

# **Joint Select Committee on Australia's Family Law System**

31 January 2020

## TABLE OF CONTENTS

1. About Women's Legal Service Queensland
2. Introduction
3. Some Overarching Comments
4. A Safer Way Forward for the Family Law System - Recommendations
5. Responses to Terms of Reference
  - a. Interaction between the family law system, child protection systems and family and domestic violence jurisdictions
  - b. The appropriateness of family court powers to ensure truthful and complete evidence and enforcement
  - c. Reforms needed to the current structure of the Family Court and Federal Circuit Court
  - d. Financial costs to families of family law proceedings and options to reduce the impact
  - e. Effectiveness of family law support services and FDR processes
  - f. Impacts of family law proceedings on the health safety and wellbeing of families and children
  - g. Issues for grandparent carers
  - h. Performance and monitoring of professionals
  - i. Improvements to the interaction between family law and child support
  - j. Pre-nuptial agreements
6. Appendix

## About Women's Legal Service Queensland (WLSQ)

WLSQ provides Queensland wide specialist, free legal information, advice and representation to women in matters involving domestic violence, family law, child protection and sexual violence. Last financial year we assisted over 16 000 victims of sexual or domestic violence. We also employ allied domestic violence social workers who assist clients to ensure a holistic response for our clients ensuring their safety, housing and other needs are met.

50% of our clients are from rural, regional or remote (RRR) areas and we have a dedicated RRR line that provides direction legal assistance to women in these areas for 4 hours each week. Our Helpline is open 5 days per week and offers triaged assistance to callers throughout Queensland. Despite increased investment and response rates, we have consistently been unable to answer 40% of calls.

WLSQ receives Women's Safety Package (WSP) funding for our high risk Gold Coast, Brisbane and Caboolture Domestic Violence Units to provide intensive support to women with complex needs in these geographical areas. Our Health Justice Partnership solicitors provide legal advice and assistance to victims of domestic violence at the Logan, Gold Coast, Redlands, QE2, PA, RBH, Redcliffe and Caboolture hospitals. Our Caboolture HJP solicitor also provides weekly legal help to young disadvantaged mothers in partnership with Micah and Queensland Health.

We also have a financial abuse prevention team consisting of a lawyer and a First Nations financial capability worker that assist clients with debt and financial abuse issues.

We have been operating for 35 years and have been actively involved in advocating for law reform in family law for the majority of our existence, principally concerned with how domestic violence is dealt with in the system and the long and short-term impacts on women and children's wellbeing when safety is not prioritised in decision-making.

## Introduction

1. Women's Legal Service Queensland (WLSQ) is grateful for the opportunity to provide a submission to the Joint Select Committee's inquiry into the Family Law System.
2. The terms of reference focus on a few discrete areas. These areas are important. However, these areas cannot be properly addressed in isolation from the broader problems plaguing the family law system.
3. It has been roundly acknowledged by all stakeholders that the family law system is broken. Not scratched or dented but broken. It therefore requires universal, systemic and complete repair. The Law Council of Australia has said '*Band-Aid solutions and tinkering around the edges is no longer enough. There must be holistic change.*'<sup>1</sup>
4. In March 2019, the Australian Law Reform Commission (ALRC) completed the first comprehensive review into the family law system since the system commenced in 1976. That review was extensive in both breadth and depth. It reviewed the courts, laws, systems, procedures and processes. It also considered interactions with other related systems such as domestic and family violence, child support, dispute resolution and child protection. It was assisted by an expert advisory committee, received over 426 written submissions from the public and stakeholders and conducted preliminary, secondary and tertiary consultations. It produced a 581-page report and made 60 recommendations.

---

<sup>1</sup> Arthur Moses SC, Law Council of Australia, Media Release, 19 September 2019.

5. The ALRC has already considered the same matters that are now being considered by this Joint Select Committee. We understand the Government will respond to the ALRC recommendations, but we are uncertain about time frames for this.
6. Meanwhile, women and children continue to suffer because of ongoing domestic violence following family breakdown. That suffering not only affects them as individuals but also has significant economic impacts for the community.<sup>2</sup>
7. Australians deserve better. We deserve a world-leading family law system that can promptly and rigorously address the ramifications of family and domestic violence within the context of family breakdown. Australians deserve the protection of the rule of law, not just in words written in a piece of legislation, but in practice.
8. As part of this inquiry, we urge the Committee to give genuine and proper consideration to the comprehensive commentary, reflections and recommendations made by previous inquiries into this vexed area of law and social policy.
9. WLSQ supports the 5 step plan or women and children's safety developed by Women's Legal Services Australia (WLSA).

## Some overarching comments

---

<sup>2</sup> The combined health, administration and social welfare costs of violence against women have been estimated to be \$21.7 billion a year, with projections suggesting that if no further action is taken to prevent violence against women, costs will accumulate to \$323.4 billion over a thirty year period from 2014-15 to 2044-45. [PricewaterhouseCoopers Australia \(PwC\) 2015](#). A high price to pay: The economic case for preventing violence against women.

**A. Family violence is core business of the family court system**

1. The evidence is overwhelming that domestic violence is the core business of the family law courts. The ALRC report refers to these statistics from the Australian Institute of Family Studies finding that:
  - Nearly 50% of families in the courts reported safety concerns for themselves or their children.
  - 85% reported a history of family violence.
  - More than 50% reported physical violence.
2. The court system's approach to service delivery needs a radical rethink and overhaul to best meet the needs of these families and the children.

**B. If Family Violence is core business what must change?**

***(i) A shift away from prioritising cooperative parenting***

3. There can be a tendency by professionals working in the family law system to prioritise outcomes that promote the cooperative care of children over and above issues of safety and risk.
4. Terminology such as 'high conflict' or conflictual relationships can be used in domestic violence matters. This has the effect of mutualising violence in relationships, meaning that both parents may be blamed for their involvement in the 'conflict'.
5. Serious consequences for the safety of women and children can flow from a failure to accurately identify the existence of domestic violence, and the person most in need of protection. Domestic violence dynamics of power and control often continues after

separation, can involve systems and litigation abuse, and can be highly dangerous and potentially lethal to women and children.

6. Importantly, when there is domestic violence, the cooperative care of children may not be in their best interest as it can continue to expose the mother and the children to ongoing issues of violence and control in the relationship.
7. The family law system needs to recognise its central role in protecting women and children in Australia from ongoing domestic violence and become domestic violence informed in its processes and decision-making.

***(ii) A move away from victim blaming***

8. Unfortunately, there can be a tendency to “victim blame” in systems that do not take a domestic violence informed approach, such as the family law system. This can result in mothers being solely blamed for a range of behaviours exhibited by children, for example, unruly behaviour of children in their care. Professionals can fail to properly consider the dynamics of domestic violence and its impact on the family, where the perpetrator may have intentionally disrupted the dynamics between the mother and the children or may have encouraged this behaviour, as a way of continuing control over the mother. This tendency towards blaming mothers without properly assessing domestic violence and placing accountability with the perpetrator, is quite common in child protection systems’ responses in Australia and throughout the world.
9. In Queensland, in response to the Not Now: Not Ever domestic violence report and the Carmody Inquiry into Child Protection, the Queensland Government has invested quite substantially into aligning the child protection and domestic violence systems.
10. The beginning of the culture shift in child protection agencies is occurring because of the adoption of David Mandel’s Safe and Together Model<sup>3</sup>, which provides a domestic

---

<sup>3</sup> [http://safeandtogetherinstitute.com/wp-content/uploads/2013/01/st\\_model.pdf](http://safeandtogetherinstitute.com/wp-content/uploads/2013/01/st_model.pdf)

violence informed framework of operation for child protection workers. The model requires compulsory training and its hallmarks include prioritising perpetrator accountability and not holding women accountable for men's use of violence, whilst recognising the impact of violence on women and children.

11. Where claims of mutual violence exist, the model requires child protection workers to map out the use of violence by each party and identify the "intent" of the violence. This means for women who may have used violence in the relationship (this is not uncommon and may be a response to threat, violence directed towards them), exploration around "intent" (was it self-defence, a trauma or frustration response?) is incredibly important. It may result in a professional assessment that her violence is unlikely to continue if she and her children are protected and if they can be supported to safety. The approach is quite revolutionary in the area of child protection and drives a culture shift away from victim blaming, emphasising perpetrator accountability whilst prioritising safety and risk by professionals in this field.
12. WLSQ recommends the investigation of the work of David Mandel and the Safe and Together Model and the adaption of key aspects of the program in the family law system as a whole in relation to perpetrator accountability, to assist a shift towards an approach that truly prioritises safety and risk for children and victims of domestic violence.
13. In our experience working in this area over decades, unless legislative and policy reform concerning issues of domestic violence and abuse is clearly articulated and placed at the centre of decision making, violence can be completely missed, minimised or ignored by service providers and decision makers. All professionals who work in the family law system must have a thorough and nuanced knowledge of issues of domestic violence and abuse and its impact on women and children to be able to intervene early or as appropriate and provide safe and appropriate referrals to specialist domestic violence agencies.

**(iii) Domestic violence harms children**



14. Perpetrating domestic violence in the family is child abuse. Exposure to domestic violence has significant and long-term impacts on children throughout their lifetime including their ability to form healthy attachments in teenage and adult lives. It can also be lethal.

15. In a submission by the Queensland Domestic and Family Violence Review Board to the Australian Law Reform Commission the Board in 2018 they write<sup>4</sup>:

*“Ongoing abuse perpetrated against victims during periods of contact to facilitate child custody arrangements was also significant in the cases reviewed, and in some cases, victims were killed by their partners during custody hand-overs.*

*In 13 of the 20 cases, 2 reviewed by the Board during the 2017-18 reporting period alone, there was evidence to suggest that children were exposed to, or a direct victim of, domestic and family violence. This included:*

- *The perpetrator using the child/ren to manipulate the victim to remain in, or reconcile, the relationship;*
- *The perpetrator using the child/ren to monitor the primary victim’s (their mother) behaviour;*
- *Witnessing and experiencing direct and indirect episodes of violence;*
- *The perpetrator making threats to seriously harm or kill the child/ren as a means to exert control over the victim (their mother); and*
- *In addition to the four child homicides reviewed in this reporting period, there were 18 children present during the homicide event (across nine cases). “*

**(iv) A presumption of shared care is dangerous**

16. Over the lifetime of the service, women who have been subjected to violence that seek our assistance, almost always start from a position of wanting their children to have an ongoing relationship with the father. It is only in the most dangerous of situations that our clients seek no contact or limited contact.

---

<sup>4</sup>Domestic and Family Violence Death Review and Advisory Board - Response to Review of the Family Law System (PDF, 1.1 MB).

17. Victims of violence will often have already entered shared parenting arrangements by the time they contact us for legal advice. This is because they have been told by the perpetrator this is the law, they believe him and as a survival tactic, they try to appease him giving into his demands, as much as possible. They seek our assistance when either the arrangements are not working, they are dangerous, or they continue to expose the children to ongoing abuse.
18. These concerns and experience are echoed in the Queensland Domestic and Family Violence Review Board submission to the Australian Law Reform Commission the Board mentioned above<sup>5</sup>:

*A recurrent theme within the Board's findings is a lack of formal engagement with this system (family law system), despite the primary victim and their children being subjected to ongoing violence post-separation and identifiable difficulties in negotiating safe shared parenting arrangements.*

*In the vast majority of the cases reviewed by the Board to date, there was a clear and demonstrated willingness by the victim to establish, and adhere to, informal shared parenting arrangements. Victims commonly expressed a desire to ensure the father (and their former partner) continued to have access to their child/ren even when it placed the adult victim at an increased risk of future harm.*

*However, while attempts to negotiate informal shared parenting arrangements may be seen positively in families, which are not characterised by domestic and family violence, this is not the case for families where domestic and family violence is present. (Page 1)*

*Among the intimate partner homicides considered by the Board in the 2017-18 reporting period, there were children in 10 cases. A domestic and family violence protection order was in place in seven of the cases (70%), with the children listed as named persons on each of these orders.*

*No Family Law Court Orders were established in any of the five cases where the couple had separated, although there were indicators of attempts to establish informal shared parenting arrangements.*

***It is clear that many separating couples negotiate parenting arrangements 'in the shadow' of what they understand to be the law, including presumptions about how much time children should spend with each parent.***

---

<sup>5</sup> Ibid.

***These arrangements can be made without careful consideration of the ongoing risk that exposure to a violent parent may pose.***

*This highlights the need for greater awareness of the capacity of the system to adjust parenting arrangements where there is evidence of domestic and family violence. To ensure that adult victims have confidence the system will be responsive to their concerns about their children being exposed to ongoing violence, and that the primary victim of violence will not be penalised as an uncooperative parent. (Pages 5 and 6)*

**(v) Perpetrator accountability**

19. A failure to hold perpetrators accountable for their violence can have immediate and intergenerational impacts on children.

20. This is supported below:

*Results from both the IVAWS (International Violence Against Women Survey) and ABS surveys suggest a relationship between the experience of violence as a child and subsequent victimisation as an adult<sup>6</sup>.*

*The IVAWS found that women who experienced abuse during childhood were one and a half times more likely to experience violence in adulthood than those who had not experienced abuse during childhood.*

*Data from the ABS Personal Safety Survey 2005 indicate that both men and women who experienced child abuse under the age of 15 years were at greater risk of partner violence as adults (since the age of 15) than those who had not experienced child abuse.*

*Those who experienced physical abuse as children were more than twice as likely to experience violence by a partner as those who had not experienced child physical abuse.*

*Victims of child sexual abuse were three times more likely to report violence by a partner than those who had not experienced sexual abuse as children.*

*An analysis of the ABS 1996 Women's Safety Survey found that history of violent victimisation, whether as a child or as an adult, predicts future victimisation.*

21. The family law system currently does not see itself as primarily as a domestic violence court, despite the statistics and this inhibits its ability to also focus on its important role in accountability and preventing inter-generational trauma.

---

<sup>6</sup>([https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2011-2012/DVAustralia#\\_Toc309798374](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/DVAustralia#_Toc309798374)).

## **Family law a safer way forward**

22. We enclose for your consideration, we provide WLSQ's plan for embedding a specialist domestic violence informed approach in the family law system. This includes several practical ideas and recommendations.
23. It requires careful planning in processes that ensure only those matters that truly require court intervention end up in litigation. Substantive investment is required in specialist domestic violence informed FDR processes to properly triage those matters that require immediate and urgent court intervention, and those families that may benefit from an enhanced and specialised domestic violence informed approach that prioritises child and victim safety. With every step of the process, being domestic violence informed better decision making will result for child and adult survivors of domestic violence throughout the system. The court also has a central role in holding perpetrators accountable for their violence. The lack of formal engagement in the family law system by high-risk families is evidence of the need for a high-risk domestic violence pathway to be established to better assist these families. Specialisation in all areas of the system is key as well as engagement with the domestic violence service sector.
24. A domestic violence informed system would have economic benefits as safer and better orders/agreements would result that appropriately prioritise the dynamics of domestic violence and better triaging across the system means that those matters that require a court adjudicated intervention are getting them as quickly as possible, therefore protecting court resources for those matters that require this.



**Changing to a family law and DFV system  
will deliver safer, more equitable and  
sustainable outcomes for all.**

## **A Safer Way Forward for the Family Law System**

### **The How**

1. One user-centred specialist Family and Domestic and Family Violence (DFV) Court.
2. An expert consistent approach to DFV cases with standardised triage and a new DFV risk and safety focus.
3. DFV informed laws and case management systems.
4. A coordinated State and Federal approach to the investigation of child abuse and DFV against children, post separation.
5. Continuous improvement embedded at all stages of the system.

### **The Outcomes**

1. Safer parenting orders.
2. More equitable financial settlements and systems that ensure the regular payment of child support.
3. Orders that are more sustainable long term.
4. Decreased litigation through more specialist diversionary programs that resolve disputes, with a focus on safety, at an earlier stage and improved case management that limits systems and financial abuse by perpetrators.

• First published by WLSQ in June 2019 and updated January 2020

## **1. One user-centred, specialist Family and DFV Court**

- A single specialist Family and DFV Court (the Federal Circuit Court to merge with and become a lower level of the Family Court) with a single entry point, legislatively guaranteed judicial appointments with appropriate DFV and family law experience.
- Develop high risk DFV court pathway that lead to early decision making about the presence of DFV and adopt an inquisitorial approach.
- Flexible court case management and assessments to consider appropriateness of specialist DFV divisionary programs (FDR) with some listed matters referred out to legal and community agencies for specialist DFV FDR or other assistance.
- Alert and responsive to financial and systems abuse by perpetrators.
- Fund specialists DFV lawyers at all stages for safety and efficiency.
- Develop a rural, regional and remote specific DFV Court plan to improve access e.g. consider greater use of technology through virtual courts.

## **2. Specialist and consistent approach to DFV cases with standardised triage and a new DFV risk and safety focus**

- Develop a standardised DFV risk assessment to determine safest and best interventions.
- Utilise specialist DFV family reports and develop capability of other report writers in relation to DFV.
- Recognise the family law system begins at the door of Family Relationship Centres and develop specialist high risk domestic violence pathway from community agencies to court (incorporating fast track legal aid grants).
- Adopt a DFV safety and risk approach determining early when DFV is present, what matters require litigation and those that can be diverted to FDR and those that can be safely assisted with specialist support and assistance.
- Adopt recommendations from Women's Legal Service Victoria's *Small Claims Big Battles* Report.
- Amend Family Law Act to enable courts to have regard to the effects of DFV in property matters reflecting strong links between DFV and poverty.

## **5. Building greater accountability**

- Accreditation of all court report writers and child contact centres including in DFV.
- Specialist DFV training for all family law system professionals including judicial officers.

## **3. DFV informed laws and case management systems**

- Use of specialist DFV expert reports to assist courts in understanding the nature of coercive and controlling behaviour and violence, safety concerns and risk, and impacts on children and adult caregivers.
- Embed DFV specialist support workers in court and include specialist domestic violence legal services in FASS.
- Fund specialist DFV Coordinated Family Dispute Resolution models (specialist FDR when there is DFV) as extra assistance for victims.
- Accredited, specialised parenting programs for DFV perpetrators and programs for victims whose parenting may have been affected by DFV.
- Removal of the presumption of equal shared parenting responsibility from the Family Law Act and amend the laws in a way that priorities safe outcomes and de-incentivise systems abuse by perpetrators.
- Recognise non-payment of child support as a form of financial abuse and introduce government guaranteed payments ensuring reliable payments to alleviate child poverty, and make government responsible for collection of non-payments.
- Make the best interests of the child the paramount consideration in child support legislation.

## **4. A coordinated State and Federal approach to the investigation of child abuse post separation**

- Develop a whole of government response at a Federal and State level to how child abuse allegations post separation will be investigated (by whom, how it will be funded and the interrelationship between the investigatory agencies, Family and DFV Court and other courts including criminal courts).
- Develop robust information sharing pathways between the Family and DFV Court, child protection, and Magistrates Court regarding DFV.
- Adapt the David Mandel model for DFV in child protection that priorities safety and perpetrator accountability to the family law system.

- Develop a national, transparent and public approach to DFV deaths in the family law system - a system of case review to understand systemic issues and make recommendations for change with the use of independent experts.
- Establish an independent, Federal Judicial Commission for judicial appointments, training and complaint handling.

## Terms of Reference

### **A. Interaction between the family law system, child protection systems and family and domestic violence jurisdictions**

25. One woman a week is murdered by her current or former partner in Australia.<sup>7</sup>

26. 1 in 3 women has experienced physical violence.<sup>8</sup> 1 in 5 has experienced sexual violence.<sup>9</sup> 1 in 6 has experienced physical or sexual violence by current or former partner.<sup>10</sup> 1 in 4 has experienced emotional abuse by a current or former partner.<sup>11</sup> Women are nearly three times more likely than men to experience violence from an intimate partner.<sup>12</sup> Women are almost four times more likely than men to be hospitalised after being assaulted by their spouse or partner.<sup>13</sup>

27. More than two-thirds (68%) of mothers who had children in their care when they experienced violence from their previous partner said their children had seen or heard the violence.<sup>14</sup>

28. Intimate partner violence is the greatest health risk factor for women aged 25-44.<sup>15</sup>

---

<sup>7</sup> Australian Institute of Criminology (AIC) 2017. The 2017 National Homicide Monitoring Program report by the AIC showed that over a 2-year period from 2012/13 to 2013/14, there were 99 female victims of intimate partner homicide.

<sup>8</sup> Australian Bureau of Statistics (ABS) 2017. Personal Safety, Australia, 2016, ABS cat. no. 4906.0. Canberra: ABS.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Australian Institute of Health and Welfare (AIHW) 2018. Family, domestic and sexual violence in Australia 2018. Cat. no FDV 2. Canberra: AIHW.

<sup>14</sup> ABS 2017. Personal Safety, Australia, 2016, ABS cat. no. 4906.0. Canberra: ABS.

<sup>15</sup> AIHW 2018. Family, domestic and sexual violence in Australia 2018. Cat. no FDV 2. Canberra: AIHW.



29. Domestic or family violence against women is the single largest driver of homelessness for women,<sup>16</sup> a common factor in child protection notifications,<sup>17</sup> and results in a police call-out on average once every two minutes across the country.<sup>18</sup>
30. 85% of the parents that come before the family courts have experienced family violence.<sup>19</sup> More than 50% involved physical violence.<sup>20</sup>
31. 50% of parents in the parents in the family courts were concerned for the safety of their children or themselves.<sup>21</sup>
32. As can be seen from the above, domestic violence is the core business of the family law system. Yet the problem is that it is dealt with on the periphery.
33. Following amendments, family violence is now mentioned in the *Family Law Act*, but it is buried deep within at section 60CC and only then towards the end of over 15 subsections to be considered in parenting matters<sup>22</sup>. Protocols and plans about how the courts intend to manage cases involving family violence<sup>23</sup> have been bolted onto the sides of the existing family law system.
34. Put simply, the family law system that was built in 1975 is no longer fit for purpose. Modifications and additions which try to address violence, even well-intentioned,

---

<sup>16</sup> AIHW 2017. Specialist homelessness services annual report 2016-17. Cat. no. WEB 217. Canberra: AIHW. Overall, 40% of clients seeking Specialist Homelessness Services were experiencing domestic and family violence, with 91% of these being female.

<sup>17</sup> AIHW 2018. Child Protection Australia 2016-2017. Cat. no. CWS 63. Canberra: AIHW. Children exposed to family violence are classified as experiencing 'emotional abuse', which while a broader category, is the most commonly substantiated type of harm (46%) in child protection notifications across Australia.

<sup>18</sup> Police across Australia deal with over 264,000 domestic violence matters each year (or one every two minutes) – calculated for police data sourced across all states and territories, collated at ABC News.

<sup>19</sup> Australian Institute of Family Studies, 'Parenting arrangements after separation', Evidence Summary, October 2019; Kaspiew et al, 'Evaluation of the 2006 family law reforms' (Report, Australian Institute of Family Studies, December 2009); Judge Joseph Harman, 'The prevalence of allegations of family violence in proceedings before the Federal Circuit Court of Australia' (2017)7(1) *Family Law Review* 3-19

<sup>20</sup> Australian Institute of Family Studies, 'Parenting arrangements after separation', Evidence Summary, October 2019.

<sup>21</sup> Ibid.

<sup>22</sup> *Family Law Act (Cth)* 1975 Section 60CC(3)(j) and (k).

<sup>23</sup> Family Violence Plan – Family Court of Australia and Federal Circuit Court of Australia – April 2019.

cannot fix the reality that the system was designed at a time where provisions about preserving marriage and encouraging reconciliation were legislated to the exclusion of any provisions about family and domestic violence<sup>24</sup>.

35. If the family law system is to address the scourge of abuse against women and children, there must be substantial fundamental change to put family and domestic violence at the centre of various systems and there must be more funding.
36. It is critical for domestic violence to be at the centre of the family law system – not just in words but in action.
37. To do this, the legislation, funding, processes and practices must be newly built around the central tenant that safety and protection from violence is paramount. There must be a legislatively enshrined domestic violence pathway. It is essential that it include triaging and early assessment about the existence of domestic violence for all families involved in the family law system. There should be standard utilisation of domestic violence risk assessments and specialist domestic violence family reports.
38. It will also require changes and funding to enable information sharing between state and federal courts and government agencies. The ALRC has made extensive recommendations about how this can occur.

### **Family violence order process and procedure (legal standards and onuses)**

39. In Queensland, family violence orders (Protection Orders) are regulated by the Domestic and Family Violence Protection Act 2012. To obtain an order, the applicant must satisfy the court of three matters:

---

<sup>24</sup> Provisions encouraging opportunities for reconciliation (12C and 13B) are still found at the outset of the *Family Law Act (Cth)* 1975 and require the court and lawyers to provide brochures about reconciliation, whilst provisions around family violence are not found until Part VII, s 60CC(3)(j).

- a. That there has been a relevant relationship between the parties
- b. That there has been an incident of domestic violence
- c. That an order is necessary or desirable

40. The onus of proof is on the applicant (called the aggrieved). The court must be satisfied of these elements on the balance of probabilities. This is the appropriate legal test because the order is a civil remedy (not criminal).

41. Whilst the elements described above appear simplistic, the court undertakes a rigorous exercise in making the determination about such cases.

42. Whilst the term 'necessary or desirable' is not defined in the legislation, it has been interpreted by the courts as requiring a further three-fold test as espoused by *MDE V MLG & Queensland Police Service* [2015] QDC 151 outlined below.

43. The court must first assess the risk of future domestic violence in the absence of any order (and there must be evidence to make factual findings or draw inferences of the nature and prospect of violence in the future). Then secondly the court must assess the need to protect the aggrieved from the violence in the absence of any order (relevant considerations include evidence about the parties' future relationships, opportunities for future contact and communication) and the then thirdly the court must consider whether imposing an order is necessary or desirable to protect the aggrieved.

44. The court may make temporary family violence orders pending a final determination of the case. These temporary orders are not considered by the family law courts in parenting cases under s.60CC.

45. If there are competing allegations about violence (or indications that both people are committing acts of violence), the court does not simply issue orders against both persons. Rather, the legislation makes it very clear that in determining such a case, the court must identify the person that is most in need of protection – and only issue orders for the protection of the most vulnerable person. In our experience, it is rare

(though present in the legislation) for Magistrates to use this provision in the interim stages but may be more likely to in final hearings. Of course, as most matters settle before final hearings this means that it is common for cross orders to be made against each party, by consent.

46. In making final orders, the court undertakes a standard trial process where each party is afforded the opportunity to present evidence, test evidence and make submissions.
47. It is only the cases that are contested, evidence tested and in which findings are made by the court, which impact or are given real consideration in parenting proceedings.
48. In our experience, the Magistrates Courts, largely, balance the need to protect victims of family violence with the requirements of procedural fairness, natural justice and are loathed to infringe upon the rights of individuals (respondents) unless there is cogent evidence of such a need.
49. Child contact is largely maintained with respondents to domestic violence orders, because of the common inclusion in domestic violence orders of 'the family law exception' to enable parents to maintain their relationships with children. The family law exception does not have standardised wording, but is often framed as, *"This condition does not apply to the extent that is necessary for the parties to attend an agreed conference, counselling, mediation session or when having contact with a child as set out in writing between the parties or in compliance with an order of a Court or when having contact authorised by a representative of the Department of Communities (Child Safety) with a child"*.

## Visibility of family violence orders in parenting cases

50. When determining parenting matters, section 60CC of the *Family Law Act 1975* provides that in determining what arrangements are in a child's best interests, the court must consider:

*(j) any family violence involving the child or a member of the child's family;*

*(k) if a family violence order applies, or has applied, to the child or a member of the child's family--any relevant inferences that can be drawn from the order, taking into account the following:*

*(i) the nature of the order;*

*(ii) the circumstances in which the order was made;*

*(iii) any evidence admitted in proceedings for the order;*

*(iv) any findings made by the court in, or in proceedings for, the order;*

*(v) any other relevant matter;*

51. If there are allegations of family violence (and no family violence order), the court will consider the evidence about the allegations that are raised in the family law proceedings themselves.

52. If a family violence order has been made, then the family law court must go on to consider that order in the parenting case.

53. However, s.60CC (k) specifically states that the court must consider the nature of the order and the circumstances, in which the order was made, and the evidence and findings made by the other court.

54. Many family violence orders are made 'by consent without admission'. This means that the respondent consents to the order being made but does not admit they did the things alleged in the application. If a family violence order is made 'by consent without admission', then the magistrate in the domestic violence matter does not

consider the evidence and there are no findings made by the lower court. This then means that in the family law proceedings, the family violence order is merely evidence that there is an order. It is not evidence that there has been family violence and it does not mean that family violence has occurred.

55. If a respondent in a family law parenting proceeding is subject to a family violence order which was made by consent without admission, it does not trigger any particular parenting consequence (for example, it does not automatically lead to any particular parenting outcome).
56. Sometimes, respondents with such a family violence order may feel they did not have adequate opportunity or resources to defend against the family violence proceedings. They may feel it prejudices them in family law proceedings. However, they have the benefit of section s.60CC (k) to demonstrate to the family law court about the nature of the order (i.e.: there was no admission) and the circumstances in which it was made (i.e.: limited or no prior legal advice).
57. A family violence order only has real repercussions in parenting proceedings if it was made following a contested hearing (where the evidence was presented and tested), or following submissions and if there are findings made against the respondent. Most family violence orders are not made following contested hearings, and most family violence matters therefore do not result in any findings. Therefore, most family violence orders do not impact the outcomes in parenting cases. The existence of a domestic violence order does not provide a strategic advantage to the party protected by the order in family law proceedings and are not made by credible commentators with experience in family law.

## Taking action to protect victims of domestic violence

58. If real action is to be taken to protect children and victims of family violence in family law matters, there must be further funding to community legal centres and Legal Aid Commissions.
59. The Committee need only read the case of *Darzi & Alinejad [2018] FCCA 2962* to obtain an insight into the reality of proceedings in the family courts and the impact on children and victims of violence. It is archetypal of the situation that courts face every day and the limitations faced in doing justice and protecting families and children.
60. The case is so accurate in its depiction of the issues faced by vulnerable families and the courts, that we have included the entire text of the decision in the Appendix to our submission.
61. The case involved the care of two children aged 10 years and 4 ½ years. The matter had been in the court for nearly two years and involved significant issues of domestic violence, though these were not outlined. Two weeks before trial the mother's legal aid grant was withdrawn, and she was self-representing on the day of the trial. The father was also unrepresented. The matters were resolved by consent orders in negotiations that took the entire day with assistance from the Independent Children's Lawyer and a solicitor from the Family Advisory Support Service who was assisting the mother. Judge Harmann reflects on the difficulty of the court to do an appropriate job in these circumstances and the impact on the litigants, the mother and the children especially if the matter did not settle.

## B. Court powers to ensure compliance and truthful and complete evidence

### Complete evidence

62. Full and frank disclosure of financial information is foundational to achieving just and equitable outcomes in financial settlements. It is very common for women to experience significant difficulties in obtaining accurate and timely information about the family income, assets and liabilities. This non-disclosure is often a continuation of the financial abuse experienced during the relationship.<sup>25</sup>

63. Whilst the obligation to provide disclosure is explained in the *subordinate* legislation, disclosure remains problematic because:

- i. It is not detailed in the *Family Law Act*;
- ii. There are differing rules for each of the Family Court and Federal Circuit Court<sup>26</sup>;
- iii. Litigants are unclear about the rules if the matter is being determined in a Magistrates Court;
- iv. It does not specify that the obligation extends to non-court processes such as FDR, mediation and arbitration; and
- v. There is no clear consequence for failing to comply or failing to comply on time.

64. The courts have existing powers<sup>27</sup> to compel disclosure but there appears a reluctance to use those mechanisms (particularly costs orders). It is common for clients to report that their partner has failed to provide documents as required by the rules or directions, but there is no repercussion. Rather, the offending party is given a 'second

---

<sup>25</sup> Prue Cameron, 'Relationship Problems and Money: Women Talk about Financial Abuse' (Wire Women's Information, 2015); Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report' (ANROWS, 2017).

<sup>26</sup> *Family Law Rules 2004* (Cth) r 13.01; *Federal Circuit Court Rules 2001* (Cth) r 24.03.

<sup>27</sup> The Court has powers to issue subpoenas to third parties, to make costs orders to encourage compliance, and in extreme cases, to make findings of contempt.



chance', more directions are made by the court and the case is adjourned again. It is the compliant party that suffers by having to attend court on another day, paying for their lawyer again on another day and taking time off work and/or trying to find alternative childcare. Even when the court is minded to make a costs penalty, such a remedy is often not available because the compliant party is unrepresented (and therefore whilst they have lost time, been out of pocket for childcare and commuting and lost wages for the court day, they do not have 'legal costs' to recover).

65. In our view, it is essential for:

- (i) The community to have a clear understanding of disclosure obligations; and
- (ii) The courts to have *and* employ mechanisms with which to enforce those disclosure obligations.

66. We therefore support the recommendations made by the ALRC<sup>28</sup> to:

- (a) Detail the disclosure obligations of both parties in the *Family Law Act 1975* (Cth);
- (b) Detail the consequences for breach of the disclosure obligations in the *Family Law Act 1975* (Cth); and
- (c) Enhance the case management powers of the court to impose remedies in cases of non-disclosure<sup>29</sup>.
- (d) Amend the Family Law Act to enable courts to have regard to the effects of domestic violence in property matters reflecting the strong links between women, poverty, homelessness and domestic violence.
- (e) Adopt the recommendation by Women's Legal Service Victoria in their Small Claims: Big Battles report.

## Truthful evidence

---

<sup>28</sup> Recommendation 25, *Family Law for the Future: An Inquiry into the Family Law System* (ALRC Report 135).

<sup>29</sup> Chapter 10, *Family Law for the Future: An Inquiry into the Family Law System* (ALRC Report 135).

67. The most complex matters faced by the courts involve those in which there are allegations of domestic violence and sexual abuse of a child. These cases involve a consideration of competing evidence as to an alleged event or events that may put a person at risk. The courts currently have powers to punish the giving of false evidence<sup>30</sup> in these cases.

68. However, it is not always necessary for the court to make a finding as to whether an alleged event occurred. Rather, the primary role of the Court is to assess the risk to the child. The High Court has held in M v M (1988) 166 CLR 69 [at 77] that:

*...There will be very many cases, such as the present case, in which the Court cannot confidently make a finding that sexual abuse has taken place. And there are strong practical family reasons why the court should refrain from making a positive finding that sexual abuse has actually taken place unless it is impelled by the particular circumstances of the case to do so.*

*In resolving the wider issue the court must determine whether on the evidence there is a risk of sexual abuse occurring ...and assess the magnitude of that risk.*

69. Often, the court is not required to decide about whether a centrally disputed event occurred or occurred in the precise manner alleged. Rather, the court makes an assessment, on all the evidence, as to whether a child would be exposed to an unacceptable risk of harm<sup>31</sup>. The court makes this assessment on the *Briginshaw* standard<sup>32</sup>. The *Briginshaw* standard means a determination is made on the balance of probabilities, but on a sliding scale – the more serious the allegation and potential consequence, the more robust and stringent the court in considering whether the evidence has passed muster.

---

<sup>30</sup> *Family Law Act 1975*, section 117 (The Explanatory memorandum of *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* provides that “s 117 ...will allow family courts to make costs orders in response to false statements in appropriate cases”.

<sup>31</sup> The “unacceptable risk” test is applied by the Court “to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access” M v M (1988) 166 CLR 69 at [78].

<sup>32</sup> *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336.

70. This means that it is uncommon for a court to need to make a determination about whether a witness has been truthful or not in respect of a disputed event (and thus there is no penalty imposed).
71. This reluctance to make findings arguably can have repercussions for women and children's safety, as clear findings may inform safer decision making and assist a safety focussed approach in relation to future interactions with service providers, police and other agencies.
72. Nevertheless, there are significant repercussions to pursuing allegations that are not substantiated. If a parent raises allegations of sexual abuse or domestic violence and those allegations are not validated, the court may take the step of reversing the residence arrangements for a child.
73. For example, in *Massey & Wilenski* [2019] FamCA 657 the mother alleged the father presented an unacceptable risk of harm to the child. The court found there was no evidence of sexual abuse by the father and that the father did not present an unacceptable risk of harm to the child. The Court also found that the mother would have been unable to facilitate a meaningful relationship between the father and that the child would have been at risk of ongoing psychological harm if the child continued to reside with the mother. The Court therefore ordered that the father have sole parental responsibility and that the child live with the father, and that the mother spend no time with the child for a period.
74. This risk makes mothers tremendously cautious about raising or pursuing the investigation of concerns around sexual abuse in particular and this has safety implications for children.

## **Child Sexual Abuse**

75. The current approach to child sexual abuse allegations in the family law courts in our experience is deeply concerning, and places children at risk. Concerns about the approach have increased since the shared parenting reforms in 2006 that emphasise through the legislation the ideals of shared and cooperative parenting.
76. The nature of this abuse means there is often little or no evidence and where mothers raise disclosures she is often viewed suspiciously. In our view, a more cautious approach that emphasises safety must be prioritised. 30% to 60% of children living in homes with domestic violence are also victims of abuse<sup>33</sup>. That is, the children are victims of not only domestic violence exposure but can also be direct victims of violence/abuse directed towards them.
77. It is often difficult to obtain proof of sexual abuse as children do not always disclose in either Police or child safety interviews or are unable to (do not have the vocabulary, are pre verbal or frightened of consequences).
78. Mothers can be placed in an unenviable Catch 22, having to make the decision between for example, consenting to orders before trial for the children to see the father for shorter periods of time e.g. Every second weekend rather than risk a longer period at trial, or residence being reversed.
79. Child Safety can be reluctant to investigate any claims of child abuse if the Family Court is involved and or they assess there is a protective parent. The Police may also be more reluctant to respond. The Family Court itself is not able to appropriately investigate the allegations as they do not have an investigatory arm and must rely on the State agencies, either the Police or Child Safety to carry out the investigation.
80. This investigatory gap has been known about for decades. Unfortunately, it can leave very vulnerable children exposed to ongoing violence and abuse. Separation does not

---

<sup>33</sup> Edleson, JL. "The Overlap between Child Maltreatment and Women Battering." Violence against Women, February 1999, 5:134-54.

stop violence and abuse. It can be a time of increased danger and risk and can be an opportune time for violence/abuse to be directed at the children who are often having unsupervised contact with the perpetrator.

81. We note this issue was raised and a recommendation made in the 2010 ALRC/NSWLRC Family Violence – A National Legal Response Final Report<sup>34</sup>:

*...the Commissions are also concerned that the problems outlined above [the investigatory gap] have been identified for many years, that recommendations to deal with them have been made in numerous ways and that, in some locations at least, no solution has been found. The Commissions note the strength of support from stakeholders that this issue be dealt with effectively. In the interests of the children concerned, these problems should not be allowed to persist.*

*The Commissions are of the view that investigatory services in Family Court cases should be provided by state child protection agencies. Further, there is strength in the proposal of the National Abuse Free Contact Campaign and the National Council of Single Mothers and their Children that there should be a specialist section in state child protection agencies to undertake this work [investigations]. This arrangement would have several advantages including:*

- Drawing on existing child protection expertise;*
- Providing a dedicated service responsive to the particular needs of Family Courts;*
- Developing expertise within child protection agencies in the needs of Family Courts; providing a resource of people familiar with both systems who can 'translate' between the systems and educate participants in both systems; and*

---

<sup>34</sup> ALRC/NSWLRC, Family Violence: A National Legal Response, 2010, paragraphs 19,95-96, Recommendation 19.1.

- *Providing a service that is not in competition with resources that need to be devoted to state child protection matters.*

82. WLSQ supports implementation of this approach or the urgent establishment of an expert committee to consider the issue and make recommendations for change.

## Enforcement – parenting orders

83. Enforcement of parenting orders cannot be considered in isolation from the high levels of domestic violence in the family law courts and the broader issues facing families with complex needs.

84. The ALRC noted<sup>35</sup>

*Entrenched conflict is characteristic of contravention matters, revealing that few applications for enforcement represent one-off disputes, but tend to be part of an ongoing conflict involving multiple proceedings. In addition, contravention applications often reflect a range of relationship issues, such as unresolved feelings about the breakdown of the marriage, grievances about child support payments or other financial matters, and anxieties about stepparents, rather than simply being a dispute over compliance with parenting orders.'*

85. We would add a major driver of contravention applications is their use by perpetrators of domestic violence who are attracted to the punitive nature, using them as a vehicle to 'punish' their ex-partner. Research by Helen Rhoades, Reg Graycar and Margaret Harrison when considering the impact of the Family Law Reform Act 1995 found there was a more than doubling of contravention applications in wake of the reforms at that time and "*their research findings suggest that many such applications (contravention) are without merit and that many are pursued as a way of harassing or challenging the resident parent, rather than representing a genuine grievance about missed contact*"

<sup>36</sup>.

---

<sup>35</sup> Australian Law Reform Commission 'Family Law for the Future: An Inquiry into the Family Law System', 2019, at 11.5 pp346, citing the findings of Rae Kaspiew et al, *Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015), 41.

<sup>36</sup> Australian Family Lawyer 2001.

86. The ALRC has recommended that *'any approach to compliance must include, in the first instance, preventative measures'*<sup>37</sup>. Those recommendations dovetail with other recommendations around case management and strengthening court powers to minimise harm caused by inappropriate use of court processes.
87. Further, in our experience, most mothers who have experienced domestic violence strive to comply with their parenting orders. In almost every case where a mother does not comply with a parenting order, it is because she has genuine concerns for the health or safety of the children. Sometimes, new issues have arisen since the order is made, but more often than not, issues with compliance occur because there was pre-existing domestic or family violence but it was not adequately addressed at the time the orders were made, and the violence has continued or increased.
88. The important question then is — why are these parenting orders being made without the violence being adequately addressed?
89. The answer perhaps is because most parenting orders are made without any determination being made by the court<sup>38</sup>. They are made 'by consent' either after litigation has commenced (but before it is determined by the court) or before litigation is commenced and arguably without the order fully reflecting the dynamics of domestic violence.
90. Our clients routinely agree to orders 'by consent' to put an end to abuse and the court process, even when they have concerns about risks to the children. Clients report that the court process exacerbates or enables the other party's abuse to continue. Women are therefore either not engaging in the court process or agreeing to settle on parenting orders to end the court process early because:

---

<sup>37</sup> Australian Law Reform Commission *'Family Law for the Future: An Inquiry into the Family Law System'*, 2019, Chapter 11 'Compliance with Children's Orders'.

<sup>38</sup> Australian Institute of Family Studies, *'Parenting arrangements after separation'*, *Evidence Summary, October 2019* notes that most parenting orders are made by consent and that only a minority are made following a court determination.



- (a) of ongoing and sustained abuse from the other parent towards herself or the children (and the orders are an attempt to appease the other parent and stop the abuse);
- (b) she does not have the financial resources to obtain legal assistance to pursue the matter through the court system;
- (c) she been denied Legal Aid despite domestic violence in family law being a priority area for government funding;
- (d) without legal assistance, she is exhausted from the duration and frequency of the court proceedings and complexity of what is required as a self-represented non-legally trained person;
- (e) she is already in financial difficulty following the separation and cannot take more time off work to attend court events (which will typically require a full day at the court on each occasion);
- (f) she does not have childcare so has difficulty attending court events (which typically require a litigant to be present at the court precinct from 8.30am until after 5pm in addition to travel times);
- (g) for culturally and linguistically diverse women, she simply does not have sufficient knowledge or capability in English to pursue the matter through the court system; and
- (h) she does not have the emotional resources to pursue the matter through the court system (she instead chooses to allocate her available energy to the care of the children).

91. This is not to say that all matters require judicial determination. However, the families most in need of judicial assistance<sup>39</sup> are also the families that face the most significant barriers to obtaining that determination. There have already been numerous reports about how to address those barriers.
92. In our submission, families with complex needs would be better prioritised to obtain parenting orders that address concerns about family and domestic violence, and thus improve compliance if there were greater investment in a specialist domestic violence FDR approach, better triaging and barriers to judicial determination were reduced.
93. Interestingly, we also note that mothers regularly report difficulties with fathers failing to care for their children as ordered. Often, fathers do not show up, collect children late, return them early, or only care for children for a small portion of the week or school holidays. Mothers report having to then leave or reduce their paid work or organise other paid care for the children – in each instance, causing upheaval for the children and financial disadvantage for the mother. Whilst the court possesses powers to address this non-compliance, in our experience, mothers are frustrated but do not pursue enforcement action because there is little practical use in doing so. It may be unsafe to do so and may re-open opportunities for the father to pursue other vexatious litigation against them.

---

<sup>39</sup> Australian Institute of Family Studies, *'Parenting arrangements after separation', Evidence Summary, October 2019* records that *'Among the 3% of parents who went to court for parenting arrangements, most reported in the Survey of Separated Parents that they experienced family violence (physical violence 54%, emotional abuse 85%). Nearly 50% reported concerns for safety (their own, their children's or both. Other problems reported by parents who used the courts included mental health issues (59%) and substance misuse (42%).'*

## **Enforcement – property and financial orders**

94. The Court has several existing powers to enforce the terms of property and financial orders<sup>40</sup>. At the extreme, the court has powers to order find a litigant in contempt and sentence them to a term of imprisonment (see for example the term of imprisonment ordered in the case of *Parrish & Gallejo (No.2)* [2018] FCCA 2851 as a result of a party's failure to comply with a property order).

95. However, it is common for litigants to have trouble enforcing orders because they have not been drafted in a way that makes them easily capable of enforcement. Often, orders are made by parties (by consent) without the assistance of lawyers. A large proportion of litigants do not have legal assistance in preparing property or financial orders because they do not qualify for Legal Aid but cannot afford private legal representation. Commonly, orders prepared by laypersons are not clear or do not create an enforceable legal obligation. If the orders are not clear or do not create an enforceable legal obligation they cannot be enforced.

---

<sup>40</sup> Parts XIII, XIII A and XIII B of the *Family Law Act (Cth)* 1975.

## C. Reforms needed to the family law and structure of the courts

96. Beyond the proposed merger, there is immediate need for four fundamental reforms:

- (a) Increased resources – more judges, registrars, counsellors etcetera
- (b) Increased resources - more funding to Legal Aid and community legal centres
- (c) Increased specialisation
- (d) Intensive triaging

### Resources - Judges

97. The need for increased resources can be most amply demonstrated by a window into the Federal Circuit Court (where most cases are allocated).

98. Judges in the Federal Circuit Court are typically allocated case lists in excess of 30 matters each day. In comparison, Supreme Court judges are routinely allocated lists between 1 - 4 matters. The volume of cases demanding consideration by a judge in the Federal Circuit Court model has been described by as "*extraordinary*"<sup>41</sup> and "*crushing*"<sup>42</sup>.

99. Under the pressure of enormous daily caseloads and 'disposal' performance markers, Judges are unable to provide families with adequate court hearing time. It is common for Judges at the first return date of a case, to give comments from the

---

<sup>41</sup> Justice Murphy, *Matenson & Matenson* [2018] FamCAFC 133 (20 July 2018) at [72].

<sup>42</sup> Arthur Moses, The Australian, 10 August 2018 "*Family, Circuit courts caseloads are too disparate for unification*".

bench regarding the merits of a case or argument without the benefit of reviewing the written materials or a hearing<sup>43</sup>, and then to instruct families to 'go outside and work it out'. We have received regular reports from our clients that at their court hearings they have been told by the Judge that they "do not have time to hear the matter today and there are no hearing dates for X months" and further that they "go outside and work it out". This is not intended to be a criticism of the hardworking Judges in the court, but merely a reflection of the reality of the resources and enormous pressures faced each day.

100. It is also not uncommon for the court to refuse to hear or determine interim applications on the first court event. It is customary to then see 50 or more people standing in the foyer areas outside of the court rooms in the mornings after these preliminary mentions before a judge, attempting to 'work it out'. Those with legal representation can and do enter into useful discussions regarding matters which can lead to resolutions or advance the matter. However, there is the concerning silent mass of families with substantial power imbalances, family violence and self-represented litigants<sup>44</sup> that are then left to flounder in the halls of the court, deliberating complex family issues with the overture of the power dynamics that often contributed to the family breakdown. This common spectre has led to the model being crudely cited behind closed doors as the 'Federal Circus Court'<sup>45</sup>.

101. Whilst rigorous case management is applauded, the unintended consequences of this model are concerning. It frequently allows perpetrators of family violence to use the court-foyer to exercise control and dominance over the victim, it provides an avenue for those with power to wield it against the other and extract settlements in their favour, it enables the party who would gain from a delay

---

<sup>43</sup> In recent evidence to a Senate committee, the Council of Single Mothers and their Children said *"many of the most disconcerting stories we hear occur in the Federal Circuit Courts where issues of family violence are disregarded in comments from the Bench"*.

<sup>44</sup> Federal Circuit Court Annual Report 16/17, 'Dispute resolution', p 74 *"The Federal Circuit Court's jurisdiction and less formal legislative mandate is such that a significant number of parties present as self-represented litigants."*

<sup>45</sup> *'Hey, it's Christmas'*, 24 December 2014, The Justinian, reporting on the appointment of Judge Vasta.

to draw out the proceeding to ensure the matter is adjourned to another day, and it perpetuates settlements-by-fatigue. These consequences have profound and long-lasting effects on children and people's lives and mental health.

102. Alternatively, if the case does get heard, the time pressures often result in errors by the court. The impact of such volumes on the administration of justice were aptly described by the Full Court of the Family Court in *Matenson & Matenson* [2018] FamCAFC 133:

*72. I have already made comment on the extraordinary size of the lists before judges of the Federal Circuit Court. It is by no means uncommon for in excess of 30 matters to be listed. By reason of simple arithmetic the average time that can be allotted to each matter as a consequence surely gives pause for thought as to whether proper process can be invoked and the requirement for individual justice met where interim decisions affecting children's lives are involved.*

*73. While simple directions, consent orders and the like can of course be accommodated within lists of that size, I am unable to see how applications for interim relief – albeit “truncated” in their length and detail – properly can be.*

*74. Increasingly, appeals from interim parenting proceedings reflect the inordinate pressure which the judges making decisions of that type are under. The pressure for hardworking judges seeking sincerely to do the best they can in difficult circumstances is crushing. It is creating appeals that would otherwise not occur. Many of those appeals are based, validly, on assertions of procedural unfairness and assertions that issues raised by parties – including important issues – are not engaged with and reasons for decisions affecting children's lives are not being given.*

*75. There is a plain need for expedition in interim decision making and a plain need for sufficient human and other resources to meet that need. However, the need to maximise the number of cases heard and the speed at which they are heard should never take the place of proper process – even if, as insufficient resources dictate, that process is “significantly curtailed”, and even if, as might reasonably be expected, reasons for decision – particularly ex tempore reasons – lack the elegance or expansiveness that added time might afford them.*

103. A system gauged only by reference to the speed and cost of dispositions, without reference to justice being done, cannot by any measure be described as a 'justice system'.
104. Justice demands a fair and proper adjudication — this entails procedural fairness, engagement with the issues in the case, consideration of relevant evidence and disregarding of irrelevant evidence, a proper application of the law to the facts, a diligent consideration to reach a decision, and reasons to explain the decision.
105. Justice requires that there be an adequate number of Judges with adequate time available to assist families in crisis, and that those families have the benefit of legal advocacy to protect and guide them.
106. Absent these elements, which lead to a fair and proper adjudication, the court system does an injustice to families and the community.
107. Obviously, there is also a need for ancillary professionals and staff to assist and support judicial decision-making. E.g. Counsellors, registrars, administration staff etcetera. If you seek an innovative court then there needs to be requisite funding to allow for the time and research to support such an exercise. A system in crisis has not time for reflective practice.

#### **Resources – Legal Aid for s.102NA**

108. In addition to the general need for increased community legal centre and legal aid funding, there is now an immediate pressing demand for funding in response to s.102NA so that trials can proceed.
109. Section 102NA of the *Family Law Act* 1975 came into operation on 11 September 2019. It was introduced to protect victims of domestic violence from being personally cross-examined by the perpetrator in all family law cases. It provides that:

(1) If...

(a) .....

(b) There is an allegation of family violence between the examining party and the witness party; and

(c) Any of the following are satisfied:

(i) Either party has been convicted of, or is charged with, an offence involving violence, or a threat of violence, to the other party;

(ii) A family violence order (other than an interim order) applies to both parties;

(iii) An injunction under section 68B or 114 for the personal protection of either party is directed against the other party;

(iv) The court makes an order that the requirements of subsection (2) are to apply to the cross-examination;

Then ....

(2) ....

(a) The examining party must not cross-examine the witness party personally;

(b) The cross-examination must be conducted by a legal practitioner acting on behalf of the examining party.

110. It is a fundamental legal right for a litigant to be able to test the evidence brought in the case. It is also the sole way that disputed factual evidence can be determined by the trial judge. During consultations in relation to the then proposed s.102NA, the government was informed by stakeholders that such a fundamental right could not be expunged without providing compensatory measures to enable litigants to have lawyers to conduct the cross examination on their behalf.

111. At the time the provisions were introduced, the government agreed to provide funding to Legal Aid Commissions to enable litigants with s.102NA cases (that would otherwise not be entitled to legal aid) to obtain a lawyer. Given that a fundamental



legal right had been removed, the funding for s.102NA grants was not subject to the usual means test. The government made a single fixed grant made to Legal Aid Commissions to contribute to the costs. There was no commitment to further or renewed funding.

112. At some time in late 2019, merely a few months after the section came into operation; the funds provided to meet the increased demand created by s.102NA were exhausted. We understand from feedback from our clients and from the statements made by the bench, that there are simply no more funds available to assist litigants pursuant to s.102NA.

113. At this point in time, family law cases with domestic violence allegations (the vast majority that proceed to trial) cannot proceed to trial because the parties are unable to obtain legal aid funding under s.102NA, and the Judge cannot permit the trial to proceed where the parties are denied the fundamental opportunity to test the evidence by way of cross examination. To do otherwise would be procedurally unfair and render the outcome invalid on appeal.

114. Section 102NA provides an important safeguard to victims of family and domestic violence, however it cannot operate without adequate funding being allocated to Legal Aid Commissions to meet the needs of the litigants. Given that family violence is the most factually raised issue in family law proceedings<sup>46</sup>, it is critical for this funding obstacle to be resolved. If funding is not provided, multitudes of the most vulnerable of all families will not be able to have their matter resolved by the court – they will be held in limbo.

## **Specialisation**

115. WLSQ supports the recommendation<sup>47</sup> made by the ALRC that:

---

<sup>46</sup> Rae Kaspiew et al, *Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 49.

<sup>47</sup> Recommendation 51.

*“statutes should be amended to require that future appointments of all federal judicial officers exercising family law jurisdiction **include consideration of the person’s knowledge, experience, skills, and aptitude relevant to hearing family law cases, including cases involving family violence.**”*

116. The ALRC notes the importance of specialization (at 13.43):

*Appropriate judicial appointments are critical to maintaining public confidence in the family law system and providing optimal outcomes and in-court experiences for litigants. Regardless of the court in which a family law matter is conducted, all family law litigants should have the same level of assurance regarding key attributes of the judicial officer. This Recommendation seeks to strengthen and harmonise federal legislative provisions regarding judicial appointments. If state and territory courts are to play a greater role in exercising federal family law jurisdiction in line with Recommendation 1, the same principles should apply to relevant state and territory judicial officers.*

117. Whilst training is an important aspect, the critical issue getting the right judicial appointment. The Judge must have existing (strong) competencies in family law. Whilst further training for judges is available and important, there are obstacles to them undertaking that training because they cannot be compelled to attend, and their high case workloads make it difficult for them to have the time available to participate. The ALRC said, *“Recognising this, the SPLA Family Violence Report suggested that the criteria for judicial appointments are critical.”*<sup>48</sup> *The ALRC agrees.”*<sup>49</sup>

118. The ALRC report sets out detailed proposals in relation to how improvements could be made to the judicial selection process (13.56 – 13.61). WLSQ supports those proposals.

---

<sup>48</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia above n 62, 285. 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* (2017).

<sup>49</sup> Australian Law Reform Commission *‘Family Law for the Future: An Inquiry into the Family Law System’*, 2019, at 13.46.

## D. Financial impacts

119. Whilst significant criticism is made of private legal professionals and legal costs, it is evident that:

- a. Lawyers undertake a vital role in resolving matters so as to reduce the pressures on the court system<sup>50</sup> In the latest ALRC report this was evidenced by the fact that unrepresented litigants were more likely to take matters to trial. It was found that the proportion of unrepresented litigants in the family law courts increased sharply when matter that proceeded to trial were isolated from the proportion of unrepresented litigants in all matters.<sup>51</sup>
- b. Delays (due to limited resources of the courts) increase the breadth and depth of disputes, create entrenched positions, and result in higher legal costs
- c. The court has powers to penalise lawyers (for example via costs orders made against the lawyers personally - see Cassidy v Murray [1995] FamCA 91) and Kaufman & Sandor [2018] FCCA 2701

---

<sup>50</sup> Parenting Arrangements after Separation, AIFS, October 2019.

<sup>51</sup> ALRC report paragraph 3.3.

## **E. Effectiveness of dispute resolution services**

120. For good reason, most FDR service providers decline to provide mediation/dispute resolution to families where there is domestic violence or other complex issues. The issue is not usually the immediate physical safety of the person, but because the service provider is, properly, concerned that there will not be an even playing field, the perpetrator will use their power to intimidate and the victim will yield to that power and be unable to make safe, clear, free and appropriate decisions.

121. We are regularly told by our clients that they do “not want to go to court” but that they do not know what else to do because the FDR provider has declined to continue the process. They tell us that they had an initial intake session with an FDR provider and disclosed the domestic violence that has been occurring, and the service provider has then informed them that the matter is not suitable for FDR/mediation and an s.60I certificate issued to the parties. There is no other alternative dispute resolution process or back up remedy. If the person is unable to afford a lawyer, this leaves them with two equally unenviable options – apply to court or be left to speak, engage and negotiate directly with the DV perpetrator.

122. A domestic violence specific model of dispute resolution needs to be developed and funded. In 2011, WLSQ developed the Coordinated Family Dispute Resolution model that was piloted in 5 sites around Australia. This provided each party with specialised support and lawyers. The pilot was evaluated by AIFS but unfortunately, it did not receive ongoing funding. The need remains for a specialist FDR response that prioritises safety.

123. Going to court takes enormous resources for an individual. At a time of crisis with personal, financial, emotional stresses, it is often the very last burden a person wants to take on. Families are acutely aware of how long the process could take. It is daunting for them. Particularly when they will need to go through the process alone and advocate for themselves in court and against the DV perpetrator because they

cannot afford private representation and are not eligible for a legally aided lawyer. More concerning, engaging in further court proceedings will often increase the violence to victims and expose them to further harm.

124. Engaging directly with the DV perpetrator leaves the victim and children susceptible to chronic abuse, manipulation and the continuation of control.

125. FDR and mediation can often occur safely if parties are legally represented and assisted before, during and after the process, however families of low to middle income are not able to meet that cost. Legal Aid funded mediations are particularly useful in these situations because legal assistance is provided as part of the mediation, however it is only available to a very small number of the families requiring the service due to limited resources.

126. We are not suggesting in any way that FDR service providers should provide mediation to families where the dynamics of domestic violence will make it inappropriate. However, there is a gap – families with limited financial resources with domestic violence dynamics are currently not able to engage FDR services to resolve parenting arrangements. That is why we advocate for the investment in a domestic violence informed model of family dispute resolution, that prioritises safety and provides a safe alternative option for some families, rather than the use of litigation.

## **F. Impact on health and wellbeing**

127. At the time when families approach the court, they are in crisis. The breakdown of the family unit results in emotional distress for adults and children. It creates or compounds pre-existing financial stressors of having to stretch family income across more than one household, it results in enormous upheaval around family routines involving home life, schools and friends, it may involve the addition of new people into the family structure, it often requires changes in employment arrangements. Layered on this for the women that we assist is physical, sexual, financial, and psychological violence. It is perhaps the greatest crisis a family will ever endure.

128. In addition, at this time of greatest need, they seek help. They enter the Federal Circuit Court or Family Court. They enter hoping for crisis management at a time when they lack the resources to self-help. They hope for an advocate to stand with them when they cannot speak for themselves. They hope for a wise and kind solution-finder who can take the time to listen to their story and help when they have been unable to find the solution themselves. They seek refuge from the crisis that has engulfed them.

129. The reality they find in the Court is a brutally stark contrast to their hopes. Despite the best efforts of the diligent, dedicated and hardworking judges and staff and the pro bono lawyers and CLC's, they find themselves alone without guidance or an advocate, faced with a sombre court building and daunting court process that resembled the style and tone of the Supreme Court, with rules, forms and documents that have been created by lawyers in lawyers language for lawyers use (but no lawyer to help them), and caught in an entire system which was designed at a time when provision was made in legislation to regulate conjugal rights but without any mention of domestic violence let alone an informed research-based process designed to triage, manage and therapeutically-resolve critical social situations.





130. Families without legal representation are required to first determine how the system works, then self-guide through it, and self-advocate.

131. A litigant or may obtain legal aid for a period, only to suddenly lose the funding at a critical point in the case<sup>52</sup>.
132. The easily foreseeable consequences of such a system are that the person will feel vulnerable, become increasingly distressed, have reduced capacity for clear and rational decision-making, and limited ability to self-advocate.
133. With enormous pressures on the courts and limited judges and judicial time, cases are not heard (even at an interim level) promptly. Rather, it is typical for families to wait 2 – 3 months for a first mention date from the time of filing (where the general outline of the matter is discussed and directions given) and then a further 2 – 3 months for an interim hearing.
134. Rather than a therapeutically centred and quick resolution, the violence can continue, exacerbated by the stresses of the court process.
135. Women report the court process increases their exposure to family violence. This is because it provides opportunities for ongoing contact between the parties and may be the only way the perpetrator can legally be near their ex-partner.
136. Meanwhile, the children's ongoing exposure to violence continues which increases the likelihood of major detrimental impacts into their adulthood.
137. The situation is even more dire for culturally and linguistically diverse persons, those with disabilities, women in refuge, and families with complex needs.
138. The ongoing litigation and constant stress of exposure to violence can have a severe impact on our client's mental health. Some women give in and return to their violent partner because it is too difficult to keep fighting him through the legal process.

---

<sup>52</sup> For example, *Darzi & Alinejad* [2018] FCCA 2962.

139. Others just endure the ongoing barrage of litigation. The use of litigation and system's abuse is now recognised as a coercive and controlling tactic used by perpetrators of violence. In the National Family and Domestic Violence Judicial Handbook<sup>53</sup> it is fully described below:

*Perpetrators of domestic and family violence who seek to control the victim before, during or after separation may make multiple applications and complaints in multiple systems (for example, the courts, Child Support Agency, Centrelink ) in relation to a protection order, breach, parenting , divorce, property, child and welfare support and other matters with the intention of interrupting, deferring, prolonging or dismissing judicial and administrative processes, which may result in depleting the victim's financial resources and emotional wellbeing, and adversely impacting the victim's capacity to maintain employment or to care for children . In the court system, this tactic is known as 'burning off', and is prevalent where, on the one hand, a victim lacks the financial resources to engage legal representation (and is therefore forced to self-represent), and on the other hand, the perpetrator is either financially well-resourced or prepared to incur significant debt (and is therefore able to engage solicitors and counsel, and fund multiple actions over extended periods ). Where the perpetrator is aware that the victim may be in a financial position to engage legal representation, the perpetrator may use a different tactic known as 'conflicting out', which involves seeking preliminary advice from multiple lawyers (this is a particular concern in regional, rural and remote communities) so as to deny the victim access to legal representation on the basis of conflict of interest.*

140. The system is not streamlined either. A litigant in an 'average' matter could expect to attend court or a court ordered event on 4 – 8 occasions each year until resolution by agreement or trial. This can occur for up to 3 years if trial is necessary. It involves ongoing stress, exposure to violence, heightened tension and emotions, causing a significant emotional drain as well as financial disadvantage with time off work, babysitting/childcare costs, and commuting.
141. It is akin to a gravely injured patient (scared and in pain) turning up to a hospital and being told that the system is really designed for the doctors to help them, but there are no doctors available, but there is a medical text book in the hall and they

---

<sup>53</sup> <https://dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/systems-abuse/>.



could do it themselves. If they have the time and can read English to a high level, and have some basic Latin, and a solid understanding of medical terminology, anatomy, physiology and chemistry, they might be able to work out which type of surgery they need, arrange and perform the pre-surgical diagnostic tests that need to be done, and if all goes well, they can get on the table and a surgeon may be available to conduct the surgery in 12 – 24 months' time.

142. Victims of domestic violence and their children deserve better.

## G. Monitoring of professionals

143. The ALRC has recently undertaken thorough and extensive consideration and analysis of the various proposals in relation to further monitoring professionals in family law. WLSQ commends that section of the report (405-421) to this Committee.

144. The ALRC has made three significant recommendations:

- d. That family lawyers complete at least one unit of CPD relating to family violence each year (as a part of their existing annual CPD regime);<sup>54</sup>
- e. That private family report writers should be subject to a mandatory national accreditation scheme;<sup>55</sup>
- f. That children's contact services should be accredited<sup>56</sup>.

145. WLSQ supports these recommendations.

---

<sup>54</sup> Recommendation 52.

<sup>55</sup> Recommendation 53.

<sup>56</sup> Recommendation 54.

## H. Interaction between family law and child support systems

146. In our experience women's decisions and desires around parenting arrangements have little to do with child support.

147. The primary concern raised by women when seeking advice on parenting matters is domestic violence, dangerous and risky behaviours by the other parent, and how to protect the children from these things. We struggle to think of ever having had a client that couched proposals for the children in the context of the consequent child support.

148. Child support is simply not a primary focus for most women. Our lawyers and social workers raise the subject from time to time, however the feedback that we commonly receive from clients is either that:

(a) They have not applied because they *"don't care about the money"* or *"don't want any money from him"*.

(b) There is *"no point"* because *"it's only \$5"* [a reference to the minimum amount payable by a payee if they are on benefits]

(c) They don't want to apply because *"they don't want to make things worse"* [the DV]. These women have commonly already sought and obtained a Centrelink exemption so that they will not be penalised in their other benefits for not pursuing Child support.

149. In our experience, mothers make parenting decisions based on what will keep the children safe and reduce the risk of harm. Mothers often prioritise their children's own safety over their own. For example even when there has been a history of very significant or extreme domestic violence by a father towards the mother and to which the children were exposed harmed – the mother will often say to us words to the effect of 'But he is a good father. I don't want to keep the kids from him' and will then

prefer an arrangement where the children spend time with the father under her supervision (to keep the children safe) but which exposes her to ongoing risk. This is a very common. Child support does not factor into these considerations.

150. It is difficult to reconcile the theory advanced by other stakeholders that the lure of child support is the significant determinant in parenting outcomes. Given that in our experience, the vast majority of mothers that are the victims of domestic violence do not apply for child support and immediately seek an exemption from Centrelink (to not be penalised) for failing to apply for an assessment. That is, they would rather not have child support than risk exposing themselves to further violence from their former partner.

151. Many of the women we assist are impoverished, have left with nothing and/or have no employment or have incredibly insecure employment. They can be victims of financial abuse where the perpetrator has laden them with debt in their name and no assets. Many are homeless or at risk of homelessness. They rely on child support to survive but often this is withdrawn, not paid or paid intermittently. It is an unreliable source of income that impacts on their ability to put food on the table, get their children to school, obtain a small loan or pay rent. Perpetrators can continue their financial abuse of the family by withholding child support or not paying it at all or at least on time. The issue of women, domestic violence and poverty is described more fully below:

*On an individual level, domestic violence creates complex economic issues for women and their children and disrupts their lives over the short and long term. Regardless of their prior economic circumstances, many women experience financial risk or poverty as a result of domestic violence. These difficulties hamper their recovery and capacity to regain control over their lives. Domestic violence directly affects women's financial security in key areas of life: debts, bills and banking, accommodation, legal issues, health, transport, migration, employment, social security and child support. Women affected by domestic violence are also more likely to have a disrupted work*

*history and are more likely to occupy casual and part-time work than women with no experience of violence<sup>57</sup>.*

152. Children and women could be provided more certainty if at least the child support payments could be paid regularly and on time. As a child poverty alleviation strategy, we recommend a change to the current approach of Child Support in Australia. That is, we recommend it becomes the responsibility of the Government to pay the assessed amount of child support to the mother, the child support becomes a debt owed to Government and the Government pursues any unpaid amounts against the payer parent. This provides ongoing, secure payments to the mother and children.

153. We also recommend that the best interests of the child become the paramount consideration in child support legislation and in determining disputes under the child support legislation.

---

<sup>57</sup>[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2011-2012/DVAustralia#\\_Toc309798394](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/DVAustralia#_Toc309798394).

## **I. Pre-nuptial agreements (BFA's)**

154. The ALRC did not make specific recommendations in relation to BFA's save for a suggestion that clarifying the property law provisions would assist families to have a better understanding of their potential property entitlement, and thus be better able to make an informed decision as to whether they should enter into the proposed BFA.

155. Whilst this is an important consideration, the main issue is not that women do not understand what they could be entitled to outside of the proposed BFA, but that due to domestic violence and power differentials, they are not in a position to decline to enter into the BFA or provide informed and bona fide consent.

156. WLSQ supports specific provisions being introduced that that specifically allow for Binding Financial Agreement to be set aside in circumstances of family violence as these do not currently exist in the setting aside provisions (which are very limited at the moment in their scope and nature). In our experience, BFAs can be used to exert financial control and abuse and some specific protection should be inserted to protect vulnerable victims of violence in these circumstances.