



Women's Legal Services Australia

12 April 2016

Senate Finance and Public Administration
Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretariat,

SENATE INQUIRY SUBMISSION- DOMESTIC VIOLENCE AND GENDER INEQUALITY

Thank you for the opportunity to participate in a national discussion recognising the link between gender inequality and domestic violence. We wish to thank the Committees for working to address the cause of violence against women.

Please find attached the submission on behalf of Women's Legal Services Australia.

We also endorse the submission of the National Family Violence Prevention Legal Services to the Inquiry dated 30 March 2016.

Please do not hesitate to contact me if you require further information or would like to discuss this submission further.

Yours sincerely,

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Women's Legal Services Australia (WLSA)

Submission to the Senate Standing Committees on Finance and Public Administration's Inquiry into Domestic Violence and Gender Inequality

12 April 2016

LIST OF RECOMMENDATIONS

1. Include COAG Advisory Panel recommendations in the Third Action Plan.
2. Reverse the national funding cuts to Community Legal Centres (CLCs) under the National Partnership Agreement (amounting to \$34.83m between 1 July 2017 and 30 June 2020)
3. The Commonwealth Government immediately inject \$120 million per year into the legal assistance sector, consistent with the recommendation made by the Productivity Commission, including at a minimum \$14.4m per year to CLCs and appropriate amount amounts for Family Violence Prevention Legal Services, Aboriginal and Torres Strait Islander Legal Services and Legal Aid Commissions
4. The Commonwealth Government commit to developing a process for determining sustainable long-term funding contributions to the legal assistance sector.
5. Introduce a specialised domestic violence pathway for legal aid grants, particularly for family law and care and protection matters. Such a pathway should include early identification of domestic violence; assistance for victims/survivors of domestic violence in completing their legal aid application; discretion with respect to the means test; discretion with respect to the merits test, for example, where victims of violence seek orders contrary to a family report writer so the recommendations can be tested in court. Such a pathway should be developed with input from specialised domestic violence workers.
6. Include women as specific priority clients in the national partnership agreement on legal assistance service
7. Increase funding for specialist women's legal services, including Aboriginal and Torres Strait Islander women's legal services
8. Prioritise the implementation of the recommendations from the ALRC/NSWLRC *Family Violence- A National Legal Response* and ALRC *Family Violence and Commonwealth Laws- Improving Legal Frameworks*.
9. Provide legislative protection in the *Family Law Act 1975* for vulnerable witnesses in family law proceedings so that victims of domestic violence and sexual assault do not have to be directly cross-examined by the alleged perpetrator of such violence nor have to directly cross-examine the perpetrator of such violence themselves, if they choose not to do so.

10. Remove the emphasis on shared parenting from the *Family Law Act* including the language of “equal shared time” and “equal shared parental responsibility” to shift culture and practice towards a greater focus on safety and risk to children.
11. Access to safe and affordable housing for victims/survivors of violence must be included in the Third Action Plan.
12. Include in the Third Action Plan the piloting in some districts that where a “viable and protective carer” for children can be located the child protection government agency provide supporting evidence of that in family law proceedings.
13. Greater integration between the National Framework for Protecting Australia's Children and the National Plan to reduce violence against women and their children.
14. Increased investment in culturally and gender responsive, trauma informed, client centred early intervention support services.
15. Establish a national accreditation and monitoring scheme for family report writers in family law proceedings that ensures that family report writers have adequate experience (including clinical experience with victims/perpetrators) and training (including specialist trauma-informed, family violence training as well as cultural competency) in the specialist field of family violence. There should also be an effective mechanism for complaints.
16. Place domestic violence specialists in family court registries to undertake risk assessment at the very earliest stages of a case and provide recommendations on interim care arrangements for children.
17. Engage court-based support services to assist families in crisis. These services could include specialist services for women from high risk groups as well as housing, domestic violence and child & youth focused workers.
18. Implement the recommendations of the Family Law Council in their *Improving the Family Law System for Aboriginal and Torres Strait islander clients* and *Improving the Family Law System for clients from culturally and linguistically diverse backgrounds*.
19. Roll out a mediation model with specialist domestic violence lawyers and social workers based on the highly effective 2012 Co-ordinated Family Dispute Resolution pilot.
20. Develop and deliver a comprehensive professional development package for all family law judicial officers, legal professionals and court staff on domestic violence, cultural competency and working with victims of trauma.
21. Women's access to justice must be a priority in the Third Action Plan.
22. Urgently adopt statutorily established and securely funded specialist domestic and family violence death review units in all states and territories and ensure that current units are statutorily based, securely funded and

comply with best practice principles, including mandating agency responses to and public monitoring of implementation of review recommendations.

23. That the federal government immediately commence work on the best model that should be established to systemically analyse child and adult deaths in the family law system (family law courts, Family Relationship Centres, Family Dispute Resolution Services) with the purpose of investigating deaths to make recommendations for immediate and long term systemic change and that such a team be multi-disciplinary, independent and accountable.
24. Include in the Third Action Plan the implementation of additional remedies to adequately address technology-facilitated stalking and abuse.
25. Include in the Third Action Plan ongoing training of police in the nature and dynamics of domestic violence, remedies for technology-facilitated stalking and abuse and collection of digital evidence.
26. Include in the Third Action Plan Technology safety training for domestic violence workers, police and legal professionals.
27. Include the status of being a victim/survivor of domestic violence as a protected attribute in anti-discrimination laws and the *Fair Work Act 2009* (Cth).
28. Provide protection against adverse action on the basis of being a victim/survivor of domestic violence in the *Fair Work Act* (Cth).
29. Implement the Victorian Royal Commission into Family Violence recommendations relating to the workplace.
30. That the Department of Social Services and the Office for Women utilize submissions to this inquiry located on the Senate Committee's website to inform the development of the third Action Plan.
31. That more inclusive and ongoing consultation mechanisms and opportunities be developed to ensure the active participation by civil society in the monitoring and implementation of the National Plan and the development of Action Plans under the National Plan.
32. Ensure that Aboriginal and Torres Strait Islander communities lead and participate in the development and implementation of the Third Action Plan.
33. Ensure that girls and women with disabilities and their advocates actively participate in the development and implementation of the Third Action Plan and that girls and women with disabilities are adequately included in the Third Action Plan.
34. The National Plan and Third Action Plan include institutional and disability accommodation settings.
35. The National Plan and Third Action Plan include addressing the forced sterilisation of girls and women with disabilities.

36. Meaningful engagement with women with lived experience in prison and their advocates about how women in prison can be included in the National Plan and the Third Action Plan.
37. A genuine commitment to diversionary programs for women, especially in relation to a non-violent offence. This is particularly important where the woman has primary/substantial caring responsibilities for children and is consistent with the [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(Bangkok Rules\)](#).
38. Where a custodial sentence cannot be avoided, commitment to and expansion of programs that enable children to live with their mother in custody - either on a full-time basis or for school holidays.
39. More Audio Visual Link (AVL) suites set up for contact visits in prison and more flexibility regarding community organisations that can facilitate the contact visits through technology where the children are located. This would enable women in prison, for example, to speak to their children about their school day, sporting events, read their children a story.
40. Improve access to safe and affordable housing so that women can get bail and parole and so their children can live with them upon release where it is safe to do so.
41. Consistent with the Victorian Royal Commission into Family Violence recommendations 183 and 184 ensure access to counselling and other supports/programs for women in prison who want to access such services and programs, including women on remand.

INTRODUCTION

Women's Legal Services Australia (WLSA) is a national network of community legal centres specialising in areas of law that disproportionately affect women and children in accessing justice due to historic and ongoing gender and other intersecting inequalities. Member centres of WLSA regularly provide advice, information, casework and legal education to women and service providers on a range of topics including family law, child protection, child support, family and domestic violence, personal protection orders, reproductive health rights and discrimination matters. Some of our members have been operating for over 30 years.

We have a particular interest in the intersection of violence against women and the law and ensuring that women from groups who are marginalized in society, such as Aboriginal and Torres Strait Islander women, women from culturally and linguistically diverse backgrounds, women with disabilities, rural women, women from LGBTIQ¹ communities, young women, older women and women in prison are not further disadvantaged by the system.

We provide holistic, high quality and responsive legal services to women from a feminist framework, placing the individual client at the centre of our interactions and try to respond to them as a 'whole person' rather than just their 'legal

¹ Lesbian, gay, bi-sexual, transgender, intersex and queer.

problem'. Some of our services, where funding permits, employ domestic violence counsellors and other support staff to assist in this holistic response.

Throughout the lifetime of our network we have recognised the disadvantage of women living in rural, regional and remote areas to accessing legal services. Most of our services have tried to address this by the provision of a 1800 free call Statewide telephone number. Some services have specific lawyers or adopted service provision models that allows for the provision of specialised services to women who live in non-metropolitan areas of Australia.

Specialist women's legal centres were established as a response to a historical and ongoing social legal context that devalues the voices and needs of women. WLSA therefore seeks to promote a legal system that is safe, supportive, non-discriminatory and responsive to the needs of women in accessing justice.

SCOPE OF OUR RESPONSE

Given our areas of practice, expertise and interest, this submission will address term (c) of the reference:

"the role of government initiatives at every level in addressing underlying causes of domestic violence, including the commitments under, or related to, the National Plan to Reduce violence against Women and their Children,"

Our submission will focus on the role of the government in adequately addressing gender inequality as both a cause and consequence of domestic violence in social and legal policy implementation as it relates to access to justice for women. We also argue that an intersectional approach and analysis to address violence against women is crucial. Sexism intersects with other systems of oppression such as racism, colonialism, ableism, ageism, classism, heterosexism etc, compounding barriers to equality for particular groups of women. If an intersectional approach is not taken to addressing gender equality, then we will not see equality for all women. For example, we know that violence effects 1 in 3 women in general. When we look at specific minority groups however, the rates are much higher and the experiences often diverse. If we fail to address the intersecting oppressions of colonialism and racism, for example, then we cannot adequately prevent violence against Aboriginal women.

Commonwealth, state and territory governments need to do more to achieve substantive equality for women which is an essential step towards eliminating violence against women. As identified in the statement prepared by Australian women's organisations in response to Australia's response to the implementation of 2015 Universal Periodic Review recommendations: "This includes taking further steps to decrease the gendered pay and superannuation gaps; removing barriers to workforce participation; addressing the unequal distribution of unpaid caring work; providing affordable and accessible childcare; increasing the participation of women in leadership roles; and providing greater protections for survivors of domestic violence to ensure they can access safe and affordable housing, opportunities for education and work related vocational training and maintain or obtain financial independence through work". This is supported by the COAG Advisory Panel recommendations 1.1, 1.2 and 2.1.

Despite having a National Plan to Reduce Violence against Women and their

Children (the National Plan) in place as well as Change the Story- a shared national framework for the primary prevention of violence against women and their children in Australia, and a strong National Research Agenda to Reduce Violence against Women and their Children, there is still a profound national cognitive dissonance that permeates the policy and practices that are meant to address gender inequality and achieve safety and justice outcomes for women and children. This inconsistency between intent and implementation further perpetuates gender inequality and puts women and children at risk of further harm (at best) and can and does cost women and children their lives (at worst).

NATIONAL OUTCOME 5- JUSTICE RESPONSES ARE EFFECTIVE

Under strategy 5.1 of the National Plan (improve access to justice for women and their children), key actions to be taken by Australian Governments from 2010-2013 were to:

- Enhance legal aid funding arrangements to ensure women and their children at risk of violence are a key priority;
- Improve the capacity of the civil and criminal justice systems to respond effectively to patterns of risk and accumulative effects of violence; and
- Enhance the family law system's response to family violence.

We are concerned that despite having a national outcome "that justice responses are effective" as well as a specific strategy to improve access to justice for women and their children (Strategy 5.1) contained in the National Plan, this has not been prioritized to the extent that is necessary and has not translated into improved outcomes for women and children survivors of violence navigating the legal system. The COAG Advisory Panel recommended adequate, long-term funding for services supporting women and children, including women's services and legal assistance services.² As with all COAG Advisory Panel recommendations, this should be included in the Third Action Plan.

RECOMMENDATION:

Include COAG Advisory Panel recommendations in the Third Action Plan.

Enhance legal aid funding arrangements to ensure women and their children at risk of violence are a key priority

ALRC Discussion Paper 54 *Equality Before the Law*, advised that to the extent that it exists in the Australian legal system, gender bias should be regarded as a form of discrimination, systemic in nature which prevents women from enjoying full equality before the law, equality under the law, equal protection of the law and equal benefit of the law³.

There are systemic and structural barriers in the legal aid system that make it particularly difficult for women to access legal aid from Legal Aid Commissions. One example of this is the disparity of grants of legal aid between genders. The gender inequity in the granting of legal aid was first formally identified as a concern in the early 1990s. An issues paper published in 1994 by the Legal Aid and Family Services (LAFS) branch of the Attorney-General's department, *Gender Bias*

² COAG Advisory Panel on Reducing Violence against Women and their Children, *Final Report*, April 2016, Recom 6.2.

³ Australian Law Reform Commission Discussion Paper 54 *Equality before the law* Sydney 1993 (ALRC DP 54), para 3.41.

in *Litigation Legal Aid*⁴, found that women do not receive as much legal aid funding for litigation as men do. In 1992/3, 63% of national legal aid expenditure on litigation assistance was paid on behalf of men. LAFS found that “a female applicant has less chance of getting legal aid than a male applicant”⁵.

According to publicly available data, the table below indicates that not much has changed since this issue was first identified. The following information was compiled by WLSA from publicly accessible information. This table demonstrates the gender breakdown of legal aid approvals in Australia during the 2014 / 15 period.

Legal aid grant approvals 2014-15⁶

State	Female %	Male %
NSW ⁷	26%	unknown
Vic	No information on gender	
Qld	Approx 35.5%	unknown
SA ⁸	Approx 26%	Approx 74%
WA ⁹	Approx 33.6%	Approx 59.7%
Tas	No information on gender	
ACT	Approx. 43.5%	Approx 53%
NT	No information on gender	

Additionally, when viewed as a whole, funding allocated to legal assistance services focuses on criminal law matters.¹⁰ This systematically disadvantages women, as there are significantly higher rates of men charged with a criminal offences that could result in imprisonment. Men are therefore more likely than women to seek assistance in criminal law matters. For example, a 2013 study found 75% of the highest users of Legal Aid in NSW were men and all participants in the study had accessed criminal law services.¹¹ On the other hand, women are more likely to require assistance in relation to being a victim/survivor of domestic and family violence, particularly in the family law system and/or civil law system, yet their gender-specific legal needs are not prioritized.

We acknowledge the importance of funding legal assistance services for criminal law matters, but argue it is also important to fund civil law services, including family law. In the context of domestic violence the loss of liberty and life arguments can be just as pertinent in family law matters as they are in criminal law matters as we see in the high rates of domestic violence homicide perpetrated against women. Consistent with the Productivity Commission recommendation in the *Access to Justice Arrangements* report we support a further investment of \$200 million for civil legal assistance services.

These issues are exacerbated by an expected 30% funding cut nationally set to take place next year for community legal centres, including specialist women's legal services, funded under the new National Partnership Agreement for Legal Assistance Services. From 2017– 2020 funding cuts of between \$11m and \$12m

⁴ Regina Graycar and Jenny Morgan (1995) *Disabling Citizenship: Civil Death for Women in the late 1990s* 17 Adel LR 49-76 at p52.

⁵ *Ibid* p53

⁶ Data collection from Annual reports.

⁷ Figure of grant approvals and duty services

⁸ Figure does not appear in the Annual report. Calculation from data provided in report.

⁹ Figure does not appear in the Annual report. Calculation from data provided in report.

¹⁰ Productivity Commission, *Access to Justice Arrangements – Productivity Commission Draft Report*, April 2014 at 627.

¹¹ Cited in Productivity Commission (2014). *Access to Justice Arrangements – Productivity Commission Draft Report*.

every year will have a drastic and profound impact on access to justice for vulnerable people and particularly victims/survivors of domestic violence¹². We are also concerned about funding cuts for other legal assistance services providers, including Family Violence Prevention Legal Services, the Aboriginal and Torres Strait Islander Legal Services and Legal Aid. It is important that there are a range of legal assistance services providers, including Aboriginal and Torres Strait Islander community controlled organisations so that people have choice and people can access a legal assistance service in the case of a conflict of interest.

The funding cuts are extremely concerning at a time when one of the National Strategies of the National Plan is to improve access to justice for women and their children and the Productivity Commission has found Legal Assistance Services to be drastically under-funded and has called for an immediate injection of \$200 million into civil legal assistance services per year¹³.

RECOMMENDATION:

Reverse the national funding cuts to CLCs under the National Partnership Agreement (amounting to \$34.83m between 1 July 2017 and 30 June 2020).

RECOMMENDATION:

The Commonwealth Government immediately inject \$120 million of the \$200 million per year into the legal assistance sector, consistent with the recommendation made by the Productivity Commission, including at a minimum \$14.4m per year to CLCs and appropriate amounts for Family Violence Prevention Legal Services, Aboriginal and Torres Strait Islander Legal Services and Legal Aid Commissions.

RECOMMENDATION:

Commit to developing a process for determining sustainable long-term funding contributions to the legal assistance sector.

Challenges for women in obtaining legal aid is also evident in the application of Legal Aid Commissions' family law policies and guidelines. For example, some women's legal services have reported cases of legal aid grants being terminated if a party does not agree with the recommendations made by a family report writer who has been appointed to comment on the care, welfare and development of a child in a family law matter.¹⁴ This is particularly concerning given that there are no minimum standards or mandatory training for family report writers in relation to their knowledge of family violence, which can impact on the conclusions they reach in their reports.

RECOMMENDATION:

Introduce a specialised domestic violence pathway for legal aid grants, particularly for family law and care and protection matters. Such a pathway should include early identification of domestic violence; assistance for victims/survivors of domestic violence in completing their legal aid application; discretion with respect to the means test; discretion with respect to the merits test, for example, where the victims of violence seeks orders contrary to a family report writer so the recommendations can be tested in court. Such a pathway should be developed with input from specialised domestic violence workers.

¹² <http://www.communitylawaustralia.org.au/launch-of-new-campaign-community-law-australia-fund-equal-justice/>

¹³ <http://www.smh.com.au/federal-politics/political-news/australian-legal-aid-services-need-200-million-more-a-year--productivity-commission-20141203-11zff7.html>

¹⁴ See *WLSA submission to the Productivity Commission's Access to Justice Inquiry*, 4 November 2013 at 18.

Another factor driving discrimination in obtaining legal aid is the fact that women are not expressly considered as priority clients under the National Partnership Agreement on Legal Assistance Services.

Since the Australian Law Reform Commission's 1994 Reports *Equality Before the Law: Justice For Women (ALRC Report 69 Part 1)* and *Equality Before the Law: Women's Equality (ALRC Report 69 Part 2)*, which drew attention to the large disparity faced by women in accessing justice, many progressions have been made in relation to the development of the law, community legal education, legal advice and referral, legal representation, research and data collection, and court processes and facilities to assist in achieving substantive equality for women. However, there have also been many challenges and hurdles that have contributed to the continued oppression of women and lack of equal access to justice.

Groups of people that are oppressed by systemic discrimination in the legal system by virtue of belonging to the group, need to be consistently prioritised by the Government. Including women as a priority group would be consistent with national policy and related initiatives regarding the advancement of gender equality in Australia such as the ratification of the Convention on the Elimination of all forms of Discrimination against Women and the National Plan to Reduce Violence against Women and their Children, and will positively contribute to Australia's commitment to gender equality. This is also consistent with the COAG Advisory Panel's recommendation of governments demonstrating national leadership with respect to challenging of gender inequality.¹⁵

WLSA does not agree with the premise that women are represented as a priority group by virtue of belonging to one or more of the priority groups already listed (i.e. Indigenous Australians; people who are culturally or linguistically diverse; people residing in rural and remote areas; people experiencing, or at risk of homelessness; financially disadvantaged people; people with a disability or mental illness; children and young people; older people; and people experiencing or at risk of family and domestic violence). In addition to barriers to accessing justice faced by virtue of belonging to a priority group, women also face additional barriers due to their gender that compounds the disadvantage and discrimination experienced. Inequality intersects and all oppressions are intrinsically linked. Failing to expressly name women as a priority group fails to recognise the specific oppressions faced by virtue of being a woman and reinforces gender discrimination in the legal system.

RECOMMENDATION:

Include women as specific priority clients in the national partnership agreement on legal assistance services.

WLSA is also concerned about the impact the funding cuts will have on already

¹⁵ COAG Advisory Panel *Final Report*, Recom 1.1

under-resourced and under-valued specialist women's legal services. Women's legal services are crucial to achieving gender equality. The 2014 CEDAW NGO Shadow Report sets out that:

Specialist women's services complement, not replace, the need to mainstream gender equality into the broader service system. They provide a physically and emotionally safe space where women can access support and advice from people who are trained to understand their unique needs. Specialist women's services also recognise and respond to the intersecting and compounding forms of discrimination that women face, which can limit their full enjoyment of citizenship.¹⁶ Despite their importance, in recent years, a number of changes of government at a State and Federal level have resulted in a loss of funding and political support for specialist women's services, including specialist women's legal services.

Specialist legal services for women are vital in empowering and supporting women to claim their legal rights and ensure women can exercise agency. Staff of these services have a thorough understanding of the nature and dynamics of domestic and family violence and are able to recognise intersecting and compounding forms of disadvantage and enact appropriate strategies in women's best interests. While we note the \$15 million (to establish specialised domestic violence units to provide access to coordinated legal, social work and cultural liaison services for women in a single location, and allow legal services to work with local hospitals, including for women from CALD communities and women living in regional/remote areas) from the "women's safety package" funding injection, we are concerned that this has only been allocated to a small number of legal assistance services and does not address the need for an immediate injection of \$200 million funding as recommended by the Productivity Commission.

RECOMMENDATION:

Increase funding for women's legal services (including Aboriginal and Torres Strait Islander women's legal services).

Improve the capacity of the civil and criminal justice systems to respond effectively to women and children at risk

Women's Legal Services Australia is concerned that despite the National Council to Reduce Violence Against Women's call for a federal inquiry, which triggered the joint inquiries that were then undertaken by the Australian and NSW Law Reform Commissions¹⁷ into improving the legal system's ability to respond adequately and appropriately to family violence, many of the recommendations from these reports are yet to be implemented.

We acknowledge that some recommendations have been implemented or considered already and have already contributed to improving the system, for

¹⁶ Regina Graycar and Jenny Morgan, 'Disabling Citizenship: Civil Death for Women in the 1990's?'

¹⁷ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114 (2010) and Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, ALRC Report 117 (2012).

example to the way the child abuse and family violence are defined within the Family Law Act¹⁸ and the development of a Family Violence Benchbook. However, without providing the broad range of reforms needed to improve the system, it is difficult for individual reforms to contribute to meaningful outcomes for women and children escaping violence.

We note that the First Action Plan *Building a Strong Foundation 2010–2013* under The National Plan included a commitment to consider the recommendations made in the 2010 report by the Australian and NSW Law Reform Commissions.¹⁹ We further note the recommendation from the federal inquiry into domestic violence in Australia that “the Evaluation Plan for the National Plan include a coordinated status report on the consideration of the recommendations in the 2010 report by the Australian and NSW Law Reform Commissions”.²⁰ This report should be publicly available.

The “mutual recognition scheme” for nationally recognising restraining orders was included in the Second Action Plan and was a COAG priority issue last year. However, we remain concerned that the “mutual Recognition scheme” has been agreed to by the Standing Committee of Attorneys General in March 2011, yet has still not been implemented, despite the inclusion in the Second Action Plan and priority on COAG agenda. We note model legislation has been introduced in NSW and that model legislation is expected to be introduced in all jurisdictions by mid 2016.²¹ It is important that this issue is progressed.

The first report to which we refer, *Family Violence- A National Legal Response*, is extensive. The recommendations were largely focused on improving safety through the following measures²²:

- A common interpretative framework—establishing a shared understanding of what constitutes family violence across relevant legislative schemes.
- Corresponding jurisdictions—expanding the jurisdiction of courts dealing with family violence to maximise the chance that families will be able to get all the legal protections they need from any court they approach.
- Specialist family violence practice—fostering expertise within magistrates courts with staff who understand the dynamics of family violence and the complex array of legislation that applies.
- Improving police and prosecutorial practice—to produce safe, fair and just outcomes for victims.
- Integrated responses—ensuring that the many services needed by those who suffer family violence work together, building a better and shared

¹⁸ Amended by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011*(Cth)

¹⁹ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114 (2010).

²⁰ Senate Standing Committees in Finance and Public Administration, *Domestic Violence in Australia*, 20 August 2015, Recommendation 16.

²¹ COAG Communiqué, 11 December 2015.

²² See summary of report here: <http://www.alrc.gov.au/inquiries/family-violence>

understanding of violence and a national system of registration of family violence orders.

- Alternative dispute resolution—developing ADR responses, but with careful and appropriate protections for those who are the victims of violence.
- Training and information—underpinning legal changes by better understandings of family violence across the whole system, including a national family violence bench book and a national register of relevant orders.

The net effect of the recommendations from the second report we refer to, *Family Violence and Commonwealth Laws- Improving Legal Frameworks*, will ensure²³:

- consistency in understanding and application of the law as a result of the adoption of a common definition of family violence;
- appropriate education and training for decision makers leading to greater consistency and fairness in decision-making of family violence claims;
- better identification of, and responses to, the disclosure of family violence, including in service delivery areas;
- a greater sense of self-agency for those experiencing family violence by being provided information about family violence responses, and being able to act with confidence that such responses will be attentive to their needs; and
- that ultimately, the safety—physical, economic and financial—of people experiencing family violence will be improved

We are of the view that the implementation of both reports is essential to achieving outcome 5 and particularly strategy 5.1 of the National Plan and is a matter of urgency for women and children survivors navigating the legal system.

RECOMMENDATION:

Prioritise the implementation of the recommendations from Family Violence- A National Legal Response and Family Violence and Commonwealth Laws- Improving Legal Frameworks.

Enhance the family law system's response to family violence

Through WLSA's work as practicing family and child protection lawyers, working with women and children escaping family violence, we have identified significant gaps in the system that put women and children risk of future harm and death.

Vulnerable witness protections in the Family Law Act

In each Australian state and territory, there are legal protections in many civil and criminal proceedings to prevent self-represented litigants cross-examining former partners where there is a history of violence, including sexual violence. These protections recognise the traumatic impact of cross-examination of vulnerable witnesses by perpetrators of violence.

²³ See summary of report here: <http://www.alrc.gov.au/inquiries/family-violence-and-commonwealth-laws>

There are no equivalent provisions in the family law jurisdiction. The *Family Law Act 1975* contains no protection against direct cross examination by perpetrators or any specific protections for vulnerability in general, for example for witnesses with disability.

This, in conjunction with the fact that victims of family violence are often unable to obtain legal aid for legal representation in family law (despite the issue being a legal aid priority), can see women who are victims of family violence, who have been raped, assaulted or psychologically abused by their ex-partner, having to deal with the frightening prospect of appearing un-represented and being cross-examined by their abuser and having to directly cross-examine the alleged abuser.

The Productivity Commission in its *Access to Justice Arrangements report* recommended amending the *Family Law Act 1975* to restrict direct cross-examination of victims of violence by their alleged abuser in family law proceedings.²⁴ The need for legislative protection for vulnerable witnesses from direct cross-examination in family law proceedings was discussed in the COAG Advisory Panel Final Report. The Advisory Panel "supports work to resolve this issue and looks forward to the outcomes".²⁵

The experience of direct cross-examination by an abusive ex-partner:

- can result in re-traumatisation of the victim;
- can compromise the quality of evidence given to the court (which can affect the court's ability to make safe and effective orders);
- allows the perpetrator to use court proceedings to exercise control and dominance over the victim, even if appropriate questions are asked;
- allows perpetrators of violence to ask seemingly valid questions (but which can have hidden and sinister meaning for the victim in accordance with the perpetrators abuse patterns);
- provides an avenue where the perpetrator could ask the victim directly about incidents of violence and abuse (as this is relevant to determining the best interests of the child);
- can be a disincentive for victims to proceed to trial; and
- can pressure some victims into consent agreements that may be unsafe or unworkable for themselves and their children, to avoid the trial experience.

This is an important issue because this kind of secondary trauma is a form of systems abuse which contributes to further oppression and trauma. In effect, the abuse is allowed to occur through a court-sanctioned process.

WLSA undertook a national survey in 2015 to uncover the narrative of women across the country who sustained secondary trauma from family court proceedings due to the prospect of being directly cross-examined by their abuser. Over 330 women responded. Some of the comments they shared with us, include:

"I never wanted to see him again let alone talk to him, especially when he's lying in court and accusing me of being crazy and making stuff up!"

²⁴ Productivity Commission, *Access to Justice Arrangements*, No 72. 5 September 2014, Recommendation 24.2

²⁵ COAG Advisory Panel, *Final Report* p51-52

Very hard to know what to do, if you react and get upset and cry or get angry and tell him off then that's just fuel for his accusations, but if you act calm like you don't care to show the magistrate that you're not crazy then they think you're in control and not at risk... What the heck are you meant to do?!"

"Terrifying. I could not look at him. Judge later said in his submission that I hated the man cause I couldn't look at him. The man terrorised me for years and to this day is still making me paranoid that he will carry out his death threat."

"I felt frozen, on the outside looking normal, on the inside like I was "bound and gagged". His tactic and lies were treated as 'truth' he had direct contact to all the barristers and lawyers. I was silenced. I could not look at him."

"Couldn't speak very well, frozen."

"Really intimidating. The judge was hostile too – when he was telling me I was a liar, the judge did not stop him, just sat back in his chair and crossed his arms. I have had trouble sleeping since, it was so unfair and still haunts me."

"I felt he had the privilege to continue his intimidation and threats yet in a confined legal space. It defeats the purpose of having a safety room at court – my support person and I sit there to avoid seeing him yet we are 'thrown to the wolves' when we enter the court room. It made me feel all the feelings over again, it made me sick to the core."

"Absolutely broken, angry at our justice system, scared."

"Horrible, it was just horrible. It felt like he was given a stick to beat me while everybody watched."

"I knew he was going to cross examine me, and so I purposefully did not bring up the abuse I endured. I tried, but couldn't. I was too scared of him cross examining me on that issue. He exerted so much control over me that I was too scared to raise it at all."

"I played down everything; I still was controlled by him due to years of conditioning. Knowing the consequences if I had answered truthfully. The tone, the way he asked questions. There was so much more to everything than what everyone heard. He walked out winning again. I had the kids but on his terms."

The quotes paint a collective narrative where women are further traumatised and children are ultimately put at further risk.

In addition to the need for legislative protection to prevent direct cross-examination of victims by alleged abusers there is a need for other specific protections. These include provisions: to enable evidence to be given remotely or behind a screen and for a victim of violence to have access to a support person while giving evidence.

Other jurisdictions, including the criminal law jurisdiction have legislated to protect "vulnerable witnesses" more broadly, Eg. Evidence via video link. Such protections should exist in all jurisdictions.

Many of our clients are often confused as they will have legal proceedings in multiple jurisdictions (i.e. virtually the same issue will be concurrently a criminal matter and/or family law matter and/or a restraining order matter). This means they will have different levels of protections afforded to them depending on the jurisdiction, which will often be confusing and inconsistent.

Besides compromising the quality of their evidence, being cross-examined by their own abuser has devastating emotional and psychological consequences on victims of violence as outlined above. It is only fair and just that vulnerable witnesses in family law are also protected.

RECOMMENDATION:

Provide legislative protection in the Family Law Act 1975 for vulnerable witnesses in family law proceedings so that victims of domestic violence and sexual assault do not have to be directly cross-examined by the alleged perpetrator of such violence nor have to directly cross-examine the perpetrator of such violence themselves, if they choose not to do so.

Prioritise children's safety and minimise risk of harm

In family law, when the court is asked to make a Parenting Order, the starting point is the presumption of equal shared parental responsibility (ESPR). ESPR is where parents have to make decisions about major long-term issues for the child/ren jointly. If ESPR applies, then parents are required to consult each other and make genuine attempts to jointly make long-term decisions for the children.

A presumption of ESPR presumes that it is in the best interest of the child to have both parents jointly make long-term decisions about their children's lives. The presumption of ESPR is not meant to apply in cases of violence and abuse because it is recognised that it would not be in the best interest of the children for an abuser to be involved in long-term decision making about someone they have abused or exposed to family and domestic violence.

However, it is often difficult to "prove" violence/abuse to the satisfaction of the Court. This can be for several reasons. The word of the victim is often not considered sufficient evidence and may be the only evidence given much domestic violence occurs out of sight, in the home. This is often left unchallenged, particularly where a victim is unrepresented.

This must be challenged and highlights the ongoing need for education of judicial officers; court staff, including family consultants; legal practitioners; and police in the nature and dynamics of family violence. We note the COAG Advisory Panel recommendation regarding the need for ongoing training of all professionals likely

to come into contact with victims and perpetrators.²⁶

We also note with concern AIFS' recent finding that almost 3 in 10 separated parents interviewed said they had 'never been asked' about family violence or safety concerns when using dispute resolution, lawyers and courts to resolve parenting matters.²⁷

All of this means the presumption of ESPR is sometimes still applied when the child has been abused or exposed to family violence, leaving women and their children at risk of further harm from a perpetrator they are trying to escape, by:

- Exposing victims of violence and their children to ongoing violence, intimidation and manipulation;
- Allowing ample opportunities for perpetrators of violence to exert ongoing control and decision-making in the family;
- Providing opportunities for the perpetrator to continually undermine the mother's parenting authority and capacity²⁸;
- Effectively denying many children the therapeutic assistance they require through domestic violence or trauma counselling because the law requires the permission of the perpetrator and this is often refused.

The presumption of equal shared parental responsibility (ESPR) and emphasis in the Act on shared parenting were not changed by the 2012 family law amendments and continue to put children at risk of ongoing abuse.

The safety of children is paramount. Every child is unique and has different needs depending on their family's circumstances. Parenting arrangements should be *in the best interests of each child*, worked out on a case-by-case basis, rather than using a one-size fits most approach.

The safety and wellbeing of children is too important to not take the time to judge each case on its own merits, especially when family violence and abuse are involved.

RECOMMENDATION:

Remove the emphasis on shared parenting from the Family Law Act including the language of "equal shared time" and "equal shared parental responsibility" to shift culture and practice towards a greater focus on safety and risk to children.

Intersection of domestic violence, child protection, family law and safe and affordable housing

WLSA is concerned that the National Plan does not adequately recognise the intersections between domestic violence, child protection, family law and access to safe and affordable housing.

Steps to address access to safe and affordable housing must be included in the Third Action Plan.

²⁶ COAG Advisory Panel *Final Report*, Recommendation 1.4.

²⁷ AIFS, Evaluation of the 2012 Family Violence Amendments, Synthesis Report, 2015 at page x, 33.

²⁸ http://media.aomx.com/anrows.org.au/s3fs-public/L1.16_1.8%20Parenting.pdf

Rather than the child protection government agency intervening at a late stage and pursuing matters through the Children's Court, parents/primary caregivers should be referred for early legal advice to see if the matter could more appropriately be resolved in the family law system. Numerous inquiries have recommended that where a "viable and protective carer" for children can be located, the child protection government agency should provide supporting evidence of that in family law proceedings.²⁹

In WLSA's experience such an early intervention approach has resulted in safer arrangements for children, reduced trauma (noting the trauma associated with a child's removal) and we submit is a better use of state and federal resources as opposed to the costs of removing a child from his/her family and assuming him/her into care.

There needs to be further training and education within the community and with service providers about the family law pathway as an early intervention strategy. We refer to the DVD entitled *Looking After Family* produced by Northern Rivers Community Legal Centre as a good example.³⁰ Such education is particularly important within Aboriginal and Torres Strait Islander communities where given the history of the Stolen Generations there is a fear of engaging with the child protection government agency.

The Senate Standing Committees on Community Affairs recommended in the *Out of home care report* that there be greater integration between the National Framework for Protecting Australia's Children and the National Plan to reduce violence against women and their children. This includes better recognition of the intersections between domestic violence, child protection, family law and access to safe and affordable housing.

We note with concern, that "in 2013-14, combined real expenditure on intensive family support and family support programs was \$6.7 million, compared to \$2.1 billion for out-of-home care services".³¹ The *Out of Home Care report* recommends increased investment in early intervention support services.

RECOMMENDATION:

Access to safe and affordable housing for victims/survivors of violence must be included in the Third Action Plan.

RECOMMENDATION:

Include in the Third Action Plan the piloting in some districts that where a "viable and protective carer" for children can be located the child protection government agency provide supporting evidence of that in family law proceedings.

RECOMMENDATION:

²⁹ See ALRC/NSWLRC, *Family Violence – A National legal Response Final Report*, ALRC Report 114, October 2010, Recommendation 19.3; Senate Standing Committees on Community Affairs, *Grandparents who take primary responsibility for raising their grandchildren*, October 2014, Recommendation 18; Family Law Council, *Families with complex needs and the intersection of family law and child protection systems Interim report*, 2014, p44.

³⁰ Northern Rivers Community Legal Centre, *Looking After Family*, accessed on 21 April 2015 at: <http://www.lookingafterfamily.org.au>

³¹ The Senate Community Affairs References Committee, *OOHC Report*, August 2015 at paragraph 5.22

Greater integration between the National Framework for Protecting Australia's Children and the National Plan to reduce violence against women and their children.

RECOMMENDATION:

Increased investment in culturally and gender responsive, trauma informed, client centred early intervention support services.

Accreditation of family report writers

A family assessment is an independent professional forensic assessment undertaken to assist a court and/or the parties to decide on parenting arrangements in the best interests of the child/ren during family law disputes.

Family assessments are undertaken by "family report writers", also known as family consultants³² (psychologists and/or social workers) and independent single experts³³ (child psychologists or psychiatrists). They assess the family, any alleged abuse and make recommendations regarding arrangements of the children.

Specific issues that family report writers might assess include:

- the children's relationships with each of the parties,
- the children's views,
- the attitudes and parenting capacity of the parties,
- assessment of any risk factors identified in a matter,
- the emotional and psychological effects of exposure to family violence,
- the effect upon a child or partner victim of contact with the perpetrator, and
- whether therapeutic intervention may assist a perpetrator to live without violence.

The conduct of these assessments and the development of these reports play a critical role in the decision-making process of the court. Although only one piece of evidence, family reports are influential and can be determinative in cases involving allegations of abuse, where there may not be any other independent evidence or verification of allegations in dispute.

Given the weight of these reports in conjunction with the prevalence of family violence in family law matters, it is crucial that family report writers have appropriate expertise and experience in identifying, assessing and responding to family violence.

Without specialist expertise, a family report writer may fail to recognise the seriousness of the violence and so make recommendations that may expose the children to an unacceptable risk.

In the experience of our clients there are also minimal opportunities to contest the method and recommendations of expert report writers in cross-examination because women are often faced with the withdrawal of legal aid if they wish to challenge the findings of these reports where they have drawn incorrect inferences, as we've mentioned earlier. Many of our clients do not have capacity or are too scared to self-represent if legal aid is withdrawn and find themselves

³² Pursuant to s62G of the *Family Law Act* (1975)

³³ Governed by Part 15.5 of the *Family Law Rules* (2004)

pressured to settle in accordance with the report writer's recommendations.

WLSA commends the work of the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of WA in developing the Australian Standards of Practice for Family Assessments and Reporting.³⁴ However, we are concerned that voluntary guidelines without mechanisms for compliance or complaint, will not go far enough to improve the standards.

There is a need to ensure that family report writers are appropriately trained and experienced in understanding the nature and dynamics of family violence and its effect, so reports appropriately recognise and consider the family violence and its consequences/effects. We note this was recommended in the Federal Inquiry into domestic violence in Australia.³⁵ It was also recommended in the COAG Advisory Panel Final Report.³⁶

RECOMMENDATION:

Establish a national accreditation and monitoring scheme for family report writers in family law proceedings that ensures that family report writers have adequate experience (including clinical experience with victims/perpetrators) and training (including specialist trauma-informed, family violence training as well as cultural competency) in the specialist field of family violence. There should also be an effective mechanism for complaints.

Further recommendations to enhance safety in family law

Additionally, we make the following recommendations to further enhance the safety of women and children in the family law system.

RECOMMENDATION:

Place domestic violence specialists in family court registries to undertake risk assessment at the very earliest stages of a case and provide recommendations on interim care arrangements for children.

RECOMMENDATION:

Engage court-based support services to assist families in crisis. These services could include specialist services for women from high risk groups as well as housing, domestic violence and child & youth focused workers.

RECOMMENDATION:

*Implement the recommendations of the Family Law Council in their *Improving the Family Law System for Aboriginal and Torres Strait islander clients* and *Improving the Family Law System for clients from culturally and linguistically diverse backgrounds*.*

We note some of these recommendations have been repeated in the recently released reports prepared for the Judicial Council on Cultural

³⁴ <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/asp-family-assessments-reporting>

³⁵ Senate Standing Committees in Finance and Public Administration, *Domestic Violence in Australia*, 20 August 2015, Recommendation 17.

³⁶ COAG Advisory Panel, *Final Report*, Recommendation 1.4

*Diversity.*³⁷

RECOMMENDATION:

Roll out a mediation model with specialist domestic violence lawyers and social workers based on the highly effective 2012 Co-ordinated Family Dispute Resolution pilot.

RECOMMENDATION:

Develop and deliver a comprehensive professional development package for all family law judicial officers, legal professionals and court staff on domestic violence, cultural competency and working with victims of trauma.

The bottom line is that women continue to be discriminated against in the legal system, including in obtaining grants of legal aid. Unless a gender lens is applied to legislation and legal policy reform and is expressly prioritised on the national agenda in a transparent and accountable way, gender inequality will continue to prevail and women and children's lives will continue to be put at risk.

RECOMMENDATION:

Women's access to justice must be a priority in the Third Action Plan.

Domestic violence death review mechanisms

Strategy 5.2 of the National Plan refers to 'monitor[ing] domestic violence-related homicide issues'. Action 19 of the Second Action Plan focuses on 'Driv[ing] continuous improvement in systems through reviewing domestic and family violence related deaths and child deaths'.

We acknowledge the importance of specialist domestic and family violence death review mechanisms to identify systemic issues and recommend actions aimed at preventing future domestic violence deaths. It is important that such mechanisms are securely funded and comply with best practice principles, including mandating responses to and public monitoring of implementation of review recommendations.

We note Tasmania and the Northern Territory do not have a domestic violence death review mechanism. This must be addressed. We welcomed the 12 month trial of a domestic violence death review mechanism in the ACT and recommend this continues.

There is also some level of confusion or inability about how state and territory based death reviews effectively deal with federally based laws and agencies and courts and a more nuanced and specialised approach is therefore required.

WLSA believes urgent consideration needs to be given to this issue. Recommendations regarding reforms to the family law system could be made through currently existing state and territory domestic violence death review mechanisms. However, this is dependent upon the death review panels having the

³⁷ Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of Court*, 2016. Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experience of Court*, 2016.

expertise to ask the right questions. Eg. lawyers with specialisation in domestic violence and family law matters. These DV death review mechanisms can also take place sometime after the actual death because of coronial and criminal court proceedings. The more specialised reviews within child protection can take more quickly after the suspicious death and make interim findings to improve systems. It is essential that recommendations be independently monitored and evaluated and where recommendations are not implemented agencies, including federal agencies, provide reasons for this. If we do not address this issue we are missing opportunities for systemic change and improvement to the family law system.

RECOMMENDATION:

Urgently adopt statutorily established and securely funded specialist domestic and family violence death review units in all states and territories and ensure that current units are statutorily based, securely funded and comply with best practice principles, including mandating agency responses to and public monitoring of implementation of review recommendations.

RECOMMENDATION:

That the federal government immediately commence work on the best model that should be established to systemically analyse child and adult deaths in the family law system (family law courts, FRCs, FDR Services) with the purpose of investigating deaths to make recommendations for immediate and long term systemic change and that such a team be multi-disciplinary, independent and accountable.

Additional Issues for inclusion in the Third Action Plan

Technology-facilitated stalking and abuse

The COAG Advisory Panel acknowledges the need to address technology-facilitated stalking and abuse (also referred to as technology-facilitated domestic violence). The Panel also acknowledges the important role police can play in collecting digital evidence. This requires training and it is important that police can access such training. The Panel also acknowledges the role of technology in supporting victims/survivors of domestic violence.

We refer to the recommendations of the Senate Standing Committees on Legal and Constitutional Affairs in their 2016 *Phenomenon colloquially referred to as 'revenge porn'* report. These include recommendations for the commonwealth, state and territory governments to legislate offences for knowingly or recklessly recording or sharing an intimate image without consent as well as threatening to take and/or share intimate images without consent, irrespective of whether or not the images exist; power to make take down orders; training for police. The recommendations should be implemented.

We refer to the NSW Standing Committee on Law and Justice *Remedies for the serious invasion of privacy in NSW report*. Recommendations included consideration of additional remedies available to the Local Court to respond to technology facilitated stalking and abuse and ongoing training of police with regards to the nature and dynamics of domestic violence, the impact of technology-facilitated stalking and abuse and the law.

RECOMMENDATION:

Include in the Third Action plan the implementation of additional remedies to adequately address technology-facilitated stalking and abuse.

RECOMMENDATION:

Include in the Third Action Plan ongoing training of police in the nature and dynamics of domestic violence, remedies for technology-facilitated stalking and abuse and collection of digital evidence.

RECOMMENDATION:

Include in the Third Action Plan Technology safety training for domestic violence workers, police and legal professionals.

Domestic violence as protected attribute

WLSA continues to advocate for inclusion of being a victim/survivor of domestic violence as a protected attribute in anti-discrimination laws and the *Fair Work Act 2009 (Cth)*. Our reasons for this are outlined in our submission to this committee's earlier inquiry into domestic violence in Australia. Additionally, protection against adverse action on the basis of being a victim/survivor of domestic violence should be included in the *Fair Work Act (Cth)*.

We also support the Victorian Royal Commission into Family Violence recommendations relating to the workplace.³⁸

RECOMMENDATION:

Include the status of being a victim/survivor of domestic violence as a protected attribute in anti-discrimination laws and the *Fair Work Act 2009 (Cth)*.

RECOMMENDATION:

Provide protection against adverse action on the basis of being a victim/survivor of domestic violence in the *Fair Work Act (Cth)*.

RECOMMENDATION:

Implement the Victorian Royal Commission into Family Violence recommendations relating to the workplace.

NATIONAL PLAN – DESIGN, IMPLEMENTATION, EVALUATION

WLSA commends the bipartisan support for the establishment of the National Plan to Reduce Violence against Women and their Children and the ongoing collaboration between commonwealth, state and territory governments in the development and implementation of Action Plans.

WLSA continues to advocate for adequate consultation in the development and implementation of the National Plan Action Plans. The Plans must be adequately and securely funded, independently monitored and inclusive of transparent accountability and governance mechanisms.

³⁸ Royal Commission into Family Violence, Recommendations 190-191.

We have ongoing concerns about the process for developing, implementing and monitoring the National Plan and Action Plans developed under the National Plan. In particular, these concerns relate to consultation and engagement with civil society, independent monitoring, and inadequate resourcing.

While we welcomed the Women's Safety package, including \$15 million funding to pilot Specialist Domestic Violence Units and Health Justice Partnerships, in the face of a 30% funding cut nationally from 2017 we have concerns about the ability for this package to contribute to measured outcomes when there are Community Legal Centres providing services to women that will most likely have to close³⁹.

There needs to be greater transparency and accountability with respect to governance mechanisms at both the Commonwealth and State and Territory levels.

The National Plan Implementation Panel (NPIP) has disbanded. The Advisory Groups intended to support NPIP did not eventuate.

We acknowledge the important work of the COAG Advisory Panel to reduce violence against women and their children. We welcomed the publically available communiqués and commend the publishing of the COAG Advisory Panel's reports.

Given the work of the COAG Advisory Panel has been completed there needs to be new and clear governance structures that involve the active participation of civil society. It is important to include specialist domestic and family violence legal practitioners in the governance structures.

We welcome the publishing of the secretariat newsletter as a means of communicating with civil society but note that most of the material included in the newsletter is drawn from media releases and recommend a more effective way of ensuring two-way communication with civil society.

We understand KPMG has been engaged to undertake an evaluation of the Second Action Plan. As a means of engaging with civil society and governments and civil society jointly working together to implement the National Plan the evaluation of the Second Action Plan should be made publically available.

We note that one of the principles of the National Plan is that *sustainable change must be built on community participation by men and women taking responsibility for the problems and solutions*⁴⁰, we are concerned about the lack of consultation and engagement opportunities with civil society including key non-government organisations in relation to the National Plan.

While there was some limited consultation on the development of the Second Action Plan, it was disappointing that submissions made regarding the development of the second Action Plan were not made public.

We are very concerned that the development of the Third Action Plan (currently underway), also appears to be quite exclusive in its consultation process, as the National Plan website⁴¹ indicates a small number of exploratory workshops and a

³⁹http://www.naclc.org.au/cb_pages/files/Media%20Releases/2016/080316_NALC_%20MR_%20Int_%20Women's_%20Day.pdf

⁴⁰ Pg 11, National Plan to Reduce Violence Against Women and their Children

⁴¹ <http://plan4womenssafety.dss.gov.au/towards-the-third-action-plan/>

series of national roundtables with key stakeholders will be held. While we are pleased that consultation is occurring we are very concerned that it is quite limited and with no particular reference to women from diverse and marginalized communities.

We are also concerned that the report for this inquiry is due in August and in effect the vital feedback from submissions may not be utilized in the development of the Third Action Plan.

RECOMMENDATION:

That the Department of Social Services and the Office for Women utilize submissions to this inquiry located on the Senate Committee's website to inform the development of the third Action Plan.

RECOMMENDATION:

That more inclusive and ongoing consultation mechanisms and opportunities be developed to ensure the active participation by civil society in the monitoring and implementation of the National Plan and the development of Action Plans under the National Plan.

Given that the National Plan recognises that policy solutions to address domestic and family violence and sexual assault must take into account the diverse backgrounds and needs of women and their children and that outcomes and strategies must be relevant to all Australians irrespective of their age, sex, sexual orientation, race, culture, disability, religious belief, faith, linguistic background or location, we submit that better consultation is required to meet the needs of all women and children escaping violence. In particular, we note:

Aboriginal and Torres Strait Islander women

Aboriginal and/or Torres Strait Islander women face the barriers of inter-generational trauma and poor health outcomes associated with colonisation and dispossession of land. Aboriginal and/or Torres Strait Islander women are 35 times more likely to be hospitalised due to a family violence related assault than non-Indigenous women⁴². Aboriginal and/or Torres Strait Islander people are also overrepresented in the child-protection system and the prison system. Aboriginal and/or Torres Strait Islander women face unique challenges in family law and other matters due to their large kinship systems (i.e. multiple parties to proceedings, difficulty finding legal assistance due to conflicts of interest, etc). Aboriginal and/or Torres Strait Islander people also experience challenges in navigating through a system that does not recognise their traditional laws and does not take their cultural needs into account.

As discussed in the opening, it is essential that an intersectional approach to achieve gender equality is adopted. It is particularly important to include actions that Aboriginal and Torres Strait Islander women themselves have designed and developed.

RECOMMENDATION:

Ensure that Aboriginal and Torres Strait Islander communities lead and participate in the development and implementation of the Third Action Plan.

⁴² AIHW, 2006

Women who are culturally and linguistically diverse

Women from CALD backgrounds face a range of additional barriers in accessing justice in the justice system. Women from CALD backgrounds do not all have the same needs and it is important to consider how different women from different backgrounds experience disadvantage.

There are a range of factors that will contribute to CALD women's experience of the justice system including:

- Migration status - women who are on temporary visas (including tourist, bridging and spousal visas) are particularly vulnerable when experiencing family violence and relationship breakdown. They are often isolated, without family support and entirely reliant on their abusive partner. They may be fearful of leaving a violent relationship because of the consequences for their migration status. Accessing legal advice and navigating the complexities of an unfamiliar court system are some challenges that they face. COAG Advisory Panel Recommendation 2.4 recommends easy access to support services for temporary residents.
- Knowledge of family law, family violence law and child protection – women often come from countries where their systems of law are vastly different to the Australian justice system. For example, family law disputes in India include return of a woman's dowry under specific Indian legislation. Without timely access to legal information and advice that is in a form that is understood by women, women are unable to effectively access justice.
- Access to interpreters – it is surprising how often women are unable to access appropriate interpreters in the legal system. The availability of interpreters is an ongoing issue at court, and in some instances the same interpreter must interpret for both parties (which we consider to be a conflict of interest). Women who require interpreters of specific dialects or come from a small community where the interpreter is known face even greater barriers.

It is essential that consultation with culturally and linguistically diverse women in undertaken in the development of the Third Action Plan.

Women from rural, regional or remote communities

Women from rural, remote and regional areas may be at greater risk of domestic violence and at risk of unique barriers to getting help such as lack of services, great travelling distances, perceived confidentiality issues, etc. It is essential that their voices are included in the development of the Third Action Plan.

Women with diverse sexualities and genders

Research on the incidence and prevalence of family violence in lesbian, gay, bisexual, trans, intersex and queer (LGBTIQ) relationships is limited.

As in heterosexual relationships, family violence in these relationships includes a pattern of controlling behaviour, which causes fear in the other partner and encompasses physical, emotional, sexual and financial abuse. The family violence experienced by LGBTIQ people may also involve actions such as the use of homophobia and fear of being 'outed' as a mechanism for abuse, or threatening

to reveal a partner's HIV status.⁴³

Ensuring that policy and community responses appropriately recognise and respond to family violence experienced by LGBTIQ people, as well as cater to non-heterosexual male perpetrators, is vital. Such responses must be considered within the broader context. For example, it is important to understand the effect of isolation, societal perceptions, stereotypes, homophobia and transphobia as well as legal inequality on the willingness of LGBTIQ people to report family violence and in contributing to barriers to accessing police, legal assistance and related services. This has flow-on effects for CLCs providing legal assistance, related service providers and police in responding to family violence-related incidents, and the courts.

One Size Does Not Fit All, the 2011 gap analysis of NSW domestic violence support services in relation to gay, lesbian, bisexual, transgender and intersex communities' needs, highlighted the fact that people from these communities experience difficulty finding LGBTI appropriate support.⁴⁴

Young women

Young women (18 – 24 years) experience significantly higher rates of physical and sexual violence than women in older age groups.⁴⁵

In 2015, VicHealth released their report *Young Australians' Attitudes to Violence against Women*⁴⁶. Some of the findings of the report included:

- One in five young people believe there are circumstances in which women bear part of the responsibility for sexual assault. For example, 20% of 16-24 year olds believe that women often say 'no' when they mean 'yes' compared to 13% of the 35-64 year age group.
- Two in five (40%) young people believe that 'rape results from men not being able to control their sexual urges', an increase from one in three young people when the survey was last conducted in 2009.
- Although most young people (84%) agree that tracking a partner by electronic means without her consent is serious, nearly half (46%) believe that it is acceptable to some degree (compared to 35% of those aged 35-64). Young men are more likely to agree with this than young women (52% v 40%).
- One in five (22%) young people agree that men should take control in relationships compared to 16% of 35-64 year olds.

Similarly, a report released by The Line this year, revealed⁴⁷:

- A quarter of young people think it's 'normal' for a boy to put pressure on girls to

⁴³ See, eg, L Bartels, *Emerging Issues in Domestic/Family Violence Research* (2010) Research in Practise Report 10, prepared for Criminal Research Council; Same-Sex Domestic Violence Interagency, *Another Closet: Domestic Violence in Same-Sex Relationships* (2009); C Chan, *Domestic Violence in Gay and Lesbian Relationships* (2005) prepared for Australian Domestic Family Violence Clearinghouse. See also: Australian Law Reform Commission, *Family Violence and Commonwealth Laws—the Lesbian, Gay, Bisexual, Trans and Intersex Community*, Information Sheet (2012).

⁴⁴ ACON Lesbian and Gay Anti-Violence Project, *One Size Does Not Fit All: Gap Analysis of NSW Domestic Violence Support Services in Relation to Gay, Lesbian, Bisexual, Transgender and Intersex Communities' Needs* (2011).

⁴⁵ See ABS, 2013: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4906.0Chapter3002012>

⁴⁶ https://www.vichealth.vic.gov.au/~media/ResourceCentre/PublicationsandResources/PVAW/SurveySummary_YoungPeople-attitudes-violence-against-women.pdf?la=en

⁴⁷ <http://www.ourwatch.org.au/getmedia/fa1265e8-abfd-4ca3-ac3a-099bbb612910/The-Line-Evaluation-Research-on-consent-FINAL.pdf.aspx>

do sexual things, and 60% think the girl is responsible for making it very clear if she doesn't want to have sex;

- a fifth of young women are being put under pressure to do sexual things
- more than a third (37%) of young people think it is hard to respect a female when she is drunk; and
- more than a fifth (27%) think it is hard to be respectful of a female who wears revealing clothing.

Mature-age women

Research shows that between 2008 and 2009, 25% of women over the age of 45 years had experienced violence perpetrated by their current partner,⁴⁸ and that women often experience violence over long periods.⁴⁹ Mature age women tend to experience emotional and financial abuse at higher rates than their younger counterparts.⁵⁰ Specific barriers to reporting family violence experienced by mature age women may include social isolation and alienation, lack of awareness about services, physical or cognitive disability, lack of awareness about what constitutes family violence, and reluctance to leave long-term relationships and family situations.⁵¹ Increasingly, research also indicates a link between mature age women who experience family violence and homelessness.⁵² It is vital to include the voices of these women in the development of the Third Action Plan.

Women with Disability

Women with disability are at a higher risk of being assaulted, and experience sexual assault at twice the rate of women who do not have disability.⁵³ Women with disability are particularly vulnerable to family violence for a range of reasons, including for example dependence on others, isolation and marginalisation, communication barriers, lack of knowledge of rights, lack of appropriate and accessible services, and institutional living. Women with disability who experience domestic violence also face particular barriers accessing legal advice and assistance, including as a result of communication barriers, costs of representation, and misconceptions about people with disabilities.⁵⁴

As discussed previously, the National Plan does not currently adequately address the intersectional causes of violence against women. We believe this has led to issues of violence against women with disability largely being treated as a disability issue rather than considered through the lens of gender and disability.

Action 2.3.1. of the National Disability Strategy states "ensure that the National Plan to Reduce violence against women and their Children 2010–2022 and the National Framework for Protecting Australia's Children have priority action to improve the safety and wellbeing of women and children with disability".⁵⁵

⁴⁸ L McFerran, *The Disappearing Age Discussion Paper on a Strategy to Address Violence of Older Women* (2009), prepared for Australian Domestic and Family Violence Clearinghouse.

⁴⁹ A Morgan and H Chadwick, *Key Issues with Domestic Violence* (2009) Research in Practise Summary Paper No 7.

⁵⁰ See, eg, D Bagshaw, S Wendt and L Zannettino *Preventing the Financial Abuse of Older People by a Family Member: Designing and Evaluations Older-Person-Centred Models of Family Mediation* (2009).

⁵¹ L McFerran, *The Disappearing Age Discussion Paper on a Strategy to Address Violence against Older Women*, (2009), prepared for Australian Domestic and Family Violence Clearinghouse.

⁵² See, eg L McFerran, *It Could Be You: Female, Single, Older and Homeless* (August 2010).

⁵³ L Healey et al, *Building the Evidence: a Report on the Status of Policy in Responding to Violence against Women with Disabilities in Victoria* (2008).

⁵⁴ See, eg, Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (February 2014); Women with Disabilities Australia, *Submission to Australian Law Reform Commission Inquiry into Equal Recognition Before the Law and Legal Capacity for People with Disability*, January 2014; National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence Against Women and their Children, 2009–2021* (2009), 18.

⁵⁵ National Disability Strategy, p69.

The Australian Senate Community Affairs References Committee's *Violence, abuse and neglect against people with disability in institutional and residential settings* report recommended the National Plan to reduce violence against women and their children (National Plan) be "updated to include institutional and disability accommodation settings".⁵⁶

Women with disabilities and their advocates have also long been advocating for recognition of forced sterilisation of women and girls with disabilities as a form of gendered violence and for inclusion of this issue in the National Plan.

It is vital that girls and women with disabilities and their advocates actively participate in the development and implementation of the Third Action Plan and that girls and women with disabilities are adequately included in the Third Action Plan.

RECOMMENDATION:

It is vital that girls and women with disabilities and their advocates actively participate in the development of the Third Action Plan and that girls and women with disabilities are adequately included in the Third Action Plan.

RECOMMENDATION:

The National Plan and Third Action Plan include institutional and disability accommodation settings.

RECOMMENDATION:

The National Plan and Third Action Plan include addressing the forced sterilisation of girls and women with disabilities.

Women in prison

The issue of women in prison highlights intersectional discrimination based on factors including gender, race, disability, poverty and age.

Aboriginal and Torres Strait Islander women form 2.2% of Australian women and yet comprise 34% of the women in prison in Australia.⁵⁷

As Stathopoulos notes, Aboriginal women generally serve shorter sentences, often for minor offences such as driving infringements and non-payment of fines and are more likely than non-Aboriginal women to be on remand.⁵⁸ This raises concerns about over-policing. It is also of great concern that women are being incarcerated because they are poor. As Stathopoulos further acknowledges "prisoners who are on remand are usually not eligible to participate in programs".⁵⁹

Courts are not generally well informed about the pathways to prison for women as a result of family violence, including sexual assault. A high proportion of women in prison have been victims of violent crime prior to coming into custody. For example, the 2009 NSW Inmate Health Survey found that: 66% of female inmates had been involved in at least one violent relationship and 29% of female inmates

⁵⁶ Senate Community Affairs References Committee, *Violence, abuse and neglect against people with disability in institutional and residential settings report, 2015, Recommendation 24.*

⁵⁷ Peta MacGillivray & Eileen Baldry, 'Australian Indigenous Women's Offending Patterns', Indigenous Justice Clearinghouse, Brief 19, June 2015, p1.

⁵⁸ Research cited in Mary Stathopoulos, *Addressing women's victimisation histories in custodial settings*, ACSSA, No 13, 2012 at 3.

⁵⁹ *Ibid.*

had been subjected to at least one form of sexual violence.⁶⁰

Lawrie's 2003 study of Aboriginal women in NSW prisons found that over 75% of Aboriginal women had being sexually assaulted as a child, just under 50% had been sexually assaulted as adults and almost 80% were victims of family violence.⁶¹

As Stathopoulos observes, "the most significant co-occurrence of child sexual abuse sequelae is substance addiction and mental health issues ... [which] is intertwined with mental health problems and pathways to offending".⁶² As Herman explains, drugs are a coping mechanism, providing relief and a form of escape from reality.⁶³

Helping women to address their trauma is key to reducing recidivism. With respect to Aboriginal and Torres Strait Islander women this should include transgenerational trauma as a result of colonisation.

We are also concerned that the over-representation of Aboriginal and Torres Strait Islander women in prison is a factor impacting on the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care.

For all these reasons, it is vital there is meaningful engagement with women with lives experience in prison and their advocates about how women in prison can be included in the National Plan and the Third Action Plan.

From our experience of working with women in prison we make the following recommendations.

RECOMMENDATION:

Meaningful engagement with women with lived experience in prison and their advocates about how women in prison can be included in the National Plan and the Third Action Plan.

RECOMMENDATION:

A genuine commitment to diversionary programs for women, especially in relation to a non-violent offence. This is particularly important where the woman has primary/substantial caring responsibilities for children and is consistent with the [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(Bangkok Rules\)](#).

RECOMMENDATION:

Where a custodial sentence cannot be avoided, commitment to and expansion of programs that enable children to live with their mother in custody - either on a full-time basis or for school holidays.

RECOMMENDATION:

More Audio Visual Link (AVL) suites set up for contact visits in prison and more flexibility regarding community organisations that can facilitate the

⁶⁰ Devon Idig, Libby Topp, Bronwen Ross, Hassan Mamoon, Belinda Border, Shalin Kumar and Martin McNamara, 2009 *NSW Inmate Health Survey*, Justice Health, Sydney 2010 p 131

⁶¹ Lawrie cited in Natalie Taylor & Judy Putt, 'Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia,' *Trends and Issues in crime and criminal justice*, Australian Institute of Criminology, September 2007 p 2.

⁶² Mary Stathopoulos, *Addressing women's victimisation histories in custodial settings*, ACSSA, No 13, 2012 p6.

⁶³ Herman cited in Mary Stathopoulos, *Addressing women's victimisation histories in custodial settings*, ACSSA, No 13, 2012.

contact visits through technology where the children are located. This would enable women in prison, for example, to speak to their children about their school day, sporting events, read their children a story.

RECOMMENDATION:

Improve access to safe and affordable housing so that women can get bail and parole and so their children can live with them upon release where it is safe to do so.

RECOMMENDATION:

Consistent with the Victorian Royal Commission into Family Violence recommendations 183 and 184 ensure access to counselling and other supports/programs for women in prison who want to access such services and programs, including women on remand.