners that family consultants are possibly not well*

*equipped to undertake a comprehensive assessment of cultural issues as they relate to the best interests of Indigenous children.”<sup>40</sup>*

To assist in ensuring that the importance of cultural connection, identity and wellbeing for all Aboriginal and Torres Strait Islander children is identified, foregrounded and considered in all family law proceedings involving Aboriginal and Torres Strait Islander parties, the National FVPLS Forum makes the following proposals:

#### ***A) Restructuring s60CC decision-making framework***

The National FVPLS Forum is of the view that restructuring the decision-making framework in Part VII is essential to make s60CC3(h) into a primary consideration for all Aboriginal and Torres Strait Islander children, rather than an ‘additional consideration’ as it is at present. Restructuring the list of s60cc factors in this way would direct judicial officers to the imperative of considering cultural connection for all Aboriginal and Torres Strait Islander children, while still maintaining the paramount consideration of the child’s safety and protection from harm.

While legislative amendments elevating the significance of cultural connection for Aboriginal and Torres Strait Islander children would help ensure consistency and accountability in promoting children’s cultural rights, we again stress that legislative changes will have little impact without increased measures to strengthen cultural awareness training for all judicial officers and improved resourcing and referral to culturally safe and specialised, Aboriginal and Torres Strait Islander Community Controlled legal assistance services such as FVPLSs.

#### ***B) Separate notice for Aboriginal and Torres Strait Islander children***

We propose consideration of a separate notice that the parties themselves have to file if the child is Aboriginal or Torres Strait Islander, to ensure that the court is aware of its responsibility to take into account the child’s cultural rights from the earliest stage. Once the notice is filed, the onus would be upon the courts to respond and ensure that the child’s Aboriginality and cultural issues are taken into account at all stages of decision making.

At a minimum, the filing of such a notice should ensure that:

- wherever possible, Aboriginal or Torres Strait Islander Family Consultants are allocated to cases involving Aboriginal or Torres Strait Islander children;
- parties are prompted to consider and provide evidence in relation to the child’s cultural background and needs, and ensure parenting proposals put to the court will promote and protect the child’s cultural rights;
- a cultural report forms part of the family report in all cases involving Aboriginal and Torres Strait Islander children; and
- cultural experts are engaged as expert witnesses as required.

In addition, significant work is required within court registries to ensure all registry staff routinely and appropriately ask the Standard Indigenous Question of clients and accurately collect and record Aboriginal and Torres Strait Islander status of parties to family law proceedings.

#### ***C) Cultural Support Plan***

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<sup>40</sup> Family Court of Australia, *Indigenous Australians and Family Law Litigation: Indigenous perspectives on access to justice*, 2011, available at: <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/reports/2011/indigenous-australians-and-family-law-litigation>

There should be a legislative requirement that every time that parenting orders are made for an Aboriginal and Torres Strait Islander child, a Cultural Support Plan should be developed with advice from an ACCO with family violence expertise, such as FVPLSs, for that child. A Cultural Support Plan is an individually tailored plan for Aboriginal and Torres Strait Islander children containing information about their traditional links and family connections and detailing actions to be taken in order to maintain a strong sense of identity and belonging, and connection to culture.

At present, Cultural Support Plans are most often developed in state and territory child protection jurisdictions for Aboriginal and Torres Strait Islander children in out-of-home care, especially children in non-Aboriginal kinship care or non-kinship care. This should be adopted in the family law jurisdiction and become a requirement for family law parenting orders; cultural support plans could be annexed to or form part of the final orders. This would ensure guaranteed consideration and primacy of cultural rights for Aboriginal and Torres Strait Islander children, including their rights to maintain meaningful relationships with and connection to extended family and community, and meaningful steps to promote and maintain connection to culture and identity.

## Property

### **Question 17 What changes could be made to the provisions in the Family Law Act governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?**

FVPLSs do not assist with property matters alone, however, our lawyers can assist with small property matters that are bound up in family law and family violence matters. FVPLS lawyers report that clients commonly continue to experience financial abuse and disadvantage after separation. The National FVPLS Forum supports increasing the court's powers to make orders for the split or transfer of unsecured joint debt and liabilities. We also refer to the recommendations in Women's Legal Service Victoria's *Small Claims, Large Battles* report launched in March 2018. The recommendations focus on:

- Streamlining court processes;
- Improving financial disclosure;
- Superannuation;
- Dealing with joint debts;
- Responding to family violence; and
- Improving access to property settlements.

The National FVPLS Forum supports these recommendations, insofar as their implementation has regard to the specific needs and barriers faced by Aboriginal and Torres Strait Islander victim/survivors of family violence, particularly women and children, and the importance of building the capacity of and appropriately resourcing, culturally safe and holistic legal representation for Aboriginal and Torres Strait Islander victim/survivors, from a specialised Aboriginal legal service provider such as FVPLSs, in settling family-violence related small property matters.

## Recommendations

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

**Recommendation 21:** Improve measures of early identification of family violence by family law courts, including through the preparation of a separate family violence report at an early stage in proceedings by an independent and culturally competent professional with appropriate qualifications in family violence.

**Recommendation 22:** Remove the presumption of equal shared parental responsibility and the language of equal shared time from Part VII of the *Family Law Act 1975*.

**Recommendation 23:** Include a provision in the Family Law Act that recognises that a parent ‘may include a person who is regarded as a parent of a child under Aboriginal tradition or Torres Strait Islander custom’.

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

**Recommendation 25:** Consider a requirement for parties to file a notice on commencing family law proceedings if the child involved is Aboriginal or Torres Strait Islander, to ensure that the court is aware of its responsibility to take into account the child’s cultural rights from the earliest stage. At a minimum, the filing of such a notice should ensure that:

- wherever possible, Aboriginal or Torres Strait Islander Family Consultants are allocated to cases involving Aboriginal or Torres Strait Islander children;
- parties are prompted to consider and provide evidence in relation to the child’s cultural background and needs, and ensure parenting proposals put to the court will promote and protect the child’s cultural rights;
- a cultural report forms part of the family report in all cases involving Aboriginal and Torres Strait Islander children; and
- cultural experts are engaged as expert witnesses as required.

**Recommendation 26:** Amend Part VII of the *Family Law Act 1975* to provide for the preparation of a Cultural Plan, which sets out how the child’s ongoing connection with cultural identity, kinship networks and country may be maintained, to be developed any time parenting orders are made for an Aboriginal and Torres Strait Islander child.

**Recommendation 27:** Adopt all fifteen recommendations in Women’s Legal Service Victoria’s ‘Small Claims, Large Battles’ report.

## Resolution and adjudication

**Question 20** What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?

**Question 21** Should courts provide greater opportunities for parties involved in litigation to be diverted to other dispute resolution processes or services to facilitate earlier resolution of disputes?

With respect to dispute resolution and early resolution of disputes, we strongly advocate for the central importance of adequately resourced, culturally safe, Aboriginal and Torres Strait Islander community controlled, specialist legal services (such as FVPLSs) to assist all Aboriginal and Torres Strait Islander women and children engaged with the family law system, including through legally-assisted alternate dispute resolution processes. Given the significant barriers to accessing justice faced by Aboriginal and Torres Strait Islander victims/survivors of family violence, we caution against early dispute resolution initiatives that seek to encourage or promote parties resolving matters without suitably qualified and culturally safe support, including legal advice and representation.

### Appropriate dispute resolution for family violence

**Question 23** How can parties who have experienced family violence or abuse be better supported at court?

**Question 24** Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

Although it has been a requirement for parents to attempt Family Dispute Resolution ('FDR') to endeavour to settle arrangements for their children prior to initiating court proceedings since 2006, many of our clients do not access FDR processes (or at least, non-legally assisted FDR) and instead avail themselves of the exception in cases of family violence. The National FVPLS Forum takes the strong position that given the barriers and inherent power imbalances outlined above, Aboriginal and Torres Strait Islander victim/survivors should not be required to participate in non-legally assisted FDR and should always have access to appropriately resourced and specialist legal representation from Aboriginal and Torres Strait Islander legal service providers like FVPLSs.

A number of FVPLSs hold the view that in many cases of family violence, FDR is not appropriate or in the interests of Aboriginal and Torres Strait Islander victims/survivors and their children. Nevertheless legally-assisted FDR can be a more attractive prospect than protracted proceedings for some clients and in a number of jurisdictions FDR is a pre-requisite to obtaining a grant of legal aid. It is therefore critical that Aboriginal and Torres Strait Islander people – victims/survivors of family violence and women in particular – have access to legally-assisted FDR with the support of holistic, culturally safe and specialised legal representation (for example from an FVPLS) in advance, during and after any FDR processes.

FVPLS clients have reported feeling pressured and/or intimidated into participating in FDR and unaware of their right to say no to FDR on the basis of the family violence exception. Aboriginal and Torres Strait Islander women may also be less likely to challenge an assessment that a lawyer is not required and slip through Family Relationship Centre screening processes in which they do not feel safe to disclose family violence or ask for a lawyer. The National FVPLS Forum therefore strongly recommends that, for Aboriginal and Torres Strait Islander people, entry to FDR should be through Aboriginal and Torres Strait Islander Community Controlled legal assistance services like FVPLSs with

appropriate expertise and resourcing in FDR, and that all Aboriginal and Torres Strait Islander people accessing Family Relationship Centres should be offered a referral to such an organisation.

FDR presumes an equal playing field in which both parties have the capacity to put their views forward freely and effectively, without fear or censorship. This is simply not the reality in situations of family violence which inevitably involve power imbalance, coercion and fear. Evidence shows that separation is a time of increased risk for family violence victims/survivors and many of our clients report ongoing fear, intimidation and anxiety around negotiating family law matters with their former abuser, which may make them more likely to capitulate and accept less safe, fair or workable settlements than they may otherwise have achieved.

The National FVPLS Forum posits that this may be even more so for Aboriginal and Torres Strait Islander women who have experienced family violence given the presence of additional, complex and compounding barriers to participating equally and being understood in FDR processes. Accordingly, it is essential that all Aboriginal and Torres Strait Islander victims/survivors of family violence are referred to culturally safe and specialised legal representation, such as from an FVPLS, to assist them in deciding whether or not to access FDR, support them through the FDR process and indeed throughout the life of their matter.

It is also critical that mainstream FDR be culturally appropriate and that all FDR staff undertake cultural awareness training which incorporates specific content on both family violence and the particular barriers faced by Aboriginal women accessing justice and supports. This training is essential and should run alongside comprehensive cultural awareness and family violence training for judges, lawyers, court staff and mainstream services to ensure the rights and needs of Aboriginal and Torres Strait Islander victims/survivors are understood, respected and promoted throughout the process of obtaining Consent Orders or participating in legally assisted FDR. It is essential that FVPLSs are provided with increased resourcing to be able to support Aboriginal and Torres Strait Islander victims/survivors, particularly women, to engage in legally-assisted FDR processes.

We refer to and support the Family Law Council 'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems' 2016 Final Report recommendation that the federal government work with Aboriginal and Torres Strait Islander communities and organisations to develop and deliver culturally appropriate post-separation parenting programs and family dispute resolution services.<sup>41</sup> We also strongly reiterate comments made in our previous submission:

*"While NFVPLS welcomes resourcing to support improved cultural competence and accessibility of the family law system, it is critical that any moves to develop Aboriginal and Torres Strait Islander-specific FDR processes take place in partnership with Aboriginal and Torres Strait Islander communities and Aboriginal and Torres Strait Islander Community Controlled Organisations with expertise in family law and assisting Aboriginal and Torres Strait Islander victims/survivors of family violence. Meaningful partnership must involve more than inviting an Aboriginal or Torres Strait Islander mediator or service into the standard FDR process. Rather, the development of a culturally safe FDR process would entail rigorous reflection, consideration and consultation on the potential re-design of all aspects of the mediation process."<sup>42</sup>*

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<sup>41</sup> Family Law Council, 'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems' 2016 Final Report, p. 9, available at: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF>

<sup>42</sup>National FVPLS Forum submission to the Committee for Social Policy and Legal Affairs: Parliamentary Inquiry into a Better Family Law System to Protect Those Affected by Family Violence May 2017, page 15-16

In summary, the National FVPLS Forum recommends developing practices and procedures that ensure:

- all Aboriginal and Torres Strait Islander victims/survivors of family violence have access to culturally safe and holistic advice and representation from an appropriately resourced and specialised Aboriginal and Torres Strait Islander legal service providers, such as FVPLSs, prior to, during and following participation in legally-assisted Family Dispute Resolution;
- all Aboriginal and Torres Strait Islander clients are offered a referral to a suitably specialised Aboriginal and Torres Strait Islander Community Controlled legal service provider prior to family dispute resolution screening and/or on accessing a Family Relationship Centre, whichever is earliest; and
- any entry by Aboriginal and Torres Strait Islander victim/survivors of family violence into family dispute resolution is facilitated through an Aboriginal legal service provider with expertise in family law and supporting victims/survivors of family violence.

Furthermore, the development of any national legally-assisted family dispute resolution program appropriate for family violence cases must be supported by specialist family violence, trauma-informed and culturally competent lawyers and family violence and trauma-informed family dispute resolution practitioners, including Aboriginal and Torres Strait Islander family dispute resolution practitioners.

More specifically, any development of Aboriginal and Torres Strait Islander-specific family dispute resolution processes must take place in genuine partnership and consultation with Aboriginal and Torres Strait Islander communities and Community Controlled Organisations with expertise in supporting victims/survivors of family violence (such as FVPLSs). This should be a condition of any funding contracts related to piloting and delivering such models.

## Misuse of process

### **Question 25 How should the family law system address misuse of process as a form of abuse in family law matters?**

The National FVPLS Forum reiterates our support for the elimination of direct cross-examination of victim/survivors by self-represented perpetrators by way of amendments to the *FLA* and corresponding legislative amendments to the *Evidence Act (WA)*. We consider that access to on-going culturally safe legal advice and representation for all Aboriginal and Torres Strait Islander victims/survivors (especially women and children) involved in family law matters is also an essential means of addressing this problem.

We further call for the need to remove all other avenues available in the family law system for perpetrators of family violence to commit further abuse against their victims. For example, FVPLS lawyers report that there is insufficient recognition of the manipulative behaviour frequently employed by perpetrators during family law proceedings – not only towards victim/survivors themselves but also towards family law professionals. Perpetrators may be skilled at hiding violence and presenting themselves as agreeable, which may lead Family consultants to (mis)represent them favourably in family reports. By contrast, a lack of understanding of the severe and ongoing impacts of trauma can lead family consultants to view the behaviour and responses of victim/survivors as ‘hostile’ or ‘uncooperative’. This highlights the importance of comprehensive and ongoing family violence sensitivity and trauma informed training for all family law professionals as a key means of addressing the risk of perpetrators misusing the family law process.

To ensure that changes to include misuse of process within the definition of family violence are not used against victim/survivors, we refer to and support WLSA's comments in their submission to the Issues Paper:

*Our support for including misuse of process within the definition of family violence is contingent upon the definition continuing to be focused on coercive and controlling behaviour. We also note this provision would need to be carefully drafted.*

*We note the FLC Final Report recommended the Federal Government commission research on what family law systems abuse occurs and how it can be prevented and support this recommendation.*

*We further note that removal of the presumption of equal shared parental responsibility and overall emphasis in the FLA on equal time and shared parenting and so looking at each matter on a case-by-case basis should go a significant way to limiting opportunities for misuse of process as a form of abuse.<sup>43</sup>*

In addition, FVPLS lawyers have raised concerns that perpetrators are able to maintain control and increase risk to victim/survivors and children by dragging out family law proceedings through their non-compliance with court orders. We therefore recommend that research into family law systems abuse include consideration of increasing court powers to mandate compliance with orders such as attendance at men's behaviour change, case management or counselling programs. Where the perpetrator is Aboriginal and Torres Strait Islander, this should involve a referral to a culturally safe men's behaviour change program run by or in partnership with an Aboriginal and Torres Strait Islander community controlled organisation. We note Dardi Munwurro in Victoria as one such example.

As regards the subpoenaing of sensitive records, we refer to and endorse the following proposals contained in the report produced by Women's Legal Service NSW - *Sense and Sensitivity: Family Law, Family Violence and Confidentiality (Sense and Sensitivity)*:

*“Proposal 7*

*Therapeutic records be subpoenaed and produced by following a guided, preferably prescribed, decision-making process to establish the necessity and importance of accessing these documents. The potential for further delay in proceedings is acknowledged, but in the absence of urgency the consequences of disclosure outweigh any delay.*

*Proposal 8*

*The decision making process about access to therapeutic records, whether ideally contained in the court rules or in the form of guidelines like the Family Violence Best Practice Principles, might include the following:*

- *A presumption that there is always potential for a detrimental impact on the therapeutic relationship when sensitive records are accessed, particularly in a litigation context.*
- *Clarification of the type of sensitive records to be protected.*
- *Acknowledgement that parties can seek production of their own therapeutic records with restrictions on access by a perpetrator as required.*
- *A requirement to seek leave to issue a subpoena for therapeutic records, reversing the onus from parties and professionals who would typically object to the subpoena production to the party seeking access, including ICLs. Parties retain the right to object to production even if leave is granted to issue the subpoena.*

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<sup>43</sup> Women's Legal Services Australia, Submission to the ALRC Family Law Review Issues Paper, May 2018, 23.

- *A standard that leave to issue a subpoena only be granted if the records appear to be relevant to a fact in issue and there is no less intrusive source of the evidence available or there are circumstances of urgency, which may need to be defined.*
- *If records about therapeutic interventions with children are sought, the court must consider whether the consent of the child must be obtained or if an additional protection is required, such as the records only being viewed by the judge.*
- *Acknowledge that evidentiary rules will be relevant to the consideration of legitimate forensic purpose.*
- *A requirement for parties inspecting therapeutic records to sign an undertaking pursuant to 15A.12(2) as discussed in Sampson & Hartnett [2014] FCCA 99 at 19-20.”<sup>44</sup>*

## Technology

**Question 28 Should online dispute resolution processes play a greater role in helping people to resolve family law matters in Australia? If so, how can these processes be best supported, and what safeguards should be incorporated into their development?**

The Issues Paper notes that online tools to assist parties undergoing separation are only appropriate for families who do not have complex needs such as family violence. The National FVPLS Forum strongly supports this view. Moreover, given the disproportionate rates of family violence in Aboriginal and Torres Strait Islander communities and the significant barriers that Aboriginal and Torres Strait Islander victim/survivors face in disclosing and seeking support for family violence, the National FVPLS Forum is of the view that online dispute resolution processes are unlikely to be appropriate for Aboriginal and Torres Strait Islander people in general, regardless of whether family violence has been identified or disclosed by either party. Online tools are also unable to address the unique and significant barriers to accessing the family law system experienced by Aboriginal and Torres Strait Islander victim/survivors, predominantly women and their children, and the prevalence of complex and interlocking legal and non-legal needs. The most effective response to these barriers, involves developing a trusting relationship face-to-face, which is a crucial aspect of the holistic, culturally safe and specialist support provided by FVPLSs.

## Decision making

**Question 29 Is there scope for problem solving decision-making processes to be developed within the family law system to help manage risk to children in families with complex needs? How could this be done?**

**Question 30 Should family inclusive decision-making processes be incorporated into the family law system? How could this be done?**

As noted in the Issues Paper, the adversarial court system is often not the best way to support families with complex needs, such as family violence, and can increase risk and escalate conflict. We reiterate the central importance of access to specialist and culturally safe legal service providers for all Aboriginal and Torres Strait Islander victim/survivors. FVPLSs assist clients with complex needs by

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<sup>44</sup> Carolyn Jones, *Sense and Sensitivity Family Law, Family Violence and Confidentiality* (Women’s Legal Service NSW), May 2016, Proposal 7-8 accessed at: <http://www.wlsnsw.org.au/wp-content/uploads/WLS-NSW-Sense-and-Sensitivity-web.pdf>

providing holistic and ongoing support for a range of legal and non-legal needs as well as referrals to other services to address interlocking concerns such as mental health, drug and alcohol or housing issues.

### Family led decision making

We refer to the recommendation in the 2012 Family Law Council Final Report that 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. We note that the need for Aboriginal and Torres Strait Islander specific family group conferences was again recommended in the FLC Final Report 2016. We continue to support the implementation of these recommendations.

We reiterate our recommendation outlined above that reforms such as this which impact the lives of Aboriginal and Torres Strait Islander people must be developed in genuine partnership and collaboration with Aboriginal and Torres Strait Islander communities and take into account a diversity of perspectives, most especially Aboriginal and Torres Strait Islander Community Controlled Organisations with expertise in family violence and supporting victims/survivors. Rigorous consultation and careful consideration will be required to ensure that any newly initiated family group conferences are both culturally safe, locally tailored and family violence sensitive – with the safety of women and children at their heart.

### Problem solving decision making

We note the Issues Paper refers to two different approaches to problem solving at page 66:

- A hybrid model in which the court transfers the role of monitoring the parties' engagement with services to a registrar of the court or to a community-based family relationship agency; and
- An administrative model, such as a non-judicial tribunal, such as proposed in Parent Management Hearings.

We recommend further exploration of the Registrar monitoring the parties' engagement with services. We have previously raised a number of concerns regarding Parent Management Hearings, and we refer you to our previous submission to the Senate Legal and Constitutional Affairs Committee in response to the Family Law Amendment (Parenting Management Hearings) Bill 2017.<sup>45</sup> In summary, we do not endorse Parent Management Hearings as there is a strong possibility that Aboriginal and Torres Strait Islander victim/survivors will go unrepresented to the detriment of their safety and capacity to access justice.

We further suggest that it is worth considering whether the Koori Children's Court in Melbourne (or other local examples) could be used as a model to develop 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.

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<sup>45</sup> National FVPLS Forum, Submission to the Legal and Constitutional Affairs Legislation Committee – Family Law Amendment (Parenting Management Hearings) Bill 2017, January 2018, available at: [http://www.nationalfvpls.org/images/files/FVPLS\\_Submission\\_-\\_FLA\\_Bill\\_Parent\\_Management\\_Hearings\\_2018\\_FINAL.pdf](http://www.nationalfvpls.org/images/files/FVPLS_Submission_-_FLA_Bill_Parent_Management_Hearings_2018_FINAL.pdf)

We would be pleased to consult further with the ALRC and Federal government to develop and explore the various possibilities outlined in this section.

## Recommendations

**Recommendation 28:** Develop practices and procedures that ensure:

- all Aboriginal and Torres Strait Islander victims/survivors of family violence have access to culturally safe and holistic advice and representation from an appropriately resourced and specialised Aboriginal and Torres Strait Islander legal service providers, such as FVPLSs, prior to, during and following participation in legally-assisted Family Dispute Resolution;
- all Aboriginal and Torres Strait Islander clients are offered a referral to a suitably specialised Aboriginal Community Controlled legal service provider prior to family dispute resolution screening and/or on accessing a Family Relationship Centre, whichever is earliest; and
- any entry by Aboriginal and Torres Strait Islander victim/survivors of family violence into family dispute resolution is facilitated through an Aboriginal legal service provider with expertise in family law and supporting victims/survivors of family violence (such as an FVPLS).

**Recommendation 29:** Ensure any development of Aboriginal and Torres Strait Islander-specific family dispute resolution processes take place in genuine partnership and consultation with Aboriginal and Torres Strait Islander communities and Community Controlled Organisations with expertise in supporting victims/survivors of family violence. This should be a condition of any funding contracts related to developing, piloting and delivering such models.

**Recommendation 30:** Consider an option for the court to compel perpetrators of family violence to attend behaviour change programs, case management or family violence counselling programs, including, where available, a referral for Aboriginal and Torres Strait Islander perpetrators to a culturally safe men's behaviour change program run by or in partnership with an Aboriginal and Torres Strait Islander provider.

## Integration and collaboration

Almost all FVPLS clients with family law matters have a co-occurring range of legal and non-legal support needs, such as simultaneous child protection or victims of crime compensation matters, intervention orders, housing and financial difficulties or other therapeutic needs. In addition to navigating the family law system, it is often necessary for clients to engage a wide range of different services and legal systems to address these needs. Service fragmentation and cross-jurisdictional proceedings can contribute to the re-traumatisation of clients due to the need to repeatedly retell their story and re-litigate questions of risk. It also increases the risk of prolonging and escalating violence due to delays and the potential for systems abuse by perpetrators.

In theory, the Forum supports efforts to strengthen integration and collaboration, however we stress that this must not compromise the privacy and safety of vulnerable family law clients, particularly Aboriginal and Torres Strait Islander women and children. For Aboriginal and Torres Strait Islander victim/survivors of family violence engaged with the family law system, the holistic wraparound model of service delivery provided by FVPLSs is crucial in mitigating the risks of service fragmentation and providing culturally safe support across a range of legal and non-legal needs. It is therefore critically important that all Aboriginal and Torres Strait Islander victims/survivors of family violence have access to an Aboriginal and Torres Strait Islander community controlled and specialist legal service provider that integrates the overlapping areas of family law, child protection, family violence and victims assistance, and that FVPLSs are adequately resourced to do this work. It is also crucial, as discussed above, that increased resourcing is provided to enable FVPLSs to address unmet and increasing demand, increase geographic coverage, and strengthen capacity to provide comprehensive assistance and effective outcomes across all areas of the family law system.

We note that WLSA has proposed an ideal model of a “*specialist domestic violence court or specialist domestic violence list where all professionals within the system are domestic violence, child abuse and trauma informed, culturally competent and disability aware and the court can consider matters relating to intervention orders as well as family law.*”<sup>46</sup> While we support this proposal, we recognise that it would not be realistic in many of the rural, regional and remote areas where FVPLSs work. Furthermore, there is a risk that it still may not meet the needs of Aboriginal and Torres Strait Islander victim/survivors. We again reiterate that culturally safe, specialist and holistic legal and non-legal support from FVPLSs is therefore a key component of addressing multi-jurisdiction issues for Aboriginal and Torres Strait Islander women and their children.

As regards the Family Advocacy and Support Service (‘**FASS**’) model discussed in the Issues Paper,<sup>47</sup> the National FVPLS Forum perceives that the FASS model represents a positive development in increasing the availability of duty lawyers for victim/survivors of family violence – however, we have concerns that a mainstream duty lawyer model is insufficient to address the cultural and, frequently complex, needs of Aboriginal and Torres Strait Islander victims/survivors of family violence and their children. We note that, subject to a positive evaluation of the current pilot, the SPLA Committee has recommended expanding the model to include collaboration and referral pathways to Aboriginal and Torres Strait Islander specific services. We strongly support this expansion and look forward to discussing FVPLSs involvement. We also raise the importance of duty lawyers identifying the Aboriginality of clients and making appropriate referrals to FVPLSs in a timely and culturally competent way, necessitating comprehensive cultural safety and trauma informed training for all FASS duty lawyers.

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<sup>46</sup> Women’s Legal Services Australia, Submission to the ALRC Family Law Review Issues Paper, May 2018, 34.

<sup>47</sup> Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper No 48 (2018) 70.

## Engaging with multiple courts

### **Question 32 What changes should be made to reduce the need for families to engage with more than one court to address safety concerns for children?**

As outlined above, cross-jurisdictional issues are very significant for Aboriginal and Torres Strait Islander victims/survivors – and Aboriginal and Torres Strait Islander women in particular – given the high levels of family violence and child protection intervention experienced and the movement of victim/survivors between states and territories in seeking to connect with family and/or to escape violent partners.

Aboriginal and Torres Strait Islander victim/survivors who are engaged with multiple courts, and FVPLS lawyers who represent them, face increased challenges including:

- Having to deal with two or more separate courts, legal frameworks and court personnel can be doubly stressful;
- There is often confusion among clients and community members about the difference between the Children’s Court (Family Division) and the Family Court;
- Difficulty maintaining client engagement and trust in court systems when multiple and onerous proceedings are required;
- Adapting to different procedural requirements, thresholds and legislative frameworks across jurisdictions can be practically and strategically complex;
- Increased avenues for perpetrators of family violence to intimidate and exert control over victims/survivors through the fragmentation of the court systems; and
- Risk of differing and inconsistent findings or thresholds with respect to risk and violence.

Holistic, specialist, culturally safe legal representation is crucial for assisting Aboriginal and Torres Strait Islander victims/survivors to not only navigate the court systems, but also understand the different purposes and requirements of each. The following case study outlines the complexities our clients face navigating multiple jurisdictions and the critical role of culturally safe, holistic and specialist legal assistance such as that provided by FVPLS.

#### Case study

Ms M is an Aboriginal woman with three children who has been involved in family law proceedings for over five years. She lived in a rural area in Victoria.

As a result of the longstanding family violence she experienced at the hands of the children’s father, Ms M fled with her children. He pursued her and threatened to kill her, as well as threatening to slit the dog’s throat if she didn’t do as he said, and the Police made an Intervention Order for Ms M which didn’t include her children on it. As a result of threats, Ms M returned to live with the Father and participated in a roundtable dispute resolution process, resulting in parenting orders by consent whereby the two youngest children were to live with Ms M and the oldest child was to live with the father.

After further violence Ms M again left the home with the two children. Late one night, her ex-partner came to her house, bringing two other men with him to intimidate her so that he could take the two youngest children. Ms M was too terrified to say or do anything. From this point onwards, the father continued to make threats, such as ‘I’ll personally make concrete boots for you and leave you at the bottom of the lake’ and ‘When you go home there might be two men waiting for you’.

Final family law orders were made in 2014 which awarded full time care of all three children to her violent ex-partner. These orders were supported by the relevant child protection department because of the unsubstantiated allegations made against her that she was homeless and using ice. The father is non-Aboriginal and denies the children's Aboriginality, frequently calling them "coons" and other racist slurs. Around this time, Ms M, who was suffering immense and ongoing trauma, fear, intimidation and grief, met a new partner, moved interstate, and attempted to get her life back on track.

The following year, child protection contacted Ms M to let her know that her three children had been removed from the father's care. Ms M moved back to the city and was successful in having her children returned to her care pursuant to Children's Court Orders, provided that she did not relocate with them interstate.

Ms M was aware that the orders allowed her to take the children interstate for school holidays, and so this is what she did with the explicit approval of the child protection department. As soon as she did this, child protection withdrew the proceedings and closed their file, *without first ensuring that Ms M would not be in breach of Federal Circuit Court Parenting Orders*. The child protection department knew – or ought to have known – Ms M would be in breach of Federal Circuit Court orders, once the Children's Court orders were revoked. Ms M thought that child protection would have done what was necessary to ensure the children were legally within her care. She thought she was doing the right thing, as she had previously applied for legal aid and instructed her lawyer to put in an application to revoke the existing family law orders, although this had never eventuated.

In 2017, the father applied for a recovery order for the children. In interim proceedings, the Court ordered the Father live with the children and the Mother have contact with the children on alternate fortnights. The judge in the Federal Circuit Court was furious, and he expressed a view that child protection should never have pulled out and that if he had the power to send one case back to the Children's Court this would be "at the top of the list". The judge recognised that child protection was aware that Ms M was moving interstate with her children and not planning on returning, had applied to revoke the Children's Court Order without ensuring that Ms M would not be left in breach of Federal Circuit Court Orders.

Had child protection been concerned about the legal health of Ms M and her children, they would have facilitated an application for variation or revocation of the parenting orders which had placed the children in their father's care. However, they did not assist Ms M, she is now involved in complex and ongoing family law litigation. Our member organisation is currently assisting Ms M with this litigation, flexible support packages and housing assistance, as she has been forced to relocate back to regional Victoria in order to have regular contact with her children, prove her parenting capacity and stability. This relocation will last until final orders are made which could be up to one year away. In the meantime, the Father, a perpetrator of violence and a person who has put his children at risk of significant harm previously, remains the primary carer of the children.

This case study demonstrates the lack of communication, initiative and collaboration between state children's courts and federal family courts, to ensure that the law brings safety and finality to children and women who are victims of family violence.

As noted in the Issues Paper, state and territory courts of summary jurisdiction rarely exercise the federal family law jurisdiction they are vested with under Part VII of the Act. While the ability to resolve parenting matters within state or territory proceedings may be an incentive for some clients, we are concerned that Aboriginal and Torres Strait Islander women may face increased pressure to consent to parenting orders without proper and culturally safe legal advice.

As elaborated in our submission to the Family Law Council Inquiry on *Families with Complex Needs & the Intersection of the Family Law and Child Protection Systems* (May 2015), the National FVPLS Forum is of the view that the expansion of family law jurisdiction to state and territory courts without a concomitant increase in funding and support for local courts would be disastrous. In summary, we stress that an expansion in state and territory family law jurisdiction must be contingent on a Federal Government commitment to provide significant additional resources and funding for local courts and legal assistance services, including FVPLSs, to ensure they are in a position to take on an increased caseload in this new and complex area of law. In addition, a prerequisite consideration must be given to how the recommendations and issues raised in this submission regarding cultural competence, family violence and the cultural needs of Aboriginal and Torres Strait Islander children would be reflected at the local level.

## Cross-jurisdictional collaboration

### **Question 33 How can collaboration and information sharing between the family courts and state and territory child protection and family violence systems be improved?**

With regard to Children's Courts taking on expanded family law powers, it is important to note that the Children's Court and the Family Court have distinct purposes and legislative (and practice) approaches to applying principles relating to the best interests of the child. While the Children's Court is mandated to make a judgement which addresses 'protection from harm' as its primary role (and only in circumstances where a threshold need for protection – and state intervention - has been met to permit an application to the Court), the Family Court is guided by 'the best interests' of the child as 'the paramount concern'. The issues and fundamental principles which underlie these considerations are distinct, and the National FVPLS Forum maintains they should remain distinct.

However, the National FVPLS Forum does support collaborative approaches between Magistrates, Children's and Family Law Courts. For example, our FVPLS member organisation in Western Australia reports that a practice direction was issued<sup>48</sup> relating to the Western Australian Children's Court ('CCWA') and the Western Australian Family Court ('FCWA') which allowed for the proper and efficient exchange of documentation between the FCWA and the CCWA. This has ensured that care and protection matters are being dealt with within these courts concurrently. At present there is a Department for Child Protection and Family Support (DCPFS) worker situated at the FCWA who provides ongoing support within the Court. This co-location of services within the FCWA enables the sharing of information in highly complex cases, which our member reports operates well in this jurisdiction. As discussed below, any expansion to further jurisdictions would need to be carefully considered in terms of local application and potential unintended consequences, including close consultation with FVPLSs in that jurisdiction<sup>49</sup>.

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<sup>48</sup> Practice Direction, 1 of 2015 of the Family Court of Western Australia.

<sup>49</sup> National FVPLS Forum, Submission to Family Law Branch of the Attorney-General's Department: *Amendments To The Family Law Act 1975 To Respond To Family Violence*, February 2017.

Without sufficient improvements to the cultural sensitivity and approach of child protection agencies, there is a danger that increased information sharing between family courts and child protection agencies could have the unintended and harmful consequence of increasing child protection scrutiny and intervention in Aboriginal and Torres Strait Islander families. This would likely contribute to the high and escalating rates of child removal within Aboriginal and Torres Strait Islander communities and the reluctance of Aboriginal and Torres Strait Islander families, particularly Aboriginal and Torres Strait Islander women who have experienced family violence, to access the family law system.

Given these concerns, the National FVPLS Forum has previously put forward several options for improving information sharing and collaboration between family law courts and child protection agencies which could be of benefit to Aboriginal and Torres Strait Islander families. Many of these have been reflected in the recommendations of recent inquiries, including:

- Greater powers for family law courts to compel the production of documents by child protection agencies;
- Greater powers for family law courts to compel child protection agencies to be joined as parties to family law proceedings;
- Aboriginal liaison officers within family law courts whose role is to provide cultural information within courts and assist to establish and maintain clear pathways for Aboriginal and Torres Strait Islander families moving between both jurisdictions;
- Strengthened training and accountability within child protection agencies around cultural awareness and the cultural rights of Aboriginal and Torres Strait Islander children; and
- Increased training and understanding within child protection agencies of the role, principles and legal frameworks of the family law system.

Further, we reiterate our support for the development of a national database of court orders and joint training for judicial officers across the family law and state and territory jurisdictions, both currently underway, as important means of addressing cross-jurisdictional issues. In addition, we support the following comments and recommendations made by WLSA in their submission to the Issues Paper:

*“Efforts to improve responsiveness to family violence disclosures are welcomed but it is important that information sharing is not seen as the panacea.*

*If there is to be a database that each of the courts can access issues of timeliness and currency of data would need to be considered. For example, it would need to be made clear to users that it should not be assumed that a lack of relevant information on a database necessarily reflected the latest circumstances.*

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

*WLSA also raises concerns about privacy, particularly in relation to sensitive information and who would have access particularly in cases involving self-represented litigants.*

*WLSA supports the national register of intervention orders and recommends this information be available to all court systems in real time.*

*WLSA has previously recommended<sup>50</sup> that the Australian Government:*

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<sup>50</sup> Women’s Legal Services Australia, Submission to House of Representatives Committee 2017, at Attachment A.

- *fund training for state and territory police officers on family law and family violence to ensure there is a consistent national understanding of these matters. Training should include the formation of a national risk assessment and response framework that can be used by police nationally when responding to a family violence incident. Such a framework could, for example, draw upon the Victorian CRAF or the NSW DVSA<sup>51</sup>;*
- *work through COAG to encourage all state and territory police to introduce and enact consistent (or alternatively one national) Code of Practice for the Investigation of Family Violence, as in Victoria and NSW; and*
- *clarify the interaction between the criminalisation of breaches of family law safety injunctions and the proposed national DVO scheme.*<sup>51</sup>

In response to the alternative solutions proposed on page 74 of Issues Paper, the National FVPLS Forum makes the following comments:

- Vesting federal judicial officers with dual commissions – We support this proposal provided there is specific and appropriate consultation in its development, appropriate safeguards and pre-requisites of cultural competence for all federal judicial officers with dual commissions. We look forward to consulting further on the detail of this proposal and suggest consideration of how such a model might be incorporated into the development of Aboriginal and Torres Strait Islander specific hearing processes.
- Developing a national family and child protection system – We raise concerns about this proposal in line with our comments and the risk that such a model would further disadvantage or deter Aboriginal and Torres Strait Islander families from accessing the family law system.
- Developing digital hearing processes to reduce the need for families to physically attend court hearings in different locations – As outlined in the section ‘Access and Engagement’, we support consideration of this proposal to increase the accessibility of the family court for rural, regional and remote litigants, with the provision that Aboriginal and Torres Strait Islander people using digital hearing processes have access to adequately funded, specialist, cultural safe legal assistance, such as from FVPLSs;
- Expansion of the co-located CP worker model to all family court registries – We raise concerns about this proposal. In our view, this proposal inadequately takes into account the barriers experienced by Aboriginal and Torres Strait Islander people in accessing the family law system, particularly the ongoing fear of child protection intervention initiated by family law proceedings, as discussed at page 9 of this submission. Any moves to expand such a model would need to be carefully considered and subject to extensive consultation with Aboriginal and Torres Strait Islander communities and organisations with expertise in supporting victim/survivors of family violence, such as FVPLSs;
- Increasing circuiting of FCC judicial officers – As outlined in the section ‘Access and Engagement’, we strongly support this proposal<sup>52</sup>.

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<sup>51</sup> Women’s Legal Services Australia, Submission to the ALRC Family Law Review Issues Paper, May 2018, 35.

<sup>52</sup> Australian Law Reform Commission, *Review of the Family Law System*, Issues Paper No 48 (2018) 74.

## Recommendations

The National FVPLS Forum is of the view that the experiences of Aboriginal and Torres Strait Islander victims/survivors of family violence involved in both child protection and family court proceedings could be improved through implementing the following recommendations:

**Recommendation 31:** Implement Women’s Legal Services Australia’s recommendations to:

- *“fund training for state and territory police officers on family law and family violence to ensure there is a consistent national understanding of these matters. Training should include the formation of a national risk assessment and response framework that can be used by police nationally when responding to a family violence incident. Such a framework could, for example, draw upon the Victorian CRAF or the NSW DVSAT;*
- *work through COAG to encourage all state and territory police to introduce and enact consistent (or alternatively one national) Code of Practice for the Investigation of Family Violence, as in Victoria and NSW; and*
- *clarify the interaction between the criminalisation of breaches of family law safety injunctions and the proposed national DVO scheme.”<sup>53</sup>*

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<sup>53</sup> Women’s Legal Services Australia, Submission to the ALRC Family Law Review Issues Paper, May 2018, p. 35

## Children’s experiences and perspectives

Question 34 How can children’s experiences of participation in court processes be improved?

Question 35 What changes are needed to ensure children are informed about the outcome of court processes that affect them?

Question 36 What mechanisms are best adapted to ensure children’s views are heard in court proceedings?

Question 37 How can children be supported to participate in family dispute resolution processes?

Question 38 Are there risks to children from involving them in decision-making or dispute resolution processes? How should these risks be managed?

Question 39 What changes are needed to ensure that all children who wish to do so are able to participate in family law system processes in a way that is culturally safe and responsive to their particular needs?

Question 40 How can efforts to improve children’s experiences in the family law system best learn from children and young people who have experience of its processes?

As acknowledged by the Issues Paper, it is a ‘balancing act’ between upholding child’s right to participate in family law processes and protecting the child from harm that may be caused through participation. The National FVPLS Forum is of the view that, on the whole, the voices and views of children are under-represented in the family law system. Provisions facilitating children’s participation in both court processes and FDR processes need to be significantly improved. As FVPLSs do not directly represent children in family law matters, we do not profess to be experts in this area. However, we do wish to make the following points.

### Independent Children’s Lawyers

The role of Independent Children’s Lawyers (‘ICLS’) is to represent the child’s best interests and ensure that is the focus of any decisions about parenting arrangements. While providing their own, independent perspective about what arrangements or decisions are in the child’s best interests, ICLs are obliged to consider the views of the child. However, in the experience of FVPLS lawyers, ICLs frequently don’t meet with the child whose best interests they are representing. This means that children’s voices, views and needs are frequently not centred in family law proceedings to the extent that they should be.

### Case study

Ms N is an Aboriginal woman with a teenage daughter who was physically abused by her father, our client’s ex-partner. The father denied the allegations of physical abuse and claimed Ms N had fabricated the claims and was deliberately trying to turn the child against him.

The daughter was represented during family law proceedings by an Independent Children’s Lawyer. Without ever meeting with the child, the ICL proposed to the court that the child should have supervised contact with her father. The child was threatening suicide if she had to see the father.

The National FVPLS Forum recommends that, at minimum, there needs to be a proviso stipulating that an ICL meet directly with the child prior to proposing orders purported to be in her or his best interests, unless there is evidence that such a meeting would be contrary to the child's best interests.

The National FVPLS Forum recommends the development of a national accreditation system with minimum standards and ongoing professional development for family consultants, including capacity building and cultural safety, family violence and trauma informed training. This system should include a complaints mechanism for parties when ICLs do not meet the required professional standards. Further, we encourage consideration of the merits of children and young people with sufficient capacity being directly represented by a lawyer, as already occurs in state and territory child protection jurisdictions.

#### Cultural competency of family consultants

As discussed above, family consultants are given significant credibility within proceedings, with judicial officers relying heavily on family reports in making determinations about the best interests of the child. However, FVPLS lawyers and clients raise concerns that family consultants often only meet with the child and parents once and for a limited amount of time. This process can leave children (particularly young children) exhausted and overwhelmed. Further, insufficient consideration is given to the fact that it is unlikely that children will disclose experiences of violence, or the extent of the violence, when in the presence of their parents, particularly the offending/violent parent – or indeed, will rarely disclose their experiences on a first visit or limited interaction with an unknown professional. There should be a requirement for family consultants to meet with children and their families more than once, unless this would be contrary to the children's best interests.

Further, as noted above, many of the reports prepared for court by internal or external Family consultants, and other experts, demonstrate a lack of cultural competency, leading to inappropriate assumptions and assessments of the needs and experiences of Aboriginal and Torres Strait Islander children and young people by non-Indigenous report writers and/or mainstream services. It is therefore essential that there be specific considerations given to culturally-specific support for Aboriginal and Torres Strait Islander children in family law processes. As discussed under 'Access and Engagement', this should include the employment of Aboriginal and Torres Strait Islander family consultants and the development of procedural requirements stipulating that, where possible, family consultants appointed in cases involving Aboriginal and Torres Strait Islander children should be Aboriginal or Torres Strait Islander themselves and all family consultants should be trained and suitably skilled in trauma-informed and family violence sensitive practice and analysis. Where possible, that person should also, be gender-appropriate. If there is no Aboriginal and Torres Strait Islander family consultant available, they should be culturally competent professionals who have experience working with Aboriginal and Torres Strait Islander children, as well as in family violence-sensitive and trauma-informed practice.

#### Children's participation in Family Dispute Resolution

The National FVPLS Forum recommends consideration of processes and mechanisms to better include children and young peoples' views and perspectives in culturally safe legally-assisted Family Dispute Resolution, ensuring appropriate safeguards to mitigate the risk of further harm to children.

## Recommendations

**Recommendation 32:** Enact a requirement for all Independent Children’s Lawyers to meet face to face with children prior to representing their best interests in family court, unless this would be contrary to the children’s best interests.

**Recommendation 33:** Develop a national accreditation system with minimum standards and ongoing professional development for Independent Children’s Lawyers which encompasses cultural safety, family violence and trauma informed training, including a specific focus on the unique needs and experiences of Aboriginal and Torres Strait Islander children and young people. This system should include a complaints mechanism for parties when Independent Children’s Lawyers do not meet the required professional standards.

**Recommendation 34:** Develop and implement a practice direction which specifies a preference for family consultants to meet more than once with children and parents, unless this would be contrary to the children’s best interests.

**Recommendation 35:** Consider processes to better include children and young peoples’ views and perspectives in culturally safe legally-assisted Family Dispute Resolution, ensuring appropriate safeguards to mitigate the risk of further harm to children.

## Professional skills and wellbeing

**Question 41 What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?**

The National FVPLS Forum calls for the development of thorough, consistent and recurrent training for all family law professionals in cultural awareness, family violence and trauma-informed practice. We make the following general comments, followed by some specific recommendations for certain groups of family law professionals. In every instance, long term and ongoing training and professional development is essential.

As outlined throughout this submission, wherever possible we stress that specialist Aboriginal and Torres Strait Islander legal services are best placed to provide culturally safe support for Aboriginal and Torres Strait Islander victim/survivors of family violence, predominantly women and children, and preference for Aboriginal and Torres Strait Islander family law professionals where possible. However, we refer to the following comments of Victoria Legal Aid in their submission regarding the importance of culturally safe mainstream services:

*“The system should support specialist Aboriginal and Torres Strait Islander services while ensuring all aspects of the family law system, including mainstream services, are providing a culturally safe service so that Aboriginal and Torres Strait Islander clients can make a choice about the service they access. Due to the limited availability of specialist legal services, there is also a likelihood of legal conflicts arising when Aboriginal and Torres Strait Islander clients seek to use specialist Aboriginal services. It is therefore important that there is a wide availability of a range of culturally safe services, including mainstream and community-led services.”<sup>54</sup>*

As recommended by the Family Law Council 2016 Final Report, it is essential that all family law system professionals, including judicial officers, receive ongoing cultural competency training that builds an understanding of the multiple and diverse factors contributing to the high levels of family violence in Aboriginal communities, and an understanding of Aboriginal and Torres Strait Islander family structures and child rearing practices.<sup>55</sup>

Aboriginal and Torres Strait Islander communities must be provided with the opportunity to lead the development of such training programs to ensure that local cultural knowledge is drawn upon in each of the states and territories. Such training should address the history and ongoing legacy of colonisation, discrimination, forced assimilation and child removal in order to develop the understanding of the pervasive and enduring barriers that Aboriginal and Torres Strait Islander people (women and men) experience in accessing the family law system, and therefore improve the participation and wellbeing of Aboriginal and Torres Strait Islander children and their families. As such, it is important to stress that Aboriginal and Torres Strait Islander cultural awareness training must not be conflated with generalist cultural competency training, such as that aiming to improve accessibility for Culturally and Linguistically Diverse Communities.

Despite the prevalence of family violence in family law matters, many family law professionals demonstrate an inadequate understanding of family violence, including the impacts on children’s

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<sup>54</sup> Victoria Legal Aid, Submission to the ALRC Family Law Review Issues Paper, 2018 , 21.

<sup>55</sup> Family Law Council, ‘Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems’ 2016 Final Report, p. 152, available at: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF>

attachment relationships. There is also insufficient understanding of complex trauma, for example, its effects on brain development, the responses and behaviours of traumatised children and the impact on the memory or coherence of victim/survivors. Family violence training must centre the experiences of victim/survivors and include comprehensive training in risk assessment, as well as training around the complex interlocking issues that may impact Aboriginal and Torres Strait Islander victim/survivors and their children, such as foetal alcohol syndrome disorder, mental health, drug or alcohol issues, housing, education or employment.

We would especially encourage training targeted at the unique experiences and needs of Aboriginal and Torres Strait Islander women, as those most at risk of family violence. This is especially important in a context where fear of child removal and over-criminalisation are significant deterrents for Aboriginal and Torres Strait Islander victims/survivors to disclose family violence or access the family law system. This would be a critical step in overcoming the significant alienation and mistrust of the family law system felt by Aboriginal and Torres Strait Islander victim/survivors of family violence and their communities. Furthermore, this makes clear that cultural awareness training and family violence training cannot be seen as entirely separate training packages, but rather as intersecting issues. Given the experience of FVPLSs in working with Aboriginal and Torres Strait Islander victim/survivors of family violence, the Forum and its members are therefore uniquely placed to assist in the design and delivery of this training.

We also take this opportunity to reiterate that, while it is essential to increase the cultural competency and family violence sensitivity of all family law system professionals, the decisions made in family law proceedings are only as good as the evidence and legal advice provided. It is absolutely crucial that Aboriginal and Torres Strait Islander victim/survivors have access to culturally safe holistic legal advice, support and representation from an Aboriginal and Torres Strait Islander community controlled legal service provider with family violence expertise, like FVPLSs, so that women and their children are empowered to access and navigate the family law system in a culturally safe way.

#### Judicial officers

We strongly recommend that cultural awareness and family violence training, as outlined above, be developed specially for judicial officers. Such training must include a specific focus on the interaction of Aboriginal and Torres Strait Islander people within the family law system and the unique needs and barriers faced by Aboriginal victims/survivors of family violence. Incorporating these elements into judicial training packages is essential not only to ensure Judges understand and appropriately apply the legislative provisions and obligations towards Aboriginal children under the *Family Law Act*, but doing so would also assist the family law courts to be responsive to the needs of Aboriginal and Torres Strait Islander people, especially Aboriginal and Torres Strait Islander women and children who have experienced family violence.

We note that the Judicial College of Australia delivers such training and FVPLS members have been invited to present in the past. This is an important step to be supported and we commend the Judicial College of Australia.

Furthermore, we raise the need to take the background of family law judicial officers into consideration before their appointment to the bench. We understand that to be eligible for appointment to the Family Law Court of Australia, a person must satisfy a specific criterion over and above that for general judicial appointments, namely that the person must “a person must also by reason of training, experience and personality, be a person suitable to deal with matters of family law”<sup>56</sup>. This requirement is not in place for appointments to the Federal Circuit Court which can result

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<sup>56</sup> See: <https://www.ag.gov.au/LegalSystem/Courts/Pages/Courtappointments.aspx>

in family law matters being heard within the Federal Circuit Court being heard by Judges with no prior experience in family law or indeed exposure to complex socio-economic issues faced by vulnerable family law parties – particularly the levels of complex, and often intergenerational, trauma among Aboriginal and Torres Strait Islander victims/survivors of family violence.

Accordingly, the National FVPLS Forum recommends that judicial appointment and administration processes be amended to require that any judges hearing family law matters (whether within the Family Court of Australia or Federal Circuit Court) must have previously practiced in family law and be subject to the eligibility requirements of the Family Court of Australia, namely “a person must also by reason of training, experience and personality, be a person suitable to deal with matters of family law”.<sup>57</sup>

The National FVPLS Forum also recommends mandating consideration of and reference to the National Domestic and Family Violence Bench Book (**‘NDFVBB’**) in all Family Court judgements involving family and domestic violence. This recommendation should include a provision for the NDFVBB to be relied upon in evidence by either party or their legal representative’s or the Independent Children’s Lawyer during proceedings.

### Family Consultants

Due to the many significant barriers outlined in this submission, many Aboriginal and Torres Strait Islander women will not disclose, or not fully disclose, details of family violence to report writers, resulting in a significant and often disadvantageous impact on court outcomes. Judges and family consultants may draw adverse conclusions regarding a client’s credibility where a client has not previously included details of family violence in affidavit material. In some cases, family consultants demonstrate a lack of understanding of the complex dynamics of family violence or the impact of the violence upon children. For example, family consultants often fail to give adequate weight to emotional and verbal abuse and its impact, particularly when these occur against a pattern of controlling and coercive behaviour or are designed to cause harm or fear.

The National FVPLS Forum recommends that all Family Consultants engaged in family law cases involving allegations of family violence must have specific family violence expertise and experience. We refer to and endorse WLSA’s recommendations in their submission to the Issues Paper:

*“We recommend Family Report Writers who provide evidence in family law proceedings must be accredited. They must have clinical experience in working with victims-survivors of family violence and be bound by standards and there must be an effective mechanism for complaints.”<sup>58</sup>*

Given the disproportionate rates of family violence experienced by Aboriginal and Torres Strait Islander people, it is similarly essential for any newly appointed Aboriginal and Torres Strait Islander Family Consultants to receive comprehensive and ongoing family violence training.

We also reiterate our comments at pages 20-21 and 56 above regarding the need for improved cultural competence of Family Consultants and consideration of a process of cultural accreditation for all Family Consultants, as an additional measure over and above our recommendation that Aboriginal and Torres Strait Islander family consultant positions be re-established. More broadly, we refer to and endorse Recommendation 30 of the Parliamentary Inquiry into a better family law system to protect those affected by family violence final report that “*the Australian Government develops a national accreditation system with minimum standards and ongoing professional development for family*

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<sup>57</sup> See: <https://www.ag.gov.au/LegalSystem/Courts/Pages/Courtappointments.aspx>

<sup>58</sup> Women’s Legal Services Australia, Submission to the ALRC Family Law Review Issues Paper, May 2018, 37.

*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.”<sup>59</sup>*

### Independent Children’s Lawyers

In addition, we strongly recommend that Independent Children’s Lawyers be required to participate in both cultural competence and family violence training detailed above. In FVPLSs experiences, ICLs require a better understanding of the many complex issues that may be interlocked with experiences of family violence, such as drug and alcohol or mental health issues. We strongly recommend development and participation in general family violence training, and comprehensive cultural awareness training with a specific focus on the intersectional experiences and unique barriers faced by Aboriginal and Torres Strait Islander women and their children.

#### Case study

Ms L is a young Aboriginal woman who was participating in rehabilitation to address drug-related issues. Ms L had experienced repeated severe physical assaults from her partner. Her FVPLS lawyer supported Ms L to file affidavit material that detailed her experiences of family violence, however both the court and the Independent Children’s Lawyer effectively ignored the family violence due to Ms L’s drug-related history – in effect minimising or excusing family violence as a somehow ‘natural’ consequence of drug use.

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<sup>59</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A better family law system to support and protect those affected by family violence*, December 2017, 287.

## Recommendations

**Recommendation 36:** Amend the *Family Law Act 1975* to include a requirement, supported by appropriate investment, for comprehensive and in-depth cultural awareness, trauma-informed and family violence sensitivity training for all family law professionals (including Judges, Independent Children’s Lawyers, Family Consultants, Family Dispute Resolution practitioners, court staff, lawyers and allied services such as child contact centres), including specific content on the unique experiences and needs of Aboriginal and Torres Strait Islander victim/survivors of family violence and the particular barriers faced by Aboriginal and Torres Strait Islander women in accessing justice through the family law system.

**Recommendation 37:** Amend processes for judicial appointment to and administration of the Federal Circuit Court to require that any judicial officers appointed to hear family law matters must have previously practiced in family law and be otherwise subject to the eligibility requirements of the Family Court of Australia, namely “a person must also by reason of training, experience and personality, be a person suitable to deal with matters of family law”.<sup>60</sup>

**Recommendation 38:** Mandate reference be made to the National Domestic and Family Violence Bench Book in all Family Court judgements involving family and domestic violence and include provision for the National Domestic and Family Violence Bench Book to be relied upon in evidence by either party or their legal representative’s or the Independent Children’s Lawyer during proceedings.

**Recommendation 39:** Consider corresponding cultural awareness, family violence sensitivity and trauma-informed training for other key players with a duty to assist family law clients with complex and interlocking needs and to support the judiciary in enforcing court orders, such as child protection agencies and Australian Federal Police and police forces at state and territory levels.

**Recommendation 40:** Implement the following recommendation made by WLSA in their submission to the Issues Paper in this inquiry:

*“We recommend Family Report Writers [Family Consultants] who provide evidence in family law proceedings must be accredited. They must have clinical experience in working with victims-survivors of family violence and be bound by standards and there must be an effective mechanism for complaints.”<sup>61</sup>*

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<sup>60</sup> See: <https://www.ag.gov.au/LegalSystem/Courts/Pages/Courtappointments.aspx>

<sup>61</sup> Women’s Legal Services Australia, Submission to the ALRC Family Law Review Issues Paper, May 2018, p. 37