

Submission to Senate Finance and Public
Administration References Committee

Domestic Violence Inquiry

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Contents

Introduction	1
Prevalence and impact of domestic violence	3
Aboriginal and Torres Strait Islander women	4
Women with disability	4
Women from culturally and linguistically diverse communities	4
LGBTIQ people	5
Mature age women	6
Adequacy of policy and community responses, the effects of policy decisions, and the role of the Federal Government	6
CEDAW	7
National Plan to Reduce Violence Against Women and their Children	7
Consultation and engagement	8
Independent monitoring and evaluation	8
Adequate resourcing	9
Implementation of ALRC Recommendations	9
Future reforms	10
Access to legal assistance	10
Family law and domestic violence	13
National prevention strategy for domestic violence homicides	15
Women on temporary visas experiencing domestic violence	15
Employment and domestic violence	16
Anti-discrimination law	16

Introduction

This submission is made jointly by the National Association of Community Legal Centres Inc (NACLC) and Women's Legal Services Australia (WLSA), to the Senate Finance and Public Administration References Committee in response to a call for submissions as part of the Committee's Inquiry into domestic violence in Australia.

NACLC is the peak national body of Australia's community legal centres. NACLC's members are the eight State and Territory Associations of Community Legal Centres. WLSA is a NACLC endorsed National Network of community legal centres (CLCs) specialising in women's legal issues. The member CLCs of WLSA provide advice, information, casework and legal education to women and women's service providers on a range of topics including family law, family violence, child protection, domestic violence personal protection orders, reproductive health rights and discrimination matters.

Community Legal Centres are a vital part of the legal assistance sector. CLCs are independently operating community-based organisations that provide free and accessible legal and related services to disadvantaged members of the community, and to people with special needs or who are for other reasons vulnerable and at risk. Many generalist and specialist CLCs provide advice and assistance to people experiencing family violence. For example, in 2012–13, for CLCs funded under the CLCs' major funding program, the Community Legal Services Program (CLSP), domestic violence was a factor in at least 31,861 matters.¹ In addition, Family Violence Prevention Legal Services (FVPLS) provide crucial legal assistance, casework, counselling and court support to Aboriginal and Torres Strait Islander adults and children who have or are experiencing family violence.

NACLC and WLSA welcome this opportunity to comment on the issues relating to domestic violence, which are the subject of this Inquiry. However, NACLC and WLSA note with concern the limited timeframe for submissions (one month) and for the Final Report (four months) and suggest that more time is required to enable all stakeholders the opportunity to contribute to this critical Inquiry.

The particular focus of this submission is on legal issues relating to family and domestic violence, and it aims to respond to those Terms of Reference in relation to which NACLC and WLSA have expertise. The first section briefly discusses the prevalence and impact of domestic violence and factors contributing to family violence. The focus of the submission is on the adequacy of policy and community responses, the effects of policy decisions, and the role of the Federal Government, considered in the second section of the submission.

NACLC and WLSA draw the Committee's attention to a number of previous national inquiries and reviews that have examined issues and made recommendations of relevance to this Inquiry, including for example:

- Australian Government Attorney-General's Department and R Chisholm, *Family Courts Violence Review* (2009)
- Family Law Council of Australia, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009)
- Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114 (2010)

¹ National Association of Community Legal Centres, *The Work and Clients of CLSP CLCs in Numbers* (February 2014). Note, these figures refer to CLCs funded under the CLSP, however not all CLCs are funded under the CLSP.

- Victorian Law Reform Commission, *Protection Applications in the Children's Court*, Final Report 19 (2010)
- Australian Institute of Family Studies, *Evaluation of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) Reforms* (2009);
- Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, ALRC Report 117 (2012), and
- Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (2014).

NACLC and WLSA would welcome the opportunity to provide the Committee with further information in relation to any of the issues raised in this submission.

Prevalence and impact of domestic violence

There is no single agreed definition of family or domestic violence, and a number of definitions have been recommended and incorporated into Commonwealth, state and territory legislation.² However, for the purposes of this submission, NACLC and WLSA use the term family and domestic violence interchangeably and consider that the term describes a pattern of controlling and coercive behaviour that includes violent, threatening or other behaviour to gain and then maintain power and control over the behaviour of an intimate partner or a person in a ‘domestic’ or ‘familial’ relationship with the abuser.

Numerous reports and submissions have highlighted the nature and extent of family violence in Australia. For example, *Time for Action* estimated that ‘[a]bout one in three Australian women experience physical violence and almost one in five women experience sexual violence over their lifetime’.³ Family violence is a gendered crime—87% of victims are female and 98% of offenders are male.⁴ However under-reporting and barriers to reporting family violence are significant.

CLCs focus on assisting the most disadvantaged and vulnerable members of the community. However, family and domestic violence affects women from all socio-demographic backgrounds. There are a number of groups of people who experience family violence disproportionately, or who experience specific issues relating to the intersection of family violence and other characteristics or vulnerabilities. Such groups include for example: Aboriginal and Torres Strait Islander women; women with disability; women from lesbian, gay, bisexual, trans, intersex and queer communities; and women from culturally and linguistically diverse communities;⁵ young women; mature age women; and women in prison. Many women also experience intersectional discrimination and have compounding vulnerabilities.

National Priority Two under the Second Action Plan of the *National Plan to Reduce Violence Against Women and their Children 2010–2022* (the National Plan) is ‘understanding diverse experiences of violence’, the focus of which is on furthering understanding of and improving responses to, the experiences of Aboriginal and Torres Strait Islander peoples women, women from CALD communities, and women with disability.⁶ The Second Action Plan and the *National Indigenous Law and Justice Framework 2009–2015* also include specific objectives and actions focused on reducing the incidence and impact of family violence on Aboriginal and Torres Strait Islander communities, improving access to information and resources, building community safety, and providing support.⁷ In line with these priorities and objectives, NACLC and WLSA encourage the Committee to consider the needs and perspectives of these groups, including through consultation with the relevant communities, and the need to ensure that policy and community responses are sensitive and appropriate.

² Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—a National Legal Response*, ALRC Report 114 (2010).

³ National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence Against Women and their Children, 2009–2021* (2009), 9.

⁴ Access Economics, *The Cost of Domestic Violence to the Australian Economy*, (2004).

⁵ See, eg, National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council’s Plan to Reduce Violence Against Women and their Children, 2009–2021* (2009), 18.

⁶ Second Action Plan of the National Plan to Reduce Violence Against Women and their Children, *Moving Ahead: 2013–2016*.

⁷ *National Indigenous Law and Justice Framework 2009–2015*; Second Action Plan of the National Plan to Reduce Violence Against Women and their Children, *Moving Ahead: 2013–2016*.

Aboriginal and Torres Strait Islander women

Aboriginal or Torres Strait Islander women report higher levels of physical violence during their lifetime than non-Aboriginal and Torres Strait Islander women. For example, the results of the National Aboriginal and Torres Strait Islander Social Survey indicate that approximately 25% of Aboriginal and Torres Strait Islander women had experienced one or more incidents of physical violence in the previous 12 months and that 94 % knew the perpetrator.⁸ Aboriginal and Torres Strait Islander women are also 31 times more likely to be hospitalised as a result of family violence-related assault than non-Aboriginal and Torres Strait Islander women.⁹

Family violence in Aboriginal and Torres Strait Islander communities must be understood in a historical, political, social, cultural and legal context and there is a need to recognise the intersectional discrimination and difficulty faced by Aboriginal Torres Strait Islander women experiencing family violence. The need for specific and culturally sensitive and appropriate services and issues relating to access to legal assistance for Aboriginal and Torres Strait Islander women are considered later in this submission.

However, the true extent of family violence experienced by Aboriginal and Torres Strait Islander women is unclear; in large part, as a result of under-reporting. Reasons for under-reporting specific to the experience of Aboriginal and Torres Strait Islander women include feelings of shame, lack of culturally sensitive or appropriate services, difficulty navigating the system, reluctance to engage with government services or authorities, and fear that accessing police or medical assistance may result in mandatory reporting to child protection authorities and the subsequent removal of children. In light of the expertise of FVPLS', NACLC and WLSA suggest that the Committee have particular regard to the submission from the National FVPLS with respect to these issues.

Women with disability

Women with disability are at a higher risk of being assaulted, and experience sexual assault at twice the rate of women who do not have disability.¹⁰ Women with disability are particularly vulnerable to family violence for a range of reasons, including for example dependence on others, isolation and marginalisation, communication barriers, lack of knowledge of rights, lack of appropriate and accessible services, and institutional living. Women with disability who experience domestic violence also face particular barriers accessing legal advice and assistance, including as a result of communication barriers, costs of representation, and misconceptions about people with disabilities.¹¹

Women from culturally and linguistically diverse communities

Women from culturally and linguistically diverse (CALD) communities, particularly newly arrived women, may have their experience of family violence compounded by lack of familial and social support networks and isolation, communication difficulties, limited access to services, and the consequences or fear of consequences for their migration status. These factors, combined with lack of knowledge about

⁸ Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey*, (2009), Cat. No. 4714.0.

⁹ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2011*, (2011). See also: Al-Yaman, Van Doeland and Wallis, *Family Violence Among Aboriginal and Torres Strait Islander Peoples* (2006), prepared for Australian Institute of Health and Welfare.

¹⁰ L Healey et al, *Building the Evidence: a Report on the Status of Policy in Responding to Violence against Women with Disabilities in Victoria* (2008).

¹¹ See, eg, Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (February 2014); Women with Disabilities Australia, *Submission to Australian Law Reform Commission Inquiry into Equal Recognition Before the Law and Legal Capacity for People with Disability*, January 2014; National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence Against Women and their Children, 2009–2021* (2009), 18.

Australian law and the legal system, may also make it difficult for CALD women to recognise or report family violence.¹²

Importantly, the actions under priority two of the Second Action Plan include working with CALD communities to ‘reduce violence and support women and their children, particularly those who can be most vulnerable’ and a number of important developments are highlighted. While there have been important amendments to the *Migration Regulations 1994* (Cth) to increase access to the ‘family violence exception’,¹³ ongoing reform is required, including amendments highlighted in the Second Action Plan and those recommended by the ALRC¹⁴ to address issues faced by CALD women who experience family violence.

LGBTIQ people

Research on the incidence and prevalence of family violence in lesbian, gay, bisexual, trans, intersex and queer (LGBTIQ) relationships is limited. While establishing prevalence is difficult, CLCs and other community and health organisations are increasingly providing services to clients experiencing family violence in these relationships, including lesbians, gay men and bisexual people in a same-sex relationships, as well as bisexual, trans and intersex people in either same-gender or opposite gender relationships.

As in heterosexual relationships, family violence in these relationships includes a pattern of controlling behaviour, which causes fear in the other partner and encompasses physical, emotional, sexual and financial abuse. The family violence experienced by LGBTIQ people may also involve actions such as the use of homophobia and fear of being ‘outed’ as a mechanism for abuse, or threatening to reveal a partner’s HIV status.¹⁵

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

One Size Does Not Fit All, the 2011 gap analysis of NSW domestic violence support services in relation to gay, lesbian, bisexual, transgender and intersex communities’ needs, highlighted the fact that people from these communities experience difficulty finding LGBTI appropriate support.¹⁶

¹² L Bartels, *Emerging Issues in Domestic/Family Violence Research* (2010) Research in Practise Report 10, prepared for Criminal Research Council; The National Council to Reduce Violence against Women and their Children, *The Cost of Violence Against Women and their Children* (2009).

¹³ See, eg, Australian Law Reform Commission, *Annual Report 2012–2013*, 6.

¹⁴ Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks* (2012), ALRC Report 117.

¹⁵ See, eg, L Bartels, *Emerging Issues in Domestic/Family Violence Research* (2010) Research in Practise Report 10, prepared for Criminal Research Council; Same-Sex Domestic Violence Interagency, *Another Closet: Domestic Violence in Same-Sex Relationships* (2009); C Chan, *Domestic Violence in Gay and Lesbian Relationships* (2005) prepared for Australian Domestic Family Violence Clearinghouse. See also: Australian Law Reform Commission, *Family Violence and Commonwealth Laws—the Lesbian, Gay, Bisexual, Trans and Intersex Community*, Information Sheet (2012).

¹⁶ ACON Lesbian and Gay Anti-Violence Project, *One Size Does Not Fit All: Gap Analysis of NSW Domestic Violence Support Services in Relation to Gay, Lesbian, Bisexual, Transgender and Intersex Communities’ Needs* (2011).

However, CLCs have attempted to respond to the needs of LGBTIQ people experiencing family violence through provision of legal assistance. For example, the Inner City Legal Centre (ICLC) in Sydney provides a wide range of legal advice, representation and education to LGBTIQ people and has established a Safe Relationships Project to meet the needs of LGBTIQ people seeking to escape family violence and provide a court assistance scheme for people seeking a domestic violence order. Given ICLC's unique, long standing experience and accumulated expertise from assisting LGBTI clients who have experienced family violence, NACLC and WLSA suggest that the Committee have particular regard to their submission with respect to these issues.

Mature age women

Research shows that between 2008 and 2009, 25% of women over the age of 45 years had experienced violence perpetrated by their current partner,¹⁷ and that women often experience violence over long periods.¹⁸ Mature age women tend to experience emotional and financial abuse at higher rates than their younger counterparts.¹⁹ Specific barriers to reporting family violence experienced by mature age women may include social isolation and alienation, lack of awareness about services, physical or cognitive disability, lack of awareness about what constitutes family violence, and reluctance to leave long-term relationships and family situations.²⁰ Increasingly, research also indicates a link between mature age women who experience family violence and homelessness.²¹

Adequacy of policy and community responses, the effects of policy decisions, and the role of the Federal Government

While many of the issues relating to the adequacy of policy and community responses occur at a state and territory level, the focus of this submission is on national policy, legislative and community responses.

There are a number of societal and individual factors which contribute to family violence. As a result, there is a need for a holistic approach and response to reducing and eliminating family violence. Some of the key challenges in reducing and eliminating family violence include system fragmentation and the need for an integrated and consistent approach; inadequate funding; gaps between legislative and policy intent and implementation in practice; and inadequate monitoring and reporting.²² It is also important to recognise that policy decisions in related areas such as housing, health and welfare, have flow on effects for family violence and the need for legal assistance.

These challenges and the initiatives designed to address such challenges occur within the context of a number of international and domestic policy responses including: the *UN Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW); the *National Plan to Reduce Violence Against Women and their Children* and Action Plans developed under the National Plan; and other national plans and strategies.

¹⁷ L McFerran, *The Disappearing Age Discussion Paper on a Strategy to Address Violence of Older Women* (2009), prepared for Australian Domestic and Family Violence Clearinghouse.

¹⁸ A Morgan and H Chadwick, *Key Issues with Domestic Violence* (2009) Research in Practise Summary Paper No 7.

¹⁹ See, eg, D Bagshaw, S Wendt and L Zannettino *Preventing the Financial Abuse of Older People by a Family Member: Designing and Evaluations Older-Person-Centred Models of Family Mediation* (2009).

²⁰ L McFerran, *The Disappearing Age Discussion Paper on a Strategy to Address Violence against Older Women*, (2009), prepared for Australian Domestic and Family Violence Clearinghouse.

²¹ See, eg L McFerran, *It Could Be You: Female, Single, Older and Homeless* (August 2010).

²² National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009).

CEDAW

Australia's compliance with its obligations under international law, particularly CEDAW, is vital in ensuring appropriate legislative, policy and community responses to family violence.

In July 2010, the Committee on the Elimination of all forms of Discrimination Against Women commended the Australian Government for developments towards gender equality and reducing discrimination against women in Australia.²³ The Committee also highlighted areas that require improvement and made recommendations for further reform, including in relation to: strengthening anti-discrimination laws and mechanisms; the equal participation of women in public and political life; trafficking of women; education; employment; and particular groups of women, including Aboriginal and Torres Strait Islander women, CALD women, and women with disability. It also made specific comments in relation to violence against women, including the need for implementation, funding and independent monitoring of a national plan of action, and prosecution and punishment of perpetrators of violence. The Concluding Comments and issues identified provide a useful basis for the development of more detailed actions under the Second Action Plan, and in informing broader legislative, policy and community responses.²⁴

National Plan to Reduce Violence Against Women and their Children

The National Plan was endorsed by the Council of Australian Governments (COAG) and released in February 2011. The National Plan is supported by a series of four, three-year Action Plans, two of which have been developed: *Building a Strong Foundation: 2010–2013* and *Moving Ahead: 2013–2016*.

The National Plan and Action Plans represent important developments in providing a nationally consistent and strategic approach to family violence in Australia. Some of the key achievements under the National Plan and the First Action Plan include:

- bipartisan support for the recognition of the gendered nature of family violence and sexual assault
- providing a national impetus for States and Territories to each develop their jurisdictional implementation plans linked to the National Plan
- the establishment and ongoing development of the 1800 RESPECT counselling line
- the establishment of the national social marketing campaign, *The Line*, aimed at young people
- the establishment of the National Centre for Excellence (ANROWS) tasked to develop a national research agenda to improve policy and service delivery
- the establishment of the Foundation to Prevent Violence against Women and their Children- an independent, not for profit organisation, aimed at engaging the whole community in action to prevent violence against women and their children, and
- commencement of work on the National Data Collection and Reporting Framework.

However, NACLC and WLSA submit that there is a need for an adequate, timely, well-funded, independently monitored National Plan that incorporates accountability and governance mechanisms.²⁵

NACLC and WLSA have some concerns about the process for developing, implementing and monitoring the National Plan and Action Plans developed under the National Plan. In particular, these concerns

²³ Committee on the Elimination of Discrimination against Women, *Concluding Observations on Australia*, 46th Session, UN Doc CEDAW/C/AUS/CO/7 (30 July 2010).

²⁴ Committee on the Elimination of Discrimination against Women, *Concluding Observations on Australia*, 46th Session, UN Doc CEDAW/C/AUS/CO/7 (30 July 2010), [29].

²⁵ WLSA, NACLC and others have made previous submissions on this point. See, eg, Joint NGO Submission to the UN Human Rights Committee on the List of Issues Prior to Reporting for the 6th Periodic Report of Australia (August 2012).

relate to consultation and engagement with civil society, independent monitoring, and inadequate resourcing.

Consultation and engagement

NACLC and WLSA have some concerns about past consultation and engagement and opportunities for future consultation and engagement under the National Plan. For example, there were few opportunities for participation from civil society, including by key non-government organisations, in the development of the *National Plan to Reduce Violence Against Women and their Children 2010-2022: Evaluation Plan* released in June 2014, and while there was some consultation on the development of the Second Action Plan, it is disappointing that submissions made regarding the development of the second Action Plan have not been made public. NACLC and WLSA note the need for inclusive and transparent consultation and engagement with key stakeholders in the implementation of the Second Action Plan, and the development of future Action Plans.

The Second Action Plan recognises that there ‘needs to be a collaborative effort from governments, the community sector, business and the broader community’ in order to achieve the aims of the National Plan. While the COAG Select Council on Women’s Issue has overarching responsibility for the implementation of the National Plan, there are limited forums that provide for consultation and engagement with civil society.

The National Plan Implementation Panel (NPIP) is a key forum of this type that includes government and NGO representatives. NACLC and WLSA are concerned that there is no reference to NPIP in the Second Action Plan and are uncertain whether this foreshadows planned reform of governance structures. If the existing governance structures remain, while acknowledging the expertise of the NGO representatives to NPIP, NACLC and WLSA encourage the Australian Government to ensure the panel is representative and includes practising lawyers and/or women’s legal specialists. As the National Plan provided for the establishment of advisory groups to report to the NPIP, the establishment of such groups would be an important development. In light of concerns about ensuring NPIP discussions and decision-making is transparent, NACLC and WLSA also suggest that meeting communiqués be publicly released as soon as practicable after each meeting.

The Second Action Plan also includes a number of proposed consultative mechanisms and forums such as annual national roundtables of key experts from a range of sectors, targeted consultations and National Conferences. However, there is a need to ensure regular, equal and meaningful consultation and engagement with civil society, including CLCs as well as with representatives of Aboriginal and Torres Strait Islander women, CALD women, women with disability, young women, mature age women, women in prison, women from regional, rural and remote areas and LGBTIQ people. For example, with respect to Aboriginal and Torres Strait Islander women, the *Second Action Plan* only commits to consulting with Aboriginal women and communities through the National Aboriginal and Torres Strait Islander Women’s Alliance and the Prime Minister’s Indigenous Advisory Council. While important, there is also a need to ensure there is consultation with services engaged in direct service delivery as well as existing Aboriginal community controlled organisations and legal assistance services including the National FVPLS Forum and National Aboriginal and Torres Strait Islander Legal Services.

As a result, NACLC and WLSA encourage the Committee to consider the effectiveness of existing consultative mechanisms and the development of other mechanisms and opportunities for active participation by civil society in the monitoring and implementation of the National Plan and the Action Plans under the National Plan.

Independent monitoring and evaluation

NACLC and WLSA support an independent monitoring and evaluation mechanism for the National Plan, something also emphasised as important by the Committee on the Elimination of Discrimination against

Women.²⁶ The Evaluation Plan released in June 2014 represents an important development and includes a number of evaluation activities, such as: reviews of three-yearly Action Plans; annual progress reporting; evaluation of flagship activities; and underpinning evaluation activities including analysis of data from the Personal Safety Survey and National Survey on Community Attitudes towards Violence against Women.²⁷

While NACLC and WLSA understand that select key stakeholders were invited to provide feedback in relation to the draft Evaluation Plan, there does not appear to have been broader consultation. The Evaluation Plan lacks necessary detail in a number of respects. By way of example, NACLC and WLSA suggest that reports from the Australian Human Rights Commission, as well as those developed by civil society, should be considered as part of a broad evidence base for monitoring progress against the National Plan.

Further, the Evaluation Plan refers to Annual Progress Reporting as a key monitoring, accountability and communication activity under the National Plan. The Evaluation Plan suggests that Commonwealth, state and territory governments as well as NGOs would contribute to each report and that the report would be made publicly available. In May 2013, a Progress Report was provided to COAG on the National Plan and in May 2014 a Progress Review of the First Action Plan was released. NACLC and WLSA are unclear whether the Annual Progress Reporting envisaged in the Evaluation Plan differs from those reports, and suggest further detail is required about the reporting process.

Importantly, while the Evaluation Plan suggests that there is a need for a collaborative approach and that all stakeholders will contribute to and participate in the evaluation process, there is a need to ensure this occurs in practice. As a result, NACLC and WLSA suggest that the Committee give further consideration as to how the Evaluation Plan might operate in practice to ensure it is transparent, accountable and consultative.

Adequate resourcing

Implementation of the National Plan and Action Plans is reliant on adequate resourcing and funding of all initiatives, including front line services such as women's health, counselling, housing and legal services. This issue is discussed in more detail with respect to legal assistance services later in this submission.

Implementation of ALRC Recommendations

The First Action Plan *Building a Strong Foundation 2010–2013* under The *National Plan* includes a commitment to consider the recommendations made in the 2010 report by the Australian and NSW Law Reform Commissions, *Family Violence—A National Legal Response*.²⁸

The Report contained 186 recommendations for reform. The focus of the Report was on the interaction in practice of state and territory family violence and child protection laws with the *Family Law Act 1975* (Cth) and relevant Commonwealth, state and territory criminal laws; and the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family violence context, including rules of evidence, on victims of such violence. Implementation and consideration of the

²⁶ Committee on the Elimination of Discrimination against Women, *Concluding Observations on Australia*, 46th Session, UN Doc CEDAW/C/AUS/CO/7 (30 July 2010), [29].

²⁷ *National Plan to Reduce Violence Against Women and their Children 2010–2022: Evaluation Plan* (June 2014).

²⁸ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114 (2010).

recommendations contained in the Report has occurred in a number of ways, including for example through amendment to the *Family Law Act 1975* (Cth), including to the definition of family violence in line with the ALRC's common interpretative framework by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth). Further, the Report also recommended a national domestic violence orders scheme. A 'mutual recognition scheme' was agreed to by the Standing Committee of Attorneys General in March 2011, although it has not yet been implemented, and such a scheme is included in the Second Action Plan of the National Plan. The Australian Government recently announced funding of CrimTrac for the development and pilot of a scheme.

In addition, in July 2010 following on from the first Family Violence Inquiry, the ALRC was asked to inquire into the treatment of family violence in Commonwealth laws (other than the *Family Law Act*), and to identify what improvements could be made to relevant legal frameworks to protect the safety of those experiencing family violence. Specifically, the ALRC was asked to look at child support and family assistance law, immigration law, employment law, social security law and superannuation law and privacy provisions. The ALRC's Final Report, *Family Violence and Commonwealth Laws—Improving Legal Frameworks* was publicly released in February 2012.²⁹ Only a small number of the recommendations from this second Inquiry have been implemented, including, notably, amendment of the *Fair Work Act 2009* (Cth) to provide that an employee who is experiencing family violence may request the employer for a change in working arrangements, changes to social security law practice, and amendment of the *Migration Regulations 1994* (Cth) implementing the ALRC's recommendations to broaden the types of acceptable evidence that can be submitted in support of a claim of family violence under migration law.

Unfortunately, however, many of the recommendations made by the ALRC in these two inquiries have not yet been implemented, and there is no reference to this crucial work in the Second Action Plan. Accordingly, NACLC and WLSA encourage the Committee to recommend further implementation of the ALRC's recommendations from both these Inquiries.

Future reforms

In considering key legislative, policy and community responses and the role of the Australian Government, there are a number of significant specific issues that are consistent with the priorities, aims and actions under the National Plan and Action Plans that NACLC and WLSA submit require further attention and reform.

Access to legal assistance

Legal assistance services for women experiencing family violence include Legal Aid Commissions (LACs), CLCs, Aboriginal and Torres Strait Islander Legal Services (ATSILS), FVPLS, and private legal assistance.

National Outcome Five under the National Plan is that justice responses are effective, and one of the key strategies is improving access to justice for women and children. Equitable access to legal help and the legal system is a crucial part of ensuring that this national outcome is met. However, in December 2013, the Commonwealth Government announced a funding cut of \$43.1 million for legal assistance services over four years from 2013-14.³⁰ These cuts included a cut of \$19.6 million over four years to CLCs and

²⁹ Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, ALRC Report 117 (2012).

³⁰ Australian Government, *Mid-Year Economic and Fiscal Outlook 2013–14*, December 2013.

\$3.6 million to FVPLS.³¹ Since then further funding cuts have been announced to legal assistance providers generally,³² despite some one-off grants being made to a number of individual CLCs, as well as in relation to specific programs.³³

At a time of increasing demand for legal assistance for disadvantaged and vulnerable people, NACLC and WLSA are concerned about the impact these cuts will have on assistance for people experiencing, or at risk of, family violence. NACLC and WLSA emphasise that there is a need for equitable access to culturally safe and appropriate legal services. Further, funding for all legal assistance providers is vital in ensuring people experiencing family violence are able to access legal assistance, in part to ensure that where a LAC or ATSILS have a conflict of interest or is otherwise unable to act, a CLC or FVPLS is able to offer legal assistance.

NACLC and WLSA draw the Committee's attention to the submission made by National FVPLS with respect to the uncertainty created by recent policy decisions and the shift of Departmental and Ministerial responsibility for the FVPLS program.

NACCL and WLSA also emphasise the importance of specialist women's legal services, including Aboriginal and Torres Strait Islander women's legal services. Such services have a thorough understanding of the nature and dynamics of domestic and family violence and why such violence is primarily perpetrated against women and children. They provide a safe space for women and children and strongly support holding perpetrators to account. They also recognise the intersecting and compounding forms of disadvantage that women face for example, due to their sex; gender identity, sexual orientation or intersex status; race; disability; age; and/or social and/or economic disadvantage which can significantly limit women's 'full enjoyment of citizenship', including access to justice.

As a result, NACLC and WLSA encourage the Committee to consider the need for appropriate resourcing of legal assistance providers to provide legal assistance to people experiencing family violence, and the role of the Australian Government in providing such funding.

Eligibility for legal assistance services

CLCs provide advice and assistance to many women who are victims of family violence and/or have concerns about their children's safety, and who experience financial hardship but who are unable to obtain a grant of legal aid at all or adequate legal aid to properly conduct their family law matters.

Disadvantaged women may find themselves in the position of having to navigate the complex family law system by themselves for a range of reasons including:

- costs issues
- inability to access a grant of legal aid due to a small income or low value assets
- Legal Aid Commission guidelines that affect the availability of legal aid for trial
- a determination by Legal Aid Commissions that there is no 'substantial issue in dispute', and
- in some cases the limited capacity of CLCs to offer assistance, resulting in 'turnaways'.

³¹ The implications of developments including the consolidation of 150 programs into five under a new 'Indigenous Advancement Strategy' and announced cuts of \$534.4 million over four years for Indigenous programs remain unclear for ATSILS and FVPLS.

³² For example, Australian Government, *Attorney-General Portfolio Budget Statements 2014–15*, 19, 29;

³³ See, eg, NACLC, *NACLC Welcomes One-Off Grants of \$1.55 million for Community Legal Services*, Media Release, 27 June 2014.

In the context of family violence, meeting strict eligibility criteria may in some circumstances become a barrier to accessing legal assistance. For example, a woman escaping family violence may not be able to produce evidence of her identity, bank account statements, or be able to articulate the merits of her case sufficiently to obtain a grant of legal aid without assistance (generally from another legal assistance provider). A further barrier for some women experiencing family violence is the need to establish a 'substantial dispute'.³⁴

WLSA advocates that one way of addressing this concern is to establish a specific legal aid pathway in family law for those who have experienced family violence, with its own set of guidelines that take into account these complex dynamics. WLSA suggests such guidelines could provide clear criteria for the funding of specialised family violence reports (which is consistent with the Family Courts Family Violence Best Practice Principles) to support decision-making by courts around issues of violence.

Limitations on law reform and policy advocacy work

In May 2014, the Australian Government Attorney-General's Department confirmed that the Commonwealth is 'working towards a one year extension of current CLSP service agreements' which will also serve to implement 'the Government's policy in relation to the use of Commonwealth legal assistance funding for front line service delivery' by varying the agreements to include clauses that 'provide that, in relation to Commonwealth funding, the definition of core service activities is: information, advice, casework and community legal education activities'.³⁵

The relevant amendment which was made to the Variation to the Agreement removed law reform and advocacy from the definition of 'core legal services' to make clear that services funded by the Commonwealth will not, for the period of the extension of the Agreement at least, include these activities.

While not explicitly preventing CLCs from undertaking this work, this change has made clear that CLCs are not to undertake law reform or advocacy with Commonwealth funding. The Queensland Government has effected a similar position for their state funding for CLCs. CLCs that are funded also by State Governments can undertake these activities using state funding, however those that only have Commonwealth funding must cease this important work or undertake it as additional 'volunteer' hours.

NACLC and WLSA also note similar moves to limit law reform and advocacy work being undertaken by other legal assistance providers. For example, the Government has defunded the National Aboriginal and Torres Strait Islander Legal Services and all Law Reform and Policy Officer positions with state and territory Aboriginal and Torres Strait Islander Legal Services;³⁶ LACs are prevented from using Commonwealth funding for the purpose of lobbying government or elected representatives, or to engage in public campaigns;³⁷ and FVPLS are being funded to deliver services other than law reform and advocacy services.

³⁴ See, eg, R Hunter and T De Simone, 'Women, Legal Aid and Social Inclusion', *Australian Journal of Social Issues* (2009) 44(4), Summer Edition, 388

³⁵ Email Correspondence from Director CLSP (Commonwealth AGD) to Executive Director (NACLC), *Extension of Tripartite Service Agreement*, 19 May 2014.

³⁶ NATSILS, 'Government to defund Aboriginal Legal Services Peak Body and all Law Reform and Policy Positions', Media Release, 17 December 2013.

³⁷ The Commonwealth has inserted the following clause as the first principle in the 'General Principles to be applied to each priority' in Schedule A of the National Partnership Agreement, the agreement that provides for Commonwealth funding for the State and Territory Legal Aid Commissions: 'Commonwealth funding should be directed to the delivery of services to socially or economically disadvantaged clients. Commonwealth funding must not be used for the purpose of lobbying government or elected representatives, or to engage in public campaigns. Lobbying does not include where a legal aid commission makes a submission to a government or parliamentary body to provide factual information and/or advice with a focus on systemic issues affecting access to justice'.

However, a range of bodies, inquiries and reviews have acknowledged that CLCs play a key role in law reform, policy and advocacy and expressed the view that these services should be a ‘core activity’ of CLCs.³⁸

In the opinion of NACLC and WLSA, failure to provide Commonwealth funding for law reform and policy activities will have a significant impact on the ability of CLCs, particularly the specialist and most relevantly expert CLCs, the WLS, to engage in law reform and advocacy in relation to family violence laws and policies, and more generally.³⁹ Further, it overlooks the considerable benefits that governments and the community have derived from the regular input from WLSA and other CLCs and their state and territory associations, based on the experiences of the clients and the developed analysis of these lawyers working with survivors of family violence over many years and across Australia. Including, for example, as a representative on the National Chief Justice’s Family Law Forum. The Forum is a national body that includes the Chief Justice, and Deputy Chief Justice of the Family Court, Chief Justice of the Federal Circuit Court, representatives from the Commonwealth Attorney-General’s Department, Department of Social Services, the Child Support Agency, Relationships Australia, National Legal Aid and the Family Law Section of the Law Council of Australia, among others—NACLC is represented in this forum by the WLSA National Law Reform Coordinator.

NACLC and WLSA are concerned about the significant effect of these changes, as the law reform, policy advocacy and lobbying work of legal assistance providers is crucial in identifying and encouraging reform of laws, policies and practices that adversely or inequitably impact on disadvantaged people and vulnerable groups in the community, including women experiencing or at risk of family violence.

Family law and domestic violence

Equal shared parental responsibility in family law

The *Family Law Act* contains a rebuttable presumption that it is in the best interests of children for their parents to have ‘equal shared parental responsibility’.⁴⁰ The presumption does not apply if there are ‘reasonable grounds to believe that a parent of the child ... has engaged in ... family violence’.⁴¹

While the presumption is not intended to apply in cases involving family violence, there are concerns about the gap between the intention and the practical operation of the provision for people experiencing family violence. The presumption and the emphasis on shared parenting, over and above other parenting outcomes, places children and other family members, who have experienced domestic violence, in danger. In WLSA’s experience, in some matters the presumption has the effect of:

- exposing people who have experienced family violence and their children to ongoing violence, intimidation and manipulation
- allowing opportunities for perpetrators of violence to exert ongoing control and decision-making in the family, and

³⁸ See, eg, Productivity Commission, *Access to Justice Arrangements*, Draft Report, (April 2014), 609, 623, 625; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004) 220 [11.58]. See also: N Nheu and H McDonald, ‘By the People, for the People? Community Participation in Law Reform: Summary Report’ Law and Justice Foundation of NSW (14 October 2011); N Rich, ‘Reclaiming Community Legal Centres: Maximising Our Potential so We Can Help Our Clients Realise Theirs’, Final Report (April 2009); L Curran, ‘Community Legal Centres: A Legitimate Part of the Legal Landscape’ (2007) 25 *Dissent* 19, 21; and L Schetzer, ‘Law Reform: Community Legal Centres and the Future of Law Reform’ (1998) 23 *Alternative Law Journal* 243.

³⁹ See, eg, NACLC, *Supplementary Submission to Productivity Commission Access to Justice Arrangements Inquiry: Community Legal Centres, Law Reform and Policy Advocacy*, June 2014.

⁴⁰ Inserted in 2006 by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

⁴¹ *Family Law Act 1975* (Cth) s 61DA.

- in some cases denying children the therapeutic assistance they require through domestic violence or trauma counselling because the law requires the permission of the perpetrator and this may be refused.

Accordingly, NACLC and WLSA submit that the presumption of equal shared parental responsibility should be repealed, which would allow parenting arrangements to be in the best interests of each child, determined on a case-by-case basis.

Additionally, WLSA has developed an alternative legislative decision-making framework for use in circumstances involving family violence that imports risk-assessment strategies into the legislation and would welcome further discussion about this with the Committee.

Protections for vulnerable witnesses in family law

In 2007, the Australian Institute of Family Studies identified that over half the family law files examined in the course of its work contained allegations of family violence.⁴² For women who are victims of family violence, or who have been raped, assaulted or psychologically abused by their former partner, there is a significant risk that they may be directly cross-examined by an abusive ex-partner who is unrepresented at a final or interim hearing.

In family law proceedings there are no provisions in the *Family Law Act* that prevent an abusive ex-partner from directly cross-examining the victim or the victim's family. The experience of direct cross-examination by an abusive ex-partner can result in re-traumatisation of the victim. It can also be a continuation of the family violence, if that person uses court proceedings to intimidate and exercise control and dominance over a victim.

While recognising the importance of ensuring that evidence can be tested, NACLC and WLSA recommend that vulnerable witness protections be included in the *Family Law Act*. All states have recognised the need to protect vulnerable witnesses in criminal sexual assault trials. Some states have also recognised the need to protect family violence victims in intervention orders proceedings. It is essential that the family law jurisdiction keep pace with developments at a state level in protecting vulnerable witnesses. NACLC and WLSA suggest that sections 70–72 of the *Family Violence Protection Act 2008* (Vic) provide a useful model.

There is also a need to consider 'alternative', or 'special' arrangements for the giving of evidence in family law proceedings where violence and abuse are an issue, for example through video evidence. Amendments to legislation to provide such protection for victims of sexual assault, provides a useful model for reform.

Accreditation and training of Family Report writers

In WLSA's experience, clients experiencing family violence often feel as though they are not listened to by family report writers and feel further traumatised and humiliated by the family assessment process. In part, people who have experienced, or are experiencing, family violence are hesitant to disclose the effect of the violence on them given concerns about conclusions being drawn by report writers about their capacity to parent.

WLSA and NACLC suggest that there is a need to ensure that family report writers are appropriately trained and experienced in understanding the nature and dynamics of family violence and its effect, so reports appropriately recognise and consider the family violence and its consequences/effects. This

⁴² Australian Institute of Family Studies, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings* (2007).

could occur, for example, through the accreditation of family report writers in family law proceedings, including specialist training (including trauma-informed training), clinical experience in working with victims of family violence, an effective mechanism for complaints, and the development of standards through broad consultation with specialists and reflect the widely accepted social science understandings of family violence and trauma.

This is particularly important as several WLSA members have observed that women who have experienced family violence have had their legal aid grant terminated as a result of not agreeing with a family report writer's recommendations.⁴³ This is problematic in circumstances in which family violence is occurring, or has occurred, and the family report writer has not understood the nature and dynamics of family violence.

National prevention strategy for domestic violence homicides

In 2013, National Homicide Monitoring program data revealed that 36% (or 185) of all homicides in Australia between 2008 and 2010 were domestic-related. Of those, 66% (122) were classified as being committed by an intimate partner.⁴⁴

The development of a national prevention strategy for domestic violence homicides is an important step in ensuring a meaningful and consistent approach to this issue, including collaborative risk assessment and management. An important element of any such strategy should be the adoption of a mechanism for review of such deaths in those jurisdictions which do not have such reviews, as recommended by the ALRC in the first Family Violence Inquiry, and amendment of existing reviews to ensure compliance with best practice principles. This could build on Action 19 under the Second Action Plan which is 'reviewing domestic and family violence-related deaths' and the work of the Australian Domestic and Family Violence Death Review Network which brings together representatives from each operating specialist domestic and family violence death review unit, where they exist, to share information, data and improve knowledge about family violence-related deaths.

Women on temporary visas experiencing domestic violence

The family violence exception under the *Migration Regulations 1994* (Cth) provides for the grant of permanent residence to people experiencing family violence, regardless of whether their relationship with their spouse or defacto has broken down, where their migration status depended on that spouse or defacto. The exception is largely invoked in partner visa cases. Important amendments to the *Migration Regulations* were introduced in 2012, implementing some of the ALRC's recommendations in the second Family Violence Inquiry.

NACLC and WLSA encourage the Committee to consider the outstanding recommendations made by the ALRC with respect to this issue and note that in addition to the family violence exception, there is a need to ensure that people experiencing family violence who are on temporary visas are able to access appropriate services and supports to ensure they are able to leave violent relationships.

⁴³ See, eg, Women's Legal Services Australia, *Submission to the Productivity Commission's Access to Justice Inquiry*, 4 November 2013, 18.

⁴⁴ Australian Institute of Criminology, *Homicide in Australia: 2008–09 to 2009–10 National Homicide Monitoring Program Annual Report*, AIC Monitoring Report 21 (2013).

Employment and domestic violence

The results of the National Domestic Violence and the Workplace Survey conducted in 2011 on behalf of the Australian Domestic and Family Violence Clearinghouse (ADFVC) indicated that, of those who reported experiencing family violence, nearly half the respondents stated that the violence affected their capacity to get to work—the major reason being physical injury or restraint. In the previous 12 months, 19% of respondents reported that family violence continued in the workplace. Specifically, 12% indicated it occurred in the form of abusive phone calls and emails, 11% stated that it occurred by way of the violent person attending the workplace, and 16% reported a negative effect on work performance arising from being distracted, tired or unwell.

The foundational work of academics, bodies such as the ADFVC and unions, as well as of the ALRC has been of particular importance in identifying family violence as an issue in relation to which the employment and anti-discrimination law systems can and should respond. Increasingly, millions of public and private employees have access to family violence-related leave under numerous enterprise agreements, modern awards and a range of policies and directives.

In light of the vital importance of employment in enabling people experiencing family violence to escape violent relationships, NACLC and WLSA consider that the Committee and Australian Government should consider the need for further legislative reform in this area. Amendments to the *Fair Work Act 2009* (Cth) to provide victims of family violence and those caring for victims of family violence with the right to request flexible work arrangements were significant. However, it is also necessary to consider amendment of the National Employment Standards, as well as the general protections provisions under the *Fair Work Act*.⁴⁵ In addition to legislative reform, there is an ongoing need for the Australian Government to encourage and provide funding for the inclusion of such clauses in enterprise agreements and awards as well as relevant education, training and awareness raising, and for government and businesses to develop and implement risk assessment and appropriate workplace policies in relation to family violence into their standard business practice.

Anti-discrimination law

NACLC, WLSA and other CLCs have made numerous submissions in relation to the need for amendment of anti-discrimination legislation, including to provide protection for people experiencing family violence, LGBTI people, and to ensure effective provisions for discrimination on the grounds of sex and related attributes. NACLC, WLSA and others have also consistently emphasised that existing anti-discrimination legislation does not adequately address systemic discrimination or promote substantive equality; that the burden for addressing discrimination continues to fall to individual complainants; intersectional discrimination is not adequately recognised or addressed; and exemptions, such as those for religious institutions, allow continued unfair and unreasonable discrimination.

With respect to family violence, existing Commonwealth anti-discrimination law does not afford sufficient protection for people experiencing family violence. Potentially relevant attributes including sex, family responsibilities and disability offer limited protection. As a result, and recognising the important work done by the ALRC, the Australian Human Rights Commission, CLCs and others in this

⁴⁵ See, eg, Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, ALRC Report 117 (2012); Australian Domestic Family Violence Clearinghouse, *Submission to the Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the Fair Work Amendment Bill 2013 (Cth)*, April 2013; National Network of Working Women's Centres, *Submission to the Senate Standing Committee on Education, Employment and Workplace Relations Inquiry into the Fair Work Amendment Bill 2013 (Cth)*, 16 April 2013.

area,⁴⁶ NACLC and WLSA support the inclusion of status as an actual or perceived victim of domestic violence as a protected attribute under Commonwealth anti-discrimination law.⁴⁷

Further, NACLC and WLSA are concerned that the Second Action Plan limits discussion of the promotion of gender equality to ‘improv[ing] women’s economic independence, such as paid parental leave and access to child care; efforts to support women’s leadership; and male champions and leaders speaking out against domestic and family violence and sexual assault, and promoting the broader principles of gender equality’.⁴⁸ NACLC and WLSA highlight the need for amendment to the *Sex Discrimination Act 1984* (Cth), in line with those amendments proposed in submissions as part of the process to consolidate Commonwealth anti-discrimination legislation and the 2008 Senate Inquiry into the effectiveness of the Act.⁴⁹

⁴⁶ For overview see, eg, A Alford, ‘Family Violence, Employment and Anti-Discrimination Law: The Challenge for Law Reform’ in P Easteal (ed), *Justice Connections* (2013), Cambridge Scholars Publishing.

⁴⁷ See, eg, WLSA, *Submission No 339 to the Senate Standing Committee on Legal and Constitutional Affairs in response to the Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (Cth), 20 December 2012; NACLC and Kingsford Legal Centre, *Submission No 334 to the Senate Standing Committee on Legal and Constitutional Affairs in response to the Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (Cth), 20 December 2012.

⁴⁸ Second Action Plan of the National Plan to Reduce Violence Against Women and their Children, *Moving Ahead: 2013–2016*, 19.

⁴⁹ NACLC, *Submission to the Australian Attorney-General, Areas for Increased Protection in Discrimination Law: Consolidation of Federal Discrimination Legislation*, April 2011; NACLC, *Submission to the Australian Attorney-General, Access to Justice and Systemic Issues: Consolidation of Federal Discrimination Legislation*, March 2011; NACLC, *Submission to the Senate Inquiry into the effectiveness of the Sex Discrimination Act 1984* (Cth) in *Eliminating Discrimination and Promoting Gender Equality*, 7 August 2008.

