COMMUNITY LEGAL
WESTERN AUSTRALIA

Submission to the Joint Select Committee on Australia's Family Law System

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Submission from Community Legal WA

Community Legal WA
Claisebrook Lotteries House
33 Moore Street
East Perth WA 6000

T: 08 9221 9322
E: administrator@communitylegalwa.org.au

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About Community Legal WA

Community Legal WA (CLWA) is the peak organisation representing and supporting 28 Community Legal Centres (CLCs) operating in Western Australia.

Located throughout the state, CLCs are independent, non-profit organisations which provide legal services to disadvantaged and vulnerable people or those on low incomes who are ineligible for legal aid. There are existing CLCs that are Aboriginal Community controlled and managed; specialised for CALD communities; and for people with disabilities.

A CLC is defined as an organisation that:

- Is *independent* from government, commercial and professional bodies.
- Is *not for profit, community based*, and has goals and priorities established in response to the needs of its community (geographic / specialist).
- *Provides client centred legal and/or related services* through a range of strategies.
- Develops effective ways of *informing community members* of their legal rights and responsibilities.
- *Provides disadvantaged members of the community*, and/or the public generally in public interest matters, with *access to legal and related information and/or services*.
- *Advocates* for the development of laws, administrative practices and a legal justice system which are fair, just and accessible to all.
- Develops and maintains *close links with its community* to ensure that areas of unmet legal need are detected, and appropriate services developed.
- Has developed and continues to develop management and operational structures which enable the *involvement of the community* or communities it serves.

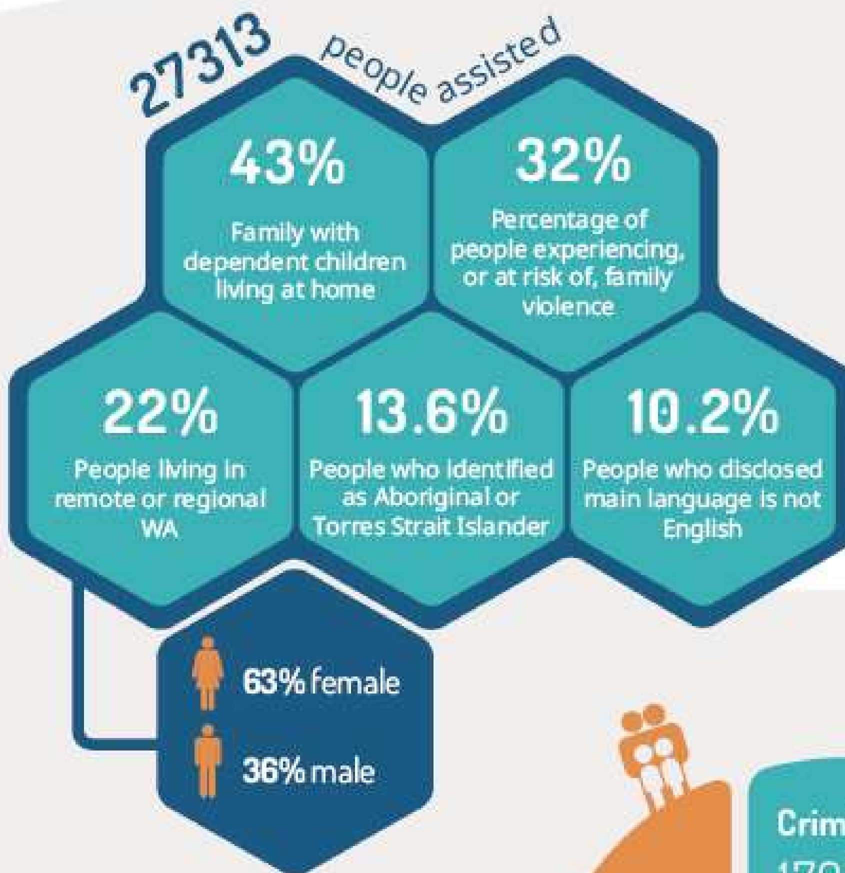
Legal Assistance Services is a generic term used in this submission to encompass CLCs, Legal Aid WA (LAWA), Family Violence Prevention Legal Services (FVPLS) and the Aboriginal Legal Service of WA (ALSWA).

As a sector we see firsthand the impact of existing laws, policies and practices on people and communities.

The work of community legal centres

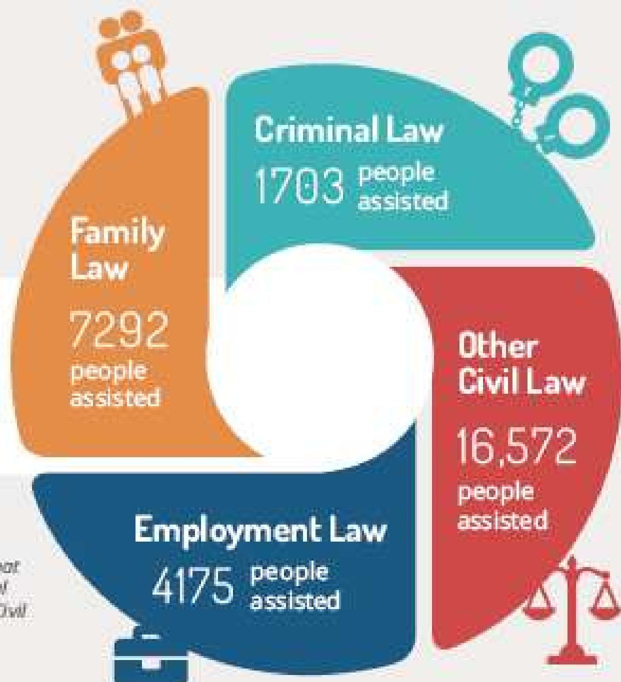
Community Legal WA is the peak body representing community legal centres in Western Australia. This state-wide data snapshot provides an overview of the work of community legal centres in 2018-19. There are 28 community legal centres in Western Australia. This snapshot is based on the data from 26 of those centres.

Note: All statistics in this infographic relate to the 2018/19 financial year. This data is collated from 26 community legal centres in WA and does not include Family Violence Prevention Legal Services.



The people we help

The areas of Law in which we provide help



#The total number of people assisted is slightly higher than the total number of people helped. This is due to the fact that one individual person may have been assisted with two legal matters during the period, e.g. a Family Law matter and a Civil Law matter.

The services we provided in 2018-19

cases opened during the financial year.

"...there is a central connection between these areas of law, and fundamental human wellbeing. They relate closely to activities and characteristics that enable social wellbeing including our familial relationships, employment, the capacity to reside in the country of our choice, the dwelling in which we live and the capacity to afford fundamental rights and services as basic as food."

— former Chief Justice Wayne Martin, 2016

Top 6 legal problems

Claisebrook Lotteries House, 33 Moore Street, East Perth WA 6000, T: 08 9221 9322 W: www.communitylegalwa.org.au ABN: 89 5741 5311

Introduction

Terminology

We refer throughout our submission to victim-survivors of family and domestic violence (FDV) as those individuals who have been subject to coercive controlling behaviour as defined in the Family Law Act.

Abbreviations

ALRC - Australian Law Reform Commission

ATSI – Australians of Aboriginal and Torres Strait Islander origin who may also prefer the term “First nations Australians”.

CLCA – Community Legal Centres Australia

FDV – Family and Domestic Violence

NFVPLS - National Family Violence Prevention Legal Services

WLSA – Women’s Legal Services Australia

Our work in FDV

In 2018-19, 43% of all clients of CLC’s in WA were families with dependent children, with 32% of all clients experiencing or at risk of FDV. Many of these are within high risk groups[1]. They cannot afford lawyers nor access grants of legal aid.

WA has a high level of family violence and data reveals significant increases in reported family violence assault in WA.[2] Whilst the complexity of FDV cases mean that victim-survivors often present with problems in several areas of law, the majority require assistance in family law and/or child protection, and tenancy. FDV and family law needs are the most significant demand pressures on CLCs[3]. We know that this is not unique to WA. Our concern is to ensure that all clients within the family law system, particularly FDV victim-survivors, always receive a fair and expedient way to address their issues with safety a paramount regard.

CLC data from 2017/18 to 2018/19 show a 48% increase in Court and Tribunal Representation for those clients experiencing family and domestic violence.

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[1] 63% of all CLC clients in WA are women. 43% are from families with dependent children

[2] During the 2018-19 financial year, 65,609 family and domestic violence-related tasks were logged by WA Police (an average of 180 tasks a day) in which family or domestic violence was a factor; 47,732 reported family and domestic violence incidents were investigated by police and 22,142 police orders were issued to protect victims of family violence.

[3] From 2017/18 to 2018/19 there was a 98% increase 48% increase in Court and Tribunal Representation for those clients experiencing family and domestic violence (Family Law). In 2015 were 5 CLCs who received specific family and domestic violence (FDV) funding. In 2019, all CLCs now provide family law legal assistance.

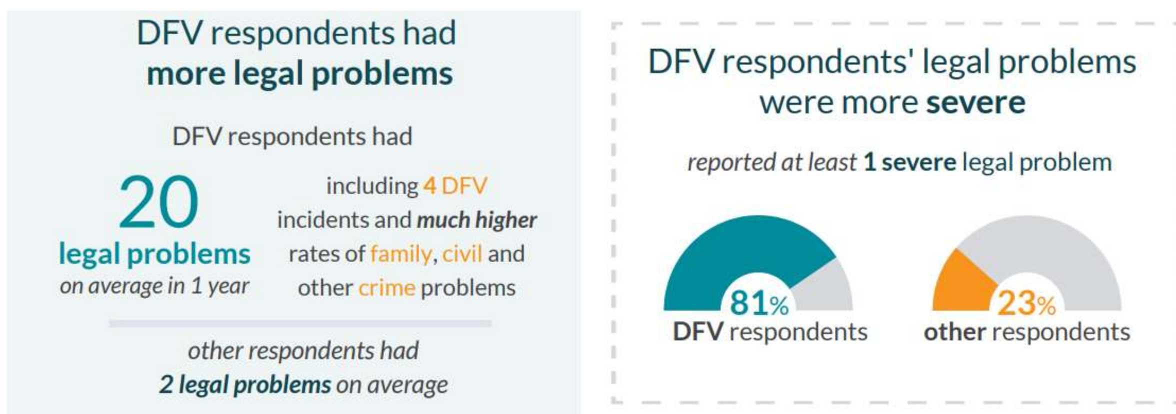
The CLC sector has experienced significant increases in demand for legal assistance services as a result of greater awareness of FDV and from policy initiatives like the Violence Restraining Orders (VROs).

FDV is rarely the only legal issue

Although clients typically come to legal assistance services seeking assistance with one issue, research (and experience) has shown that most clients have a range of problems, some of which may have a legal solution and some which may not.

The Law and Justice Foundation of NSW has recently undertaken a significant assessment of FDV data from respondents to the Legal Australia-Wide (LAW) Survey.

DFV respondents "were 10 times more likely than others to experience legal problems other than domestic violence, including a wide range of family, civil and crime problems."



Infographic: Legal and broader needs of people experiencing Domestic and Family Violence.
Source: Coumarelos, C 2019, Quantifying the legal and broader life impacts of domestic and family violence, Justice issues paper 32, Law and Justice Foundation of NSW, Sydney.

http://www.lawfoundation.net.au/ljf/site/templates/pdf/$file/LJF_DFV_infographic.pdf

Guiding Principles

We refer to the submission made by the Women's Legal Services Australia (WLSA) endorsed by Community Legal WA (CLWA) to the Australian Law Reform Commission in relation to their report on the family law system. CLWA supports the recommendations in that submission.[4]

[4] http://www.wlsa.org.au/uploads/submission-resources/WLSA_submission_to_ALRC_Review_of_the_Family_Law_System_%28fa%29.pdf

We agree that the following principles should guide any change to the family law system:

1. Ensuring safety;
2. Accessibility and engagement; and,
3. Fairness and recognition of diversity.

We believe that to adequately protect families and children, the family law system must prioritise safety and risk, putting this at the centre of practice and decision-making. 'Safety' is the right to be free from coercive and controlling behaviour and includes physical safety, psychological, emotional, financial and other recognised forms of abuse. Safety also includes cultural safety and protection for litigants identifying as LGBTQI+ or who are physically challenged.

We acknowledge that both men and women can be perpetrators of violence, and that so called 'situational couple violence' may exist. Coercive control, however, is usually perpetrated by men against women. Most deaths in FDV cases are of women and children at the hands of men. Women continue to be the majority of caregivers for children. Therefore, that family law and other systems that involve FDV victims must protect women and children. This includes (as an integral part) the provision of adequate support services for men, both as victims and perpetrators.

We support the recommendations of the National Family Violence Prevention Legal Services Forum Report, September 2017, [5] that reforms directly related to Aboriginal and Torres Strait Islander people should be Aboriginal and Torres Strait Islander led and co-designed. We note that this requires recognition of the intergenerational trauma that continues in our communities today as well as the very much higher likelihood that ATSI women will be victim-survivors of FDV.[6]

We question the need for another review after the findings of the Australian Law Reform Commission (ALRC) in their May 2019 review.

We are aware of WLSA's Safety First Plan[7] released by and endorsed by Rosie Batty in October 2019. The Plan includes five recommendations for reforming the family law system based on research, evidence and key recommendations from previous family law inquiries. The plan outlines 5 steps towards a family law system that will keep women and children safe, which are:

- Strengthen family violence response in the family law system
- Provide effective legal help for the most disadvantaged
- Ensure family law professionals have real understanding of family violence
- Increase access to safe dispute resolution models

[5] https://www.nationalfvpls.org/images/files/SNAICC-NATSILS-NFVPLS_Strong_Families_Safe_Kids-Sep_2017.pdf
[6] Ibid page 5
[7] http://www.wlsa.org.au/uploads/campaign-resources/Safety_First_in_Family_Law_Plan.pdf

- Overcome the gaps between the family law, family violence and child protection systems

The Safety First Plan outlines practical measures through which each of these steps can be achieved. These reforms can begin right now, with great benefit to the community. We would prefer to see resources utilised in their implementation than on another review.

Finally, we are mindful in making this submission that WA has its own state Family Court. We maintain that the principles we espouse in addressing the terms of reference should apply in any family law system regardless of its jurisdictional base.

We now address the Terms of Reference.

Terms of Reference

a) Ongoing issues and further improvements relating to the interaction and information sharing between the family law system and state and territory child protection systems, and family and domestic violence jurisdictions, including:

   i. the process, and evidential and legal standards and onuses of proof, in relation to the granting of domestic violence orders and apprehended violence orders, and

   ii. the visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings.

We refer to the submission to this inquiry by the Law Council of Australia (LCA Submission). We agree with the LCA that a full examination of these issues is not possible without an examination of whether the proposed bills to merge the Family and Federal Courts (Merger Bills) are fit for purpose, will achieve their purported goals and should be passed by the Parliament; how the Merger Bills interact with recommendations and concerns of the ALRC Report; and, how these Merger Bills will impact ongoing issues relating to the interaction and information sharing between the family law system, state and territory child protection systems and FDV jurisdictions (including impacts on and risks to children, families and victims of family violence).

We also note that the ALRC carried out an extensive analysis of the history and efficacy of amalgamating jurisdiction in their Report at Chapter 4[8]. However, any measures that could overcome gaps and reduce duplication between the family law, family violence and child protection systems are welcomed. We note the recommendation of the ALRC in this respect:

[8] https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135_final_report_web-min_12_optimized_1_0.pdf

Recommendation 1: The Australian Government should consider options to establish state and territory family courts in all states and territories, to exercise jurisdiction concurrently under the Family Law Act 1975 (Cth), as well as state and territory child protection and family violence jurisdiction, whilst also considering the most efficient manner to eventually abolish first instance federal family courts.

We note that significant work has already been undertaken in WA with regard to the latter through a mandatory review of the Children and Community Services Act 2004 (WA) in 2018. That review included an examination of intersections between child protection proceedings and those in the Family Court of Western Australia and how legislative changes could be made to further enhance the integration of these proceedings:[9]

Some terms of reference related specifically to opportunities for enhanced collaboration and information sharing and identifying any data limitations. This followed several reforms welcomed by the courts resulting in significant benefits to children and families, and increased support from stakeholders. [10]

WA is unique in having a state Family Court, theoretically all family law and child protection matters can be dealt with by a single court. That this has not happened despite numerous recommendations for change demonstrates the challenges involved. That "*intersection cases" (involving both family and child protection proceedings within one matter) involve duplication of resources, processes and documentation and often result in delays, confusion and frustration for families*[11] had been well documented prior to the WA review. The review found a single court to be an 'ideal model' (Recommendation 27) and the Family Court to be the most ideal 'host' court.

A consideration through the application of wider resources of how increased integration might happen is welcomed. Any situation that results in a reduction of duplication, red tape and potential re-traumatisation of FDV victims through multiple recounting of facts is beneficial, if safety is maintained as a paramount concern and subject to previous caveats expressed regarding the Merger Bills.

b) the appropriateness of family court powers to ensure parties in family law proceedings provide truthful and complete evidence, and the ability of the court to make orders for non-compliance and the efficacy of the enforcement of such orders

In FDV situations, the risk of less than accurate evidence being provided can be great. The experience of our member CLCs is that perpetrator litigants may use court

[9] https://www.dcp.wa.gov.au/Organisation/Documents/Statutory%20Review%20of%20the%20Children%20and%20Community%20Services%20Act%202004.pdf

[10] Ibid page 86

[11] Ibid page 84

proceedings as an opportunity to embarrass or harass the victim-survivor or to reassert their power and control over the victim-survivor, who may be too intimidated or afraid of consequences to relate the true facts. This can severely compromise a victim's evidence and can even pressure them into withdrawing from proceedings.

These instances greatly exceed any instances where victims (usually described as women) supposedly *"lie to set up the perpetrator."* To ignore this reality and fail to adequately provide for the safety of victim survivors will encourage distortion of facts and places victims, mainly women and children, at great risk. For this reason, any measures that protect victims and provide an environment where they feel safe enough for open and frank disclosure is vitally important.

The amendments to the Family Law Act passed in 2018[12] that prevent perpetrators of family violence from questioning their victim during cross-examination in family law proceedings were a welcome step in the right direction. We support all further recommendations of the ALRAC that would shift culture and practice towards a greater focus on safety and risk to women and children.

We also believe that legal representation is highly relevant to this issue. Participants in family Court proceedings ideally are legally represented, and receive early, accurate and comprehensive legal advice. Many litigants in the family law system are unrepresented. [13] Lack of representation greatly increases the time spent on cases and may facilitate multiple delays and adjournments. The '*do it yourself*' kits produced by the Family Court do not prevent self-represented litigants from often failing to identify a known cause of action in their pleadings.

Some believe that Judges extend too much leniency to self-represented litigants and may take the line of least resistance or let the self-represented litigant *'unload'*[14]*. A*ll these factors further add to a reduced efficacy of court processes, understanding of orders and carrying out of orders. Where enforcement is needed, a new range of explanations and possible misunderstandings result in more judicial time and the potential for unwittingly contravening orders.

Apart from reducing efficiencies, the financial and social cost of the above to the community is considerable. The only way to avoid this is to adequately fund services to litigants who cannot afford a private solicitor and, in particular, to fund legal advice in this area from specialists who practice in this area, are concerned

[12] Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (Cth) as passed by Parliament on 5 December 2018. The provisions in the Cross-examination Act commenced on 10 March 2019 and apply to cross-examinations from 10 September 2019

[13] Final report of the Justice Project, Law Council of Australia, 2018 https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20_%20Final%20Report%20in%20full.pdf p.27

[14] See; https://www.equilaw.com.au/perils-representing-family-court/

specifically with FDV vulnerable groups or are situated in high FDV risk geographical areas.[15]

c) beyond the proposed merger of the Family Court and the Federal Circuit Court any other reform that may be needed to the family law and the current structure of the Family Court and the Federal Circuit Court.

CLWA supports the ALC in their submission to this enquiry in all aspects of when they say despite the fact that "*systemic failures plague the system*" the proposed merger "*should be abandoned in favour of careful consideration of other proposals, including the ALRC's Recommendation 1 and the model proposed by the Semple Report*." We strongly agree with the ALC that: "*any proposal to merge the Family Court and Federal Circuit Court will not fix the problems. It will only hurt children, families and victims of family violence in need of the courts' assistance*".

We also support WLSA's recent open letter to the Australian Government Attorney General which emphasises the inadvisability of merging the Family Court and Federal Courts of Australia and the potential loss of specialisation that would result.[16]

Otherwise CLWA members would welcome:

- Amendments to Section 60CC of the *Family Law Act 1975* (Cth) as recommended by the ALRC [see response to TOR (f)]
- Further consultations on alternative models of structural, holistic reform to benefit children, families and victims-survivors of family violence. Greater integration with child protection systems [see TOR (a)] would be of particular value.

We agree with WLSA that any redevelopment of the family law system should also have a focus on accessibility, to include addressing issues of cost, delay, availability of services and funding for legal assistance. This also necessitates consideration of cultural competency and accessibility for people with disability, to ensure all people in our community have the opportunity for full access and engagement.[17]

We note the recommendation of the NVPLS Forum for adequate funding of culturally safe, Aboriginal and Torres Strait Islander community controlled specialist legal services to assist Aboriginal and Torres Strait Islander women, and victims-survivors of family violence in particular, through the family law system; those that recognise

[15] See National Domestic and Family Violence Benchbook at https://dfvbenchbook.aija.org.au/dynamics-of-domestic-and-family-violence/vulnerable-groups/

[16] http://www.wlsa.org.au/uploads/submission-resources/Letter_to_AG_re_concerns_about_family_court_merger_%28f_021219%29.pdf.

[17] http://www.wlsa.org.au/uploads/submission-resources/Letter_to_AG_re_concerns_about_family_court_merger_%28f_021219%29.pdf. Page 11

that FDV in the ATSI context encompasses a broader range of circumstances and behaviours that require a unique and specialised approach.[18]

d) the financial costs to families of family law proceedings, and options to reduce the financial impact, with particular focus on those instances where legal fees incurred by parties are disproportionate to the total property pool in dispute or are disproportionate to the objective level of complexity of parenting issues, and with consideration being given amongst other things to banning 'disappointment fees', and:
    i. capping total fees by reference to the total pool of assets in dispute, or any other regulatory option to prevent disproportionate legal fees being charged in family law matters, and
    ii. any mechanisms to improve the timely, efficient and effective resolution of property disputes in family law proceedings;

We are extremely concerned about the cost of private lawyers to disadvantaged litigants and the resulting difficulties that result from unrepresented litigants [see response to Term of Reference (d)]. It is widely recognised that resolving family disputes through the courts is costly. We note the ALRC report that:

> *"In 2017, over half (52%) of applicants for parenting orders were unrepresented, with 25% of applicants for financial orders and 29% of applicants for parenting and financial orders self-represented."* and that delays between 2016 and 2017 increased by 11%.[19]

The Australian Productivity Commission in 2014, having noted the value of legal assistance services in preventing or reducing the escalation of legal problems and, in turn, reducing costs to the justice system and taxpayers, estimated that additional funding from the Australian and state and territory governments of around $200 million a year was needed to maintain frontline legal assistance services that have a demonstrated benefit to the community. This issue continues to require urgent action by Government. [20]

Finally, in relation to family property matters, we note that Women's Legal Service Victoria (WLSV) report: Small Claims, Large Battles: Achieving economic equality in the family law system[21] published in March 2018. The report makes 15

[18] https://www.nationalfvpls.org/images/files/SNAICC-NATSILS-NFVPLS_Strong_Families_Safe_Kids-Sep_2017.pdf @ p.6; Cripps, K., and Adams, M. (2014) 'Chapter 23: Indigenous family violence: Pathways forward'. In R. Walker, P. Dudgeon and H Milroy (eds) Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice, Canberra: Department of Prime Minister and Cabinet, p.405

[19] https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135_final_report_web-min_12_optimized_1_0.pdf

[20] https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf

[21] https://womenslegal.org.au/files/file/WLSV%20Small%20Claims,%20Large%20Battles%20Research%20Report%202018.pdf

recommendations for reform to improve access to fair property settlements for disadvantaged women. CLWA endorses these recommendations.

e) the effectiveness of the delivery of family law support services and family dispute resolution processes

The WLSA submission identified a number of issues regarding family court reports that are obtained to inform the Court, often at the request of ICL's. These included unaffordability, a lack of consistency, inadequate understanding of family violence, failure to properly consider cultural issues, lack of enforceability and lack of transparency about the reasons for reports. WLSA recommended the establishment of "*a national accreditation and monitoring scheme with mandatory training in family violence, child abuse and trauma informed practice, cultural competency and disability awareness.*"[22]

CLWA supports this proposal, and also endorses the NFVPLSF recommendation for engagement of Aboriginal and Torres Strait Islander Family Consultants concerning Cultural Reports/plans, Aboriginal and Torres Strait Islander Family Consultants, Aboriginal and Torres Strait Islander Liaison Officers and hearings processes.

CLWA agrees with WLSA that the Australian Government implement and fund a national legally assisted family dispute resolution program appropriate for family violence cases that is supported by specialist family violence and trauma-informed lawyers and family violence and trauma-informed FDR practitioners. The role out of this program should be preceded by a legal needs analysis, to inform the Australian Government as to the scope of the service required to meet legal need. We note the following in the ALRC Report:

- Expanded role of Family Court Consultants and adequate training [23]
- Statutory recognition of guidelines for ICL[24]
- The Australian Government should ensure the availability of Indigenous Liaison Officers in court registries where they are required[25].

f) the impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings;

The significant impacts on children exposed to family violence are well documented. Children's exposure to family violence cannot be isolated from the family violence perpetrated against their caregivers and that harm perpetrated against an adult is also harm perpetrated against a child.

[22] http://www.wlsa.org.au/uploads/submission-resources/WLSA_submission_to_ALRC_Review_of_the_Family_Law_System_%28fa%29.pdf
[23] *Ibid* (4) at 5.23
[24] *Ibid* (8) pp 368-371
[25] *Ibid* (8) pp 383 at 12.70

The paramount consideration that must be given to the safety of children and victim/survivors of FDV require that the '*broken*' Family Law System be addressed and we endorse the submission of the LCA in this regard. It is of overwhelming concern that *"chronic underfunding and under-resourcing by successive governments has resulted in case backlogs and long delays for families*". And that "*some families are having to wait three years, in some cases longer, to have their matters determined.*" Subject to the reservations expressed regarding implementation of the Merger Bills, any reforms that streamline and expedite proceedings so as to lead to a safe environment at the earliest opportunity are welcomed. This includes reducing the number of self-represented litigants.

Further to this we note WLSA's observation that: "*the attraction of shared parenting to violent men as a way to exert ongoing power and control and the well-entrenched community misunderstanding that equal shared parental responsibility means equal time.*"[26] The fostering of the likelihood of courts ordering equal parenting time in matters where FDV was prevalent caused WLSA to recommend removal of the presumption of equal shared parental responsibility and overall emphasis in the FLA on equal time and shared parenting. This is elaborated fully in the WLSA's submission[27] and we have nothing further to add.

We note all the recommendations in Chapter 5 of the ALRC Report, in which the ALRC recommends a number of amendments to Pt VII of the FLA to promote the best interests of the child in family law matters. .[28] These include amendments to the presumption of shared parental responsibility. All proposals in this Chapter should be used as a basis for discussion of the best provisions to support the wellbeing of children.

g) any issues arising for grandparent carers in family law matters and family law court proceedings

Some of our members have reported a significant increase in the number of grandparent carers in both family law and care and protection proceedings. Caring for children can have significant impacts upon grandparents, their family lives, stress levels and mental health. Necessary adjustments to financial situation can easily lead to financial disadvantage.

Grandparents are therefore vulnerable, and all our recommendations regarding safety first are extremely applicable. Grandparents may become embroiled in complex situations of FDV that involve several family 'factions' or members. Examples from our members of fathers and parental grandparents exerting coercion

[26] http://www.wlsa.org.au/uploads/submission-resources/WLSA_submission_to_ALRC_Review_of_the_Family_Law_System_%28fa%29.pdf

[27] http://www.wlsa.org.au/uploads/submission-resources/WLSA_submission_to_ALRC_Review_of_the_Family_Law_System_%28fa%29.pdf page 25

[28] *Ibid* (8) p.155 et seq.

and violence towards maternal grandparents who were caring for children via orders from either the Family Court of Children's Court of WA. All parties within the family law system require education about FDV and coercion in multi-generational settings. As grandparent care is more common in ATSI families, the response to these must be ATSI driven and owned initiatives.

The Australian Human Rights Commission submission to the Senate Standing Committees on Community Affairs Inquiry into Grandparents who take primary responsibility for raising their grandchildren[29] noted that Grandparents may well be reluctant to apply to the Family Court due to *"the high emotional and financial costs and (that it) can be traumatic for all family members. Because grandparents may be more likely to own assets, such as the family home, they may not qualify for legal aid*".

Many grandparents are of a generation that may be less likely to be computer literate or competent, so access issues are also of great importance especially in terms of resources and materials. There are other accessibility issues relating to the complexities that can present with joinder applications, further exacerbated by a potential large number of unrepresented litigants in one case; this again highlights the need for cultural competency in courts as regards ATSI litigants as extended family members are more likely to be borne or be joined as litigants.

h) any further avenues to improve the performance and monitoring of professionals involved in family law proceedings and the resolution of disputes, including agencies, family law practitioners, family law experts and report writers, the staff and judicial officers of the courts, and family dispute resolution practitioners.

We note Recommendation 2 of the LCA Submission that strongly parliamentarians be provided with FDV awareness training help them undertake their roles in this Inquiry and in considering any recommendations from this Inquiry.

We strongly support the WLSA's recommendation in their submission to the ALRC Review that "*all professionals working with Aboriginal and/or Torres Strait Islander clients must be culturally competent and undertake ongoing accreditation and training in cultural competency*"[30].

Furthermore, we support the concept of core competencies as proposed in the ALRC Discussion Paper[31] "*for all professionals working in the family law system and recognise the importance of ongoing training and experiences to meet core competencies*". In respect of this proposal, the ALRC Final Report[32] noted that many "*submissions supported professionals working in the family law system having competency and understanding of* (a range of) *topics including:*

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[29] https://www.humanrights.gov.au/sites/default/files/Comunity%20affairs%20reference%20committee%20-%20Grandparent%20Carers.pdf
[30] https://www.alrc.gov.au/wp-content/uploads/2019/08/family-law_340._womens_legal_service_nsw.pdf
[31] https://www.alrc.gov.au/wp-content/uploads/2019/08/dp86_review_of_the_family_law_system_4.pdf
[32] https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf

- *family violence;*
- *trauma-informed practice, including an understanding of the impacts of trauma on adults and children;*
- *child abuse, including child sexual abuse and neglect;*
- *the impact on children of exposure to ongoing conflict;*
- *cultural competency, in relation to LGBTIQ people, as well as Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse communities;*
- *the intersections and overlaps between the family law, family violence and child protection systems; and substance misuse and mental health issues.*"

We support this approach.

i) the potential usage of pre-nuptial agreements and their enforceability to minimise future property disputes

We are concerned that there is potential misuse of pre-nuptial agreements in FDV relationships and this will leave women and children more vulnerable. The case of Thorne v Kennedy [2017] HCA 49[33] highlighted the issues that can arise when one partner, in this case a woman who spoke limited English, is in a less powerful position economically, socially and financially, and signed a pre-nuptial agreement. As required by law, the woman received independent legal advice before signing. Her lawyer advised her not to sign it, but she felt she had no choice and signed.

Section 90K of the *Family Law Act* deals with circumstances in which court may set aside a financial agreement. One such circumstance is when a party to the agreement "engaged in conduct that was, in all the circumstances, unconscionable". The High Court of Australia decided that the financial agreement should indeed be set aside for unconscionable conduct, as the woman signed it under duress, putting her at a distinct disadvantage.

We are concerned that most women will not be able to take a dispute with a pre-nuptial agreement to either the Federal or High Court of Australia.

In a submission to the ALRC Review of the Family Law System—Issues Paper (IP 48)[34], Dr Thompson, Senior Lecturer in Law at Cardiff University and author of several publications with a particular focus on prenuptial agreements[35] states that " *It is imperative that family violence is taken into account where a couple has entered into a financial agreement, including family violence that commenced after the agreement was finalised*".

[33] http://eresources.hcourt.gov.au/showCase/2017/HCA/49
[34] https://www.alrc.gov.au/wp-content/uploads/2019/08/family-law-151._s_thompson.pd
[35] The author's book Prenuptial Agreements and the Presumption of Free Choice1 which was shortlisted for three major book prizes and was cited and applied by the High Court of Australia in Thorne v Kennedy. This work was also cited by the Law Commission of England and Wales in its report on marital property agreements

The author goes on to state that *"The safeguards built into the Family Law Act 1975 undoubtedly contribute to a higher overall standard of fairness than the provisions governing binding financial agreements sit comfortably with a discretionary approach to property adjustment"* [36].

Summary and Recommendations

CLWA recommends that:

1. Rather than conduct another review, the Committee follow the recommendation of the Law Council of Australia to examine and consult with stakeholders on the 60 recommendations of the Australian Law Reform Commission's 2019 Family Law for the Future: An Inquiry into the Family Law System – Final Report (ALRC Report), including the ALRC's Recommendation 1 (Closing the Jurisdictional Gap).

2. Any proposal to merge the Family Court and Federal Circuit Court of WA be abandoned, with any discussion of future amendment to structural arrangements based upon the recommendations of the ALRC.

3. Whilst the family law system is recognised as being in need of reform, any such reform must prioritise safety and risk, placing the safety of women and children at the centre of practice and decision-making.

4. The recommendations to this Inquiry from the Law Council of Australia be supported, together with the recommendations of the Women's Legal Services Australia to the Family Law Review in 2018.

5. There be recognition and implementation of Women's Legal Services Australia 's Plan for 5 steps towards a family law system that will keep women and children safe.

6. Whilst greater streamlining of court procedures involving victim-survivors of family and domestic violence should be pursued, the ALRC Report should guide discussions and proposals in this area.

7. Discussions regarding First Nations Australians be led by First Nations Australians, and any reforms to the family law system be undertaken within an environment of co-design.

[36] Ibid page 6

8. Urgent increases to legal assistance funding be made to ensure that litigants facing disadvantage in Family Court proceedings be represented wherever possible.

9. Legal assistance services that assist victim-survivors of family and domestic violence in particular should receive adequate ongoing and consistent funding.

10. The Australian Government implement and fund a national legally assisted family dispute resolution program appropriate for family violence cases that is supported by specialist family violence and trauma-informed lawyers and family violence and trauma-informed FDR practitioners.

11. There be specialised training in family and domestic violence for all those involved in the family law system, including Parliamentarians and legislators.

12. Reforms should assist litigants in access to court information, with the provision of culturally appropriate materials and particular consideration for the needs of grandparent carers.

13. That Chapter 5 of the ALRC report provide the basis for discussion about the best interests of children, with the presumption of equal shared parenting responsibility removed from the Family Law Act to shift culture and practice towards a greater focus on safety and risk to children.

Community Legal WA
Claisebrook Lotteries House
33 Moore Street
East Perth WA 6000

T: 08 9221 9322
E: administrator@communitylegalwa.org.au
W: communitylegalwa.org.au

Office open:
Monday to Thursday