SUBMISSION

MULTI-JURISDICTIONAL ISSUES

ROYAL COMMISSION INTO FAMILY VIOLENCE

Prepared by Women's Legal Service Victoria

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SUMMARY OF RECOMMENDATIONS

IMPROVING RESPONSES TO FAMILY LAW IN THE FAMILY VIOLENCE SYSTEM

Knowledge and understanding of family law issues

1. The CLC funding program includes funding to strengthen the capacity of CLCs that have family violence duty lawyer programs to provide family law advice and representation.

2. The Magistrates' Court and Victoria Police work with CLCs and VLA to establish a warm referral process to enable parties to obtain timely family law legal advice.

3. The State and Federal Government fund family violence/family law experts, such as WLSV, to develop a digital family law information session for parties in family violence proceedings.

4. Expand opportunities for barristers and private practitioners to undertake continuing professional development in family violence and intersectional issues.

5. The State Government fund training, such as that delivered by WLSV through its Safer Families training program, to strengthen the capacity of CLC family violence duty lawyers to provide appropriate family law advice in family violence cases.

Information sharing between courts

6. State and Federal Government jointly fund the development of a central database of Family Court, Magistrates' Court and Children's Court orders.

7. The development of information sharing protocols and Memorandums of Understanding between DHHS, the Magistrates' Court and Family Courts.

8. The Magistrates' Court work with DHHS to develop and implement a pilot program that places a DHHS liaison officer at the Magistrates' Court in the family violence list.

Exercise of family law powers in the Magistrates' Court

9. The Judicial College of Victoria develop continuing professional development modules for Magistrates to strengthen understanding of family law, intersectional issues with family violence.

   We recognise that the recently developed Family Law Bench Book may go some way towards supporting improved engagement with family law issues.

10. Judicial appointments include Magistrates that have a background in family law and family violence.

11. The Magistrates' Court develop a practice direction restricting parties from negotiating parenting agreements at court during intervention order hearings.

12. Section 68R, S & T of the FLA be comprehensively reviewed and redrafted by the Federal Attorney General's Department.

13. The 21 day time limit in section 68T be repealed.

14. A process be established between the Magistrates' Court and Family Court registries providing that a section 68R suspension order trigger an application in the Federal Circuit Court for variation of a parenting agreement/order.

PILOTING A "ONE FAMILY, ONE COURT" MODEL

15. We recommend that the Department of Justice and Regulation research and develop a "one family, one court" model, engaging in broad consultation with stakeholders and family law / family violence experts. The model should then be piloted and comprehensively evaluated before being expanded.

STRENGTHENING FAMILY VIOLENCE FRAMEWORKS IN THE FAMILY LAW SYSTEM

Family consultants

16. The Australian Institute of Family Studies be provided with a reference to undertake research into the practices and assessments of family consultants.

17. The Federal Government, in consultation with family violence and family law experts develop an accreditation process and minimum standards for family consultants.

18. The Federal Government establish an oversight mechanism and complaints process to monitor and review the conduct of family consultants.

Family violence victims directly cross-examined in family law hearings

19. The Federal Government amend the Family Law Act to include legislative protections for "vulnerable witnesses" such as family violence victims from direct cross-examination by a perpetrator of family violence.

Access to legal representation for family violence victims in the family law system

20. The Australian Institute of Family Studies be provided with a reference to undertake research into the experience of unrepresented parties in family law proceedings, with a specific focus on parties that experience disadvantaged (eg family violence victims, people with a disability, people from culturally and linguistically diverse communities and Aboriginal and Torres Strait Islanders)

21. The Federal Government increase funding to legal aid commissions specifically in the area of family law.

22. VLA's funding guidelines in family law are amended to promote greater access to legal aid for women who are victims of family violence.

INTRODUCTION

This is the second part of our submission to the Royal Commission. Our main submission – ***Improving the family violence legal system*** – provides a brief background to Women's Legal Services Victoria (WLSV) as well as outlining the principles of reform that should inform the Royal Commission's recommendations.

This submission was developed with a single focus – to consider how multi-jurisdictional issues can be effectively dealt with in the legal system, in particular where there is an intersection between family violence law, family law and child protection.

The submission covers three key areas:

- Improving responses to family law in the family violence legal system.
- Developing a "one family, one court model" in the Magistrates' Courts.
- Strengthening the family violence framework in the family law system.

Our objective, in our submission, is to communicate the experience of the women that we work with. Our client group consists of women from a range of different cultural, ethnic and religious backgrounds. The women we assist are low income earners and are often at high risk of domestic violence as result of disability, age, visa status or cultural or ethnic background.

Our submission includes case studies, some of which are individual client cases that we have assisted at our service and some of which are examples of types of cases that we commonly see. All individual client case studies are de-identified and provided with the consent of the client.

There has been a significant amount of work undertaken over the last decade with respect to the intersection between family violence, family law and child protection. Much of this work sits at a national level. We refer to and recommend the Royal Commission consider the extensive recommendations of the Australian Law Reform Commission (ALRC) and New South Wales Royal Commission report from October 2010 – *Family Violence A National Legal Response* as well as the ALRC's report *Family Violence and Commonwealth Laws—Improving Legal Frameworks,* February 2012.

IMPROVING RESPONSES TO FAMILY LAW IN THE FAMILY VIOLENCE SYSTEM

The nexus between family violence and relationship breakdown

The intersection between family violence and relationship breakdown often means that victims of family violence are faced with a confusing and complex legal framework which they are required to navigate alone. Victims whose legal problems arise in the context of family violence and relationship breakdown regularly deal with multiple pieces of legislation and several different jurisdictions. For example, a victim may be required to have contact with:

- The Commonwealth family law system in the Federal Circuit Court or Family Court because of parenting matters, spousal maintenance, property and divorce proceedings.
- The Victorian civil justice system in the Magistrates' Court because they are the subject of an intervention order or they require the protection of one.
- The Children's Court in child protection cases.
- The Victorian criminal justice system in the Magistrates' Court, County Court or Supreme Court because their partner has also been charged with a criminal offence against them.

In a 2010 University of Sydney study on *'Women's experiences negotiating the family law system in the context of domestic violence'* found that the lack of coordination between the family violence system and the family law system was a significant barrier to justice for victims. The experience of victims was explained as follows:

> *"In order to protect themselves and their children, the women found that they had to navigate a fragmented and uncoordinated service system, marked by delays and barriers to accessing accurate information."*[1]

Knowledge and understanding of family law issues

Despite the close nexus between relationship breakdown and family violence, there is limited understanding of family law issues and how they impact on family violence intervention orders in the family violence system. Common misconceptions and myths about a parent's "right" to a child or "50-50" time lead to poor outcomes.

For parties in an intervention order proceeding who are also dealing with issues of separation and care of children, having access to early legal advice and information on family law issues is critical. For police, Magistrates' Court staff and legal practitioners in the family violence system a lack of understanding of family violence can lead to inaction, poor advice or referrals. The following case study is a combination of different examples and scenarios of poor practice that can arise from a lack of understanding of family law and its intersection with family violence.

[1] Laing L, *No way to live: Women's experiences of negotiating the family law system in the context of domestic violence (2010),* Faculty of Education and Social Work, University of Sydney.

Case study

On Sunday afternoon, Penny drove to a McDonald's car-park with her five year old son Daniel. She was meeting her ex-husband, Steve, for "change-over", an arrangement that would allow Daniel to be picked up by Steve so that he could spend the week with him. This change-over arrangement was set out in Federal Circuit Court orders made over 12 months ago. The arrangement was agreed to as Steven had a long history of family violence against Penny and Penny felt unsafe when Steve attended her house.

*In the McDonald's car park, Penny was helping Daniel get his things out of the car. Suddenly Steve started running towards them screaming "you stupid b*tch, I'm going to f*ing kill you". When he reached Penny he pushed her against the car and head-butted her. Daniel was screaming and pulling Steve away. Other people in the car park intervened and the police were called.*

When the police attend, the police insisted that Daniel go home with Steve since Steve had told them he had court orders. Penny tried to explain how frightened she was of Daniel being in Steve's care when he was acting like this. She wasn't sure if he was using drugs again or what was going on. She was crying and pleaded with the police. She didn't want Steve to take Daniel home. The police officer said "I'm sorry but I can't do anything for him. His dad has court orders. He has a right to take him away now".

A safety notice was taken out against Steve but only Penny was named on the notice despite Daniel witnessing the family violence.

In the Magistrates' court (Penny didn't have a lawyer representing her) she tearfully told the Magistrate what had happened. The Magistrate finalized the intervention order for Penny (Steve failed to come to court). Unfortunately the final intervention order did not include Daniel. Nor did it suspend the existing Federal Circuit Court orders.

Potential improvements to the system:

Specialist family law legal advice and information

In cases where there is separation or potential and children are involved we recommend broadening access to accurate family law information, advice and representation to parties in family violence intervention order proceedings.

There are several options for improving the access of parties to accurate and timely family law information, advice and representation such as:

- Strengthening the capacity of CLCs with family violence duty lawyer programs to provide family law advice and representation.

- Establishing a warm referrals process between the Magistrates Court, Victoria Police and legal assistance providers such as CLCs and VLA to enable referrals at the time a police application or “in person” application.

- Adopting an information model similar to that used by the Family Law Pathways Network. The Network has a “kiosk” at the Dandenong and Melbourne Family Courts. The kiosk has an ipad which parties at court can use to look up services such as legal practitioners and mediation centres.

- Developing a digital family law information session that can be available online and at court.

  This could be similar to the family law information sessions developed by WLSV and delivered to individuals engaging in the family dispute resolution process at the Melbourne Family Relationship Centre. It provides parties with basic family law information and takes a practical “myth busting” approach. This session has now also been recorded as a “digital” information session that is currently being used by the FMC Mediation and Counselling.

Specialist training

We support family law training for police and court staff to improve their understanding of family law issues and to provide appropriate referrals when family law issues are raised in the context of a family violence incident.

The training could be similar in structure and scope to what WLSV has developed and delivered to family violence workers that are part of agencies participating in WLSV’s outreach project Link (see our main submission for more detail on Link). The training is designed to provide workers with an understanding of the family law system and how family violence is dealt with in the jurisdiction. As part of this training, a Critical Legal Issues Map has been developed to assist workers to refer clients to appropriate assistance, rather than trying to provide the assistance themselves (refer to Appendix A for the maps developed by WLSV).

We also believe that it is important that lawyers and barristers are provided with training to understand the dynamics and nature of family violence together with intersection between family law and family violence law. Currently, the legal profession has continuing professional development (CPD) obligations and this could be offered as part of CPD training.

We note that as duty lawyers at Melbourne Magistrates’ Court we are opposed to some private practitioners and barristers who have a very limited understanding of family violence and family law which leads to inappropriate comments and behavior towards victims and difficulties in resolving applications.

Recommendations:

1. **The CLC funding program includes funding to strengthen the capacity of CLCs that have family violence duty lawyer programs to provide family law advice and representation.**
2. **The Magistrates' Court and Victoria Police work with CLCs and VLA to establish a warm referral process to enable parties to obtain timely family law legal advice.**
3. **The State and Federal Government fund family violence/family law experts, such as WLSV, to develop a digital family law information session for parties in family violence proceedings.**
4. **Expand opportunities for barristers and private practitioners to undertake continuing professional development in family violence and intersectional issues.**
5. **The State Government fund training, such as that delivered by WLSV through its Safer Families training program, to strengthen the capacity of CLC family violence duty lawyers to provide appropriate family law advice in family violence cases.**

Information sharing between courts

There is value in establishing an ethical framework for information sharing between jurisdictions in particular the areas of family violence, family law and child protection.

Current gaps

In intervention order proceedings the following information is often not available to Magistrates and lawyers unless it is provided by one of the parties:

- child protection orders
- details of child protection involvement and their position in a case
- family court orders
- parenting agreements
- upcoming hearing dates in the family law jurisdiction
- children's court hearing dates.

Equally as important is the role of the Magistrates' court in providing information about the intervention order proceeding to the Family Court & DHHS. If the intervention order system can

effectively identify family violence risk factors, then that information may well be useful for decision-makers in the Children's Court and Family Court.

Case study

Tran was back at the Magistrates' Court for a police application for an intervention order. She mentioned to the family violence duty lawyer that a child protection worker had come to her house on several occasions over the last twelve months. When she was asked what child protection were doing in her case, Tran said "this time when they came and they said they were worried about my son. They said that my husband should not be living with me because he is dangerous."

When the duty lawyer asked Tran if the child protection worker was intending to make a court application Tran said she didn't know. She pulled out a card with the contact details of the child protection worker who interviewed her. The duty lawyer attempted to contact the worker but with no success.

In court, the duty lawyer flagged with the Magistrate that child protection had interviewed Tran several times. The Magistrate asked what steps child protection was taking in this matter. The duty lawyer informed the Magistrate that she had attempted to contact the worker but without success. As such there was no information available before the court with respect to child protection involvement.

The Magistrate proceeded to finalise the intervention order with limited conditions, not knowing whether child protection were taking any further steps in the matter.

This case study demonstrates the challenges in obtaining information from child protection. It is often difficult to gain any information because workers are unavailable and there is no central information source within the agency.

Potential improvements to the system:

The issue of information sharing has been considered by the ALRC and by Richard Chisolm in a number of reports. Whilst these reports focus on information sharing between family law courts and child protection, they may be of assistance to the Royal Commission.

Protocols and databases

A mutual information sharing process between the courts is recommended. This may be in the form of a shared database and a Memorandum of Understanding between the courts. The DHHS in Victoria and the Family Court have established a Protocol and Memorandum of Understanding which was signed in 1995. This may be instructive in developing similar protocols with the Magistrates' Court.[2]

[2] The Protocol and further information can be found on the DHHS website: http://www.DHHS.vic.gov.au/cpmanual/legal-processes/family-court-federal-magistrates-court/1345-family-court-protocols-and-memorandum-of-understanding-with-child-protection/3

Liaison officers

The current pilot based at Melbourne and Dandenong Family/Federal Circuit Courts places a DHHS family law liaison officer at court to provide information to parties and the court in relation to child protection interventions. The feedback from our lawyers is that the pilot works well in bridging the information gap and facilitates effective advice and assistance to parties where child protection is involved. A similar pilot could be introduced in the Magistrates' Court to assist court staff and lawyers in obtaining information regarding child protection involvement. DHHS are currently evaluating the success of the pilot and it may be useful for the Royal Commission to have access to the evaluation report.

Recommendations:

1. **State and Federal Government jointly fund the development of a central database of Family Court, Magistrates' Court and Children's Court orders.**
2. **The development of information sharing protocols and Memorandums of Understanding between DHHS, the Magistrates' Court and Family Courts.**
3. **The Magistrates' Court work with DHHS to develop and implement a pilot program that places a DHHS liaison officer at the Magistrates' Court in the family violence list.**

Exercise of family law powers in the Magistrates' Court

There are a number of provisions in both the *Family Law Act* 1975 (FLA) and the *Family Violence Protection Act* 2008 (FVPA) which seek to bridge the jurisdictional divide in family law matters involving family violence and to address the gaps and inconsistencies that can commonly arise when these related issues are determined in different courts. These provisions are contained in Division 11 of the FLA, and Division 5 of the FVPA.

The key section of Division 11 of the FLA is the power under section 68R of state courts to 'revive, vary, discharge or suspend' FLA orders that expose a person, including a child, to violence. The s68R powers are complemented in the FVPA by a range of provisions that direct magistrates as to how to deal with arrangements for child contact.

Current gaps:

Limited exercise of family law powers by Magistrates

The primary issue of concern in the application of these provisions is a lack of consistency in how Magistrates deal with family law issues in family violence proceedings. The reluctance to address family law issues amongst some Magistrates and practitioners, particularly those who do not have a background in family law, is an issue that has been raised in previous inquiries.

This reluctance may be due to a number of factors including:

- the complexity of the provisions and uncertainty about some aspects of both the FLA and FVPA provisions;
- a lack of time in busy family violence lists for Magistrates to adequately deal with issues related to parenting arrangements;
- lack of family law expertise of some Magistrates and
- inadequacy of the 21 day time limit applying to s68R variations in interim family violence matters.

There are a number of potential Implications of this "hands off" approach to family law issues. A culture of deference to FLA orders can result in Magistrates referring applicants to the Federal Circuit Court for matters that could be dealt with by the lower court. While we support the principle that the specialist family law jurisdiction is best placed to make orders relating to children this results in a "revolving door" for women seeking protection, and the stress, cost and potential for re-traumatisation that flows from constant court appearances.

Pressure to negotiate parenting agreements

Where there are no FLA orders in force, women can be pressured by Magistrates and legal practitioners to negotiate child arrangements with the perpetrator while at court. In some instances "notations" on the court file relating to the agreement are made. We have heard of Magistrates refusing to make a decision in relation to the intervention order until a parenting plan has been negotiated.

We believe it is not appropriate for parties to be pressured into negotiation a parenting agreement at court during an intervention proceeding. The stress, trauma and power imbalance that can occur in this setting can lead to women being pressured into agreeing to arrangements that put their safety, and that of their children, at risk. While parenting plan is not legally enforceable, its impact in subsequent family law proceedings is significant.

21 day time limit is insufficient

Section 68T of the FLA provides a 21 day time limit for suspension of family law orders or parenting agreements. The section does not make clear whether the Magistrates' Court has the

power to make a further order to suspend upon the expiry of the 21 days. Our view is that, read in conjunction with section 68R, the court **does not** have the power to make a further order under 68R.

Case study

The last time Angela was at the Magistrates' Court, the Magistrate read through the Federal Circuit Court orders and stated that it was too dangerous to allow the children to spend time with their father. The orders were suspended and Angela was told to make an application to the Federal Circuit Court to change the conditions that her ex-husband only spend supervised time with the children.

She went to the court the same days as her Magistrates' Court hearing and made the application. The application is listed for hearing in six weeks at the Federal Circuit Court. The 21 day suspension of the orders has now expired. As Angela is not allowing her ex-husband to see the children without supervision she is at risk of a contravention application.

This case study demonstrates some of the difficulties for victims who have had orders suspended through the exercise of the section 68R power. The burden once again falls on the victim to make an application in a separate jurisdiction as a matter of urgency. Additionally it is the victim that is contravening the court orders when the 21 days expires.

The ALRC, in its report, recommended that the 21-day limit be repealed, and that any variation should have effect until the date specified in the order, the interim intervention order expires or until further order. This recommendation has not been implemented[3].

[3] Recommendations 16-5

Recommendations:

1. **The Judicial College of Victoria develop continuing professional development modules for Magistrates to strengthen understanding of family law, intersectional issues with family violence.**

   We recognise that the recently developed Family Law Bench Book may go some way towards supporting improved engagement with family law issues.

2. **Judicial appointments include Magistrates that have a background in family law and family violence.**

3. **The Magistrates' Court develop a practice direction restricting parties from negotiating parenting agreements at court during intervention order hearings.**

4. **Section 68R, S & T of the FLA be comprehensively reviewed and redrafted by the Federal Attorney General's Department.**

5. **The 21 day time limit in section 68T be repealed.**

6. **A process be established between the Magistrates' Court and Family Court registries providing that a section 68R suspension order trigger an application in the Federal Circuit Court for variation of a parenting agreement/order.**

PILOTING A "ONE FAMILY, ONE COURT" MODEL

We support the development of a court model piloted in the Magistrates' Court that is based on a "one family, one court" model.

Rather than proposing a model in our submission we have highlighted some of the key elements and considerations that should inform the development of a new court model.

Recommendations:

We recommend that the Department of Justice and Regulationresearch and develop a "one family, one court" model, engaging in broad consultation with stakeholders and family law / family violence experts. The model should then be piloted and comprehensively evaluated before being expanded.

The Royal Commission should have regard to comparative models, particularly the New York, Integrated Domestic Violence ("IDV) courts. There are a number of elements of the one court model that have value and could be built in to a model:

Dedicated Judge: A single judge presides over cases from post-arraignment through sentencing and compliance. This practice improves decision-making and ensures consistent and efficient case handling.

On-going Monitoring: Intensive judicial supervision of these cases enables the court to hold offenders accountable by promoting compliance with orders of protection and other court mandates, such as program attendance, and to swiftly respond to violations.

Resource Coordinator: A resource coordinator collects and prepares offender and victim information for the judge, holds agencies accountable for accurate and prompt reporting, and is the court's primary liaison with the community.

On-Site Victim Advocate: The on-site victim advocate serves as primary linkage to services; creates safety plans, and coordinates housing, counseling, as well as other social services; and provides victims with information about criminal proceedings, and special conditions contained within their orders of protection.

Coordinated Community Response: A coordinated community response involves increased information sharing, communication and coordination among criminal justice agencies and community-based social services; a consistent and collaborative response to domestic violence; and more opportunities for continued education and training on domestic violence and the courts.

Summary provided by the Centre for Court Innovation
http://www.courtinnovation.org/project/domestic-violence-courts

Objectives of a "one family, one court" model

In the establishment of a one court model such as this, it is essential that there be clear objectives that are legislated, similar to the objectives of the FVPA. The objectives of the model should be primarily to consider and determine multi-jurisdictional legal issues within a family violence framework – where risk to and safety of victims and their children are the primary consideration.

This is important because there are a number of competing considerations and decision-making frameworks across the different jurisdictions. For example, the family law decision-making framework is premised on "the best interests of the child". Similarly the child protection framework focusses on the safety of the child – in some instances to the detriment of the mother who may themselves be a victim of family violence.

Which legal issues should a court determine?

We recognise that victims and respondents of family violence face multiple and intersectional legal issues including:

- criminal charges
- intervention order proceedings
- victims of crime compensation claims
- family law proceedings
- child protection involvement/proceedings
- tenancy/public housing legal issues and VCAT proceedings, and
- debt and infringements arising from a violent relationship.

The New York IDV model requires parties to have a criminal family violence case as well as family court and/or matrimonial case. Minor criminal matters can be heard (misdemeanours and felony matters) as well as child abuse and neglect matters.

Eligibility criteria will need to be developed to identify which areas of law would trigger eligibility for the one court model. Further to this, consideration will need to be given to how a Magistrate will be able to determine issues of law that sit across multiple jurisdictions.

We would support a court model that had jurisdiction to determine any of the issues that we have listed above. For the women that we see, tenancy and public housing are an important consideration at the time of a family violence incident. Victims identify concerns regarding breaking of a lease or fear of consequences in the public housing system. This can be a key consideration for victims in decision-making regarding an intervention order and more broadly, whether to leave a violent relationship.

Similarly, there is value in determining victims of crime compensation claims in the one court, given that the Victims of Crime Assistance (VOCA) Tribunal currently sits in the Magistrates' Court and is presided over by a Magistrate.

A subset consideration with respect to family law matters is which family law issues should be determined in a one court model. The family law issues that may arise in a particular matter may include divorce, division of the property pool, spousal maintenance, children's arrangements and paternity issues.

Magistrates currently have the power to make final parenting orders by consent or interim orders (where the matter is contested) because of their original family law jurisdiction.

Consideration will need to be given to whether the current powers in section 68R should be expanded and whether a one court model should make final family law orders rather than just interim orders or orders made by consent.

We would support a court model that also allows for determination of small property pool claims (where the property pool is, for example, less than $50,000). The reason for enabling a one court model to determine small property pool claims is that for women that experience significant disadvantage, the cost of pursuing a family court case for a car or access to a bank account with a small pool of savings is simply not realistic. Yet, access to a small amount of money or a car may well be critical to their recovery (particularly their financial recovery) from family violence.

Opt in or ordered by the court?

Consideration will need to be given to whether parties have a choice to opt into the model or whether the decision is made by a Magistrate after a court assessment and screening process. We support the right of victims to make well-informed decisions regarding their matter however we understand the constraints in having both parties agree during a time when emotions are elevated and victims are at risk.

Expert evidence

The development of a model must consider what expert evidence will be relied upon in making decisions regarding specific legal issues.

For example, in the family law jurisdiction, independent children's lawyers and family consultants provide reports to the court to inform the court's decision-making. We have some concerns regarding the reliance of such reports, given that family violence expertise does not necessarily inform these reports. We have outlined some of our concerns in more detail below in the section *Strengthening the family violence framework in family law.*

We would recommend consideration be given to creating a new role of an independent family violence expert in a one court model. The expert could draw on the evidence and reports relevant to the child protection or family law cases and synthesis these into a report that

includes recommendations for care of children as well safety and protection of victims. The benefit of an independent expert that specialises in family violence is that it overcomes some of the limitations of family consultants, child protection experts and ICLs who do not operate within a decision-making framework that is informed by an understanding of family violence.

Mediation

There is benefit in considering how mediation can be incorporated into a one court model. Though there is a widespread belief that mediation in family violence cases is not appropriate we believe that a well supported and safe mediation process, with expert lawyers and mediators who have a sound understanding of family violence and family law, can be an empowering process for a victim. Simply referring a matter into a complex court system rarely results in a good outcome for victims.

Safe and supported mediation opportunities do currently exist, for example Victoria Legal Aid's Family Dispute Resolution Service (VLA FDR service)[4]. We have provided more detailed information at Appendix B of how parties in family violence cases can be safely and effectively be supported in the mediation process. WLSV provides legal representation in mediation through both the VLA FDR service as well as through a partnership with the Melbourne Family Relationship Centre and FMC Mediation Centre.

In a one court model, it is important that the Magistrate be satisfied that a parenting agreement has been reached without undue pressure being placed on a party. This could be achieved through a certification process with the mediator.

Specialist legal representatives

We support a one court model that provides access to lawyers This should not be a duty lawyer service but a legally aided scheme providing that links parties with lawyers that are experts in family violence, child protection and family law.

Specialist Magistrates

A one court model requires specialisation and expertise in decision-making. We recommend a pool of specialist Magistrates be part of the one court model.

Decision-making framework

We believe that a one court model would benefit from a specialised decision making framework to determine family law and child protection issues. In particular we have concerns regarding the current child protection framework where family violence is not at the centre of decision-making. In this framework, a woman may be a "non-protective parent" if she is a victim of family violence and unable to remove her children from a dangerous family situation. On the flip side, a

[4] More information regarding the VLA FDR service can be found on the VLA website: https://www.legalaid.vic.gov.au/get-legal-services-and-advice/family-dispute-resolution-victoria-legal-aid

woman may be deemed to be a "protective parent" if she is supportive of a police application, which then limits the involvement of DHHS. We have similar concerns regarding the family law decision-making framework that has a complicated formula for determining what is in the child's best interests.

STRENGTHENING FAMILY VIOLENCE FRAMEWORKS IN THE FAMILY LAW SYSTEM

The ARLC's report identified the lack of accessibility, fairness and effectiveness in the family law system when dealing with family violence matters as a significant issue. This has also been recognised by the Commonwealth Government who commissioned a series of reports to consider how the family law system could better respond to allegations of family violence and child abuse.[5]

In order to keep women and children safe, the family law system must place safety and risk at the centre of all practice and decision-making. Currently barriers within the system place the lives of vulnerable children at risk and can re–traumatise women who have been victims of family violence. In order to create a system that places children's safety at its centre, reform must occur at a number of levels:

- Cultural norms in the family law system must shift towards a more trauma informed approach underpinned by understanding of family violence.
- Policies and practices of all professionals must reflect best practice in supporting and prioritising the safety of victims of family violence (both women and children).
- Knowledge of the dynamics of family violence and its consequences must be part of the ongoing professional development of all professionals that work in the family law system.
- A risk assessment and risk management framework and practice must inform the decision-making and practice of all professionals.
- The *Family Law Act* must move away from the emphasis on "equal" in relation to parental responsibility and child arrangements.

We recommend that the Royal Commission make recommendations regarding the family law system to improve the experience of family violence victims. We have identified a number of areas in the family law system that could be strengthened to be more effective in responding to cases where allegations of family violence exist.

We recognise that a number of legislative changes came into effect in 2012 to improve the family law response to family violence (see Appendix C for a summary of the changes).

[5] *Evaluation of the 2006 family law reforms,* Australian Institute of Family Studies (AIFS), *Family Courts Violence Review*, Professor Richard Chisholm AM and *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, Family Law Council.

Family consultants

Family consultants (also known as family report writers) provide expert evidence in family law proceedings formulating recommendations for the court with respect to children; for example providing recommendations on where a child should live, how decision making about the child should occur and how much time a child spends with each parent.

Family consultants are ordinarily social workers, psychologists or psychiatrists. Their recommendations carry significant weight in court and informs court decision making with respect to children's arrangement.

Despite the critical role that family consultants play in assessing risk to children, there is no formal process of accreditation, training or monitoring of family consultants.

In our experience, a lack of training in domestic violence and child abuse has led to the following issues in family law cases:

- Inappropriate processes, practices and procedures: Family consultants are not required to follow a particular format for interviewing children who have witnessed or been the victims of domestic violence. This can lead to increased trauma for children and limited disclosure of abuse. We have cases of family consultants requesting both parents attend an interview at their offices at the same time, despite the existence of an intervention order illustrating a lack of risk assessment and safety planning in high risk cases.
- Minimizing or not believing a domestic violence victim's story: Without a sound understanding of domestic violence, there is a risk that allegations of domestic violence may be dismissed or doubted. In some instances, victims' concerns have been described as being paranoid, an over-reaction or malicious. This can lead to unsafe decisions about contact and parenting arrangements. For example, we have reports by family consultants recommending that a parent have unsupervised access to a child despite the other parent raising concerns about past domestic violence and future risk to the child.

More problematically, apart from challenging their evidence in court, there is no complaints mechanism, monitoring or oversight of poor practice. The *Australian Association of Social Workers (AASW)* released a publication confirming that there is no independent complaints process for social workers who act as family consultants (see Appendix D for the AASW publication).

In 2015, the Family Court released the Australian Standards of Practice for Family Assessments and Reporting - February 2015, which we consider to be a good first step, however these standards are not binding on family consultants.

We believe that there is considerable scope for an accreditation scheme to be introduced to oversee training and specialization of family consultants as well as undertaking ongoing monitoring and evaluation and managing a formal complaints process.

An accreditation scheme could be modelled on the system that applies to Family Dispute Resolution Practitioners. The Family Law (Family Dispute Resolution Practitioner) Regulations 2008 (Cth) (the FDR Regulations) include competency-based qualifications and outlines three different pathways to accreditation.

Recommendations:

1. **The Australian Institute of Family Studies be provided with a reference to undertake research into the practices and assessments of family consultants**.
2. **The Federal Government, in consultation with family violence and family law experts develop an accreditation process and minimum standards for family consultants.**
3. **The Federal Government establish an oversight mechanism and complaints process to monitor and review the conduct of family consultants.**

Family violence victims directly cross-examined in family law hearings

In family law proceedings a perpetrator of family violence can directly cross-examine a victim. The *Family Law Act 1975* does not contain any specific protections for victims of family violence.

For women who are victims of family violence, who have been raped, assaulted or psychologically abused by their former partner, appearing unrepresented in a family law trial is a frightening prospect. The experience of direct-cross-examination by an abusive ex-partner can result in re-traumatization 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. Under the Family Law Act, the court can stop a witness from answering a question that is regarded as offensive, abusive or humiliating. However, if the court believes that it is “in the interests of justice” the question must be answered. The court is bound by its obligation to provide procedural fairness to both parties in a trial which makes it difficult to deny a party the right to cross-examine.

We believe that it is essential for victims of family violence to be protected from further re-traumatisation in family law proceedings. As such, it is important that the *Family Law Act* include specific protections for vulnerable witnesses to stop direct cross-examination by an abusive ex-partner in a family law proceeding.

In Victoria, in criminal law proceedings for sexual offences and in family violence intervention order proceedings, respondents and accused people are prohibited from directly cross-examining a victim, a victim’s family or any other person that the court believes requires protection. The court can order that a person obtain legal representation for the trial or final

hearing. If that person is unable to organize legal representation, the court can order that VLA represent that person for the purposes of cross-examination. VLA must provide representation to a respondent or accused person if the court orders them to do so.

Recommendation:

The Federal Government amend the *Family Law Act* to include legislative protections for "vulnerable witnesses" such as family violence victims from direct cross-examination by a perpetrator of family violence.

Access to legal representation for family violence victims in the family law system

We believe that there is a growing number of women who are family violence victims who are falling through the ever growing cracks of the legal aid system. Women find themselves unable to access legal aid due to the narrowing of the legal aid family law guidelines and without the financial means to pay the fees of private family practitioners.

Over the last two decades, statistics suggest that roughly one third of litigants in the family law courts appear without a lawyer. The demographic dimensions of unrepresented litigants have not been more closely examined than to reveal that slightly more are male than female, that a disproportionate number come from a lower socio economic backgrounds and that the majority are Australian born. Indeed, the Productivity Commission has recently stated in its Access to Justice Arrangements Inquiry Report that "overall, the data on the nature and impacts of self-representation are patchy".

Little to no research exists around the particular make up of female unrepresented litigants, their demographics and the specific and complex causes and effects of the experience in court for these unrepresented women.

Recommendations:

1. **The Australian Institute of Family Studies be provided with a reference to undertake research into the experience of unrepresented parties in family law proceedings,** with a specific focus on parties that experience disadvantaged (eg family violence victims, people with a disability, people from culturally and linguistically diverse communities and Aboriginal and Torres Strait Islanders)
2. **The Federal Government increase funding to legal aid commissions specifically in the area of family law.**
3. **VLA's funding guidelines in family law are amended to promote greater access to legal aid for women who are victims of family violence.**