



Law Council
OF AUSTRALIA

Inquiry into family, domestic and sexual violence

**House of Representatives Standing Committee on Social Policy and Legal
Affairs**

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the work of its Family Law Section in the preparation of this submission, as well as input from its Indigenous Legal Issues Committee and the Migration Law Committee within the Federal Litigation and Dispute Resolution Section.

The Law Council is also grateful for the contribution of the following Constituent Bodies:

- the Queensland Law Society's Domestic and Family Violence, Family Law and First Nations Committees;
- the Law Society of New South Wales' Family Law, Children's Legal Issues and Indigenous Issues Committees; and
- the Law Society of Western Australia.

Executive summary

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to make a submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs (**Committee**) regarding its inquiry into family, domestic and sexual violence (**Inquiry**), adopted on 4 June 2020.
2. Particularly relevant to this Inquiry into the insidious and ubiquitous problem of family violence, now only heightened and magnified by the COVID-19 pandemic, is the empirical evidence which suggests a correlation between families with complex needs and those who require the courts as a form of dispute resolution. Such families tend to face a combination of factors that adversely impact on the health, safety and well-being of children and caregivers alike. Addressing these factors may be the key to improving the ability of these families to access justice and other supports where family violence occurs. More importantly, it may also remove families' need to do so by preventing violence from ever occurring.
3. It is well-recognised that in the family law system, separation is a highly stressful and dangerous event which is disproportionately associated with allegations (or the likelihood) of family violence. This is graphically illustrated by the fact that seventy percent of proceedings before the family law courts involve allegations or the risk of family violence.
4. The Law Council's contribution to this Inquiry is informed primarily from the experience and expertise of its Family Law Section, which has long advocated for the Australian Government to change its policy responsiveness to issues of family violence between separated couples, including to improve the safety of children who have been victims of or exposed to family violence. A significant number of inquiries have looked into this issue and whilst some progress has been made, many recommendations have been ignored.
5. While the *Family Law Act 1975* (Cth) (**Family Law Act**) acknowledges the profound effect of family violence on children and families, the family courts are not adequately resourced to deal properly with violence and its effects. From the absence of a court environment in which litigants always are (and feel) safe, through to the inadequacy of resources to investigate allegations and risk and the inaccessibility of victim support services, the system is comprehensively under-funded.
6. The Law Council strongly supports the use of family dispute resolution services through non-court based interventions to resolve issues arising from the breakdown of family relationships. However, the family courts provide a vital resource for those unable to resolve issues using these services. These vulnerable parties need a court system which is flexible, accessible and adequately resourced.
7. The Law Council welcomes the current Inquiry but notes that inquiries and reviews in themselves do not represent meaningful progress unless outcomes are properly considered and subsequent action is implemented. To this end, the Law Council notes the number of reviews and inquiries undertaken to date at a federal level, including: the Australian Law Reform Committee (**ALRC**) inquiry entitled *Family Law for the Future: An Inquiry into the Family Law System* (**ALRC Final Report**); the current Joint Select Committee Inquiry into Australia's Family Law System; the ALRC Family Violence Inquiries, and others referred to in this submission. The Australian Government is encouraged to promptly engage with the outcomes of the current Inquiry and take concrete action in response.

Introduction

8. For the purposes of this submission, the Law Council will consistently employ the term 'family violence' to refer to domestic and family violence and abuse, which includes sexual violence and captures non-physical forms of abuse, including that which is technology-facilitated. The expanded definition of family violence as referred to in section 4AB of the Family Law Act is a useful reference point and implicitly informs this submission.¹
9. The Inquiry was announced shortly after the tabling in May 2020 of the Senate Standing Committee on Legal and Constitutional Affairs' report on its inquiry into family violence with particular regard to violence against women and their children (**May 2020 Report**).²
10. The Law Council has publicly expressed its disappointment with the May 2020 Report,³ which was delivered three months ahead of schedule and without the benefit of input through written submissions or public hearings. The May 2020 Report failed to address numerous issues which the Law Council has raised in several submissions and papers it has previously produced on issues related to family violence, as set out below.
11. This does not diminish the progress made by the Australian Government, for example in its implementation of many of the recommendations made by the Senate Finance and Public Administration References Committee in 2015⁴ through the delivery of the *National Plan to Reduce Violence against Women and their Children 2010-2022* (**National Plan**).⁵ However, there is much still to be done on a national level to address both issues which were subject to recommendation in the National Plan, and those which have arisen since 2015.
12. Much of the Law Council's recent advocacy in this area has been informed by the research and findings set out in the chapter of its August 2018 Justice Project Final Report entitled 'People who Experience Family Violence' (**Justice Project**).⁶ The Justice Project was developed over the course of the Law Council's national, comprehensive review into the state of access to justice in Australia for people experiencing significant disadvantage during 2017 and 2018.
13. The Justice Project raised issues which go to the heart of several of the Terms of Reference now before the Committee. The Law Council recommended the following:⁷
 - Children should be better prioritised in policy responses to family violence, including through stronger recognition of the extent of harm to children who have

¹ See, also, a more in-depth scoping of the definition at paragraphs 81 below.

² Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into domestic violence with particular regard to violence against women and their children* (May 2020) <https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/DV/Report>.

³ Law Council of Australia, 'Statement on object failure of domestic violence inquiry' (Media Release, 20 May 2020) <www.lawcouncil.asn.au/media/media-releases/law-council-president-pauline-wright-statement-on-object-failure-of-domestic-violence-inquiry>.

⁴ See, Finance and Public Administration References Committee, Parliament of Australia, *Domestic Violence in Australia* (Final Report, August 2015) <https://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Domestic_Violence/Report>.

⁵ See, Australian Government, *National Plan to Reduce Violence against Women and their Children 2010-2022* (February 2011) <<https://plan4womenssafety.dss.gov.au/>> ('**National Plan**').

⁶ Law Council of Australia, 'People who Experience Family Violence' (Justice Project Final Report, August 2018) <<https://www.lawcouncil.asn.au/justice-project/final-report>> ('**Justice Project**').

⁷ See, Justice Project (n 6) 4-6.

been exposed to family violence and how it can manifest in intergenerational cycles of trauma, violence and disadvantage.

- To address possible gaps in police training, ongoing efforts must ensure adequate education and training on appropriate practices in the context of investigations and prosecutions. Police protocols in respect to the acting on warrants and issuing of family violence orders should also be reviewed.
- Government should address fragmentation in the system of services designed to target family violence, including with a focus on the interaction between different agencies and services, and on the needs of the children.
- The Australian, State and Territory Governments should increase funding to courts to match overarching family violence reforms.
- Legal, policy and service frameworks should be improved to prioritise homelessness prevention, through investment in safe, secure and appropriate housing, including inclusive crisis accommodation.
- Governments should invest in evidence-based early intervention and prevention initiatives, such as holistic family support programs and educational campaigns.
- In addition to funding specialist and community-controlled services, ongoing cultural competence training, designed in consultation with representative organisations, should be provided to personnel across the justice system and related agencies and services.
- Governments should review child protection protocols and oversight mechanisms and providing ongoing comprehensive training on the nature of family violence to child protection workers, in addition to cultural competence training.

14. The Justice Project's findings in relation to family violence may be of assistance to the Committee.

Previous submissions by the Law Council

15. The Law Council has made submissions to a range of inquiries that have relevance to the current Inquiry, the more recent of which include:

- submission to the 2014 inquiry into family violence in Australia by the Senate Finance and Public Administration References Committee;⁸
- submission to the 2017 inquiry into a better family law system to support and protect those affected by family violence by the Standing Committee on Social Policy and Legal Affairs;⁹
- submission to the 2019 inquiry by the Joint Select Committee on Australia's Family Law System;¹⁰

⁸ Law Council of Australia, 'Submission to the 2014 inquiry into family violence in Australia by the Senate Finance and Public Administration References Committee' (20 August 2014)

<<https://www.lawcouncil.asn.au/resources/submissions/inquiry-into-domestic-violence-in-australia>>.

⁹ Law Council of Australia, 'Submission to the 2017 parliamentary inquiry into a better family law system to support and protect those affected by family violence by the Standing Committee on Social Policy and Legal Affairs' (22 May 2017)

<https://www.apf.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawref/orm/Submissions> ('**LCA FV Submission 2017**').

¹⁰ Law Council of Australia, 'Submission to the 2019 inquiry by the Joint Select Committee on Australia's Family Law System' (25 September 2019) <<https://www.lawcouncil.asn.au/resources/submissions/joint-select-committee-on-australias-family-law-system>>.

- submissions to the 2017 Australian Law Reform Commission (**ALRC**) review of the family law system discussion paper (**ALRC Discussion Paper**);¹¹ and
 - following the April 2019 release of the ALRC Final Report, the Family Law Section of the Law Council's provision to the Attorney General's Department (**AGD**) a document setting out comments in response to the final report and identifying those of its 60 recommendations which might be prioritised and readily implemented.
16. The Law Council expressed its views on policy responses to family violence as relevant to the above submissions and the Law Council invites the Committee to have regard to those submissions when formulating its response to the current Inquiry.
17. The Law Council has also made substantive submissions about specific law reform proposals within the family law system, which in part address the response to, and treatment of, family violence. This includes submissions to the:
- Senate Legal and Constitutional Affairs Legislation Committee in relation to the Federal Circuit Court and Family Court of Australia Bill 2019;¹²
 - Council of Attorneys-General Family Violence Working Group in relation to its 2019 consultation on options for improving the family violence competency of legal practitioners;¹³
 - Senate Legal and Constitutional Affairs Committee in relation to the Family Law Amendment (Parenting Management Hearings) Bill 2017;¹⁴
 - Senate Legal and Constitutional Affairs Committee in relation to the Family Law Amendment (Family Violence and Other Measures) Bill 2017;¹⁵ and
 - Senate Legal and Constitutional Affairs Legislation Committee in relation to the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018.¹⁶
18. The Law Council invites the Committee to have regard to these earlier submissions to the extent that they are relevant to the current Inquiry.

¹¹ Law Council of Australia, 'Submission to the Review of the Family Law System: Discussion Paper' (16 November 2018) <<https://www.lawcouncil.asn.au/resources/submissions/review-of-the-family-law-system-discussion-paper>> ('**LCA submission to ALRC**'); Law Council of Australia, 'Submission to the Review of the Family Law System – Issues Paper 48' (7 May 2018) <<https://www.lawcouncil.asn.au/resources/submissions/review-of-the-family-law-system-issues-paper-48>> ('**LCA Issues Paper 48**').

¹² Law Council of Australia, 'Submission to the Federal Circuit Court and Family Court of Australia Bill 2019 and the Federal Circuit Court and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019' (2 April 2020) <<https://www.lawcouncil.asn.au/resources/submissions/federal-circuit-court-and-family-court-of-australia-bill-2019-and-the-federal-circuit-court-and-family-court-of-australia-consequential-amendments-and-transitional-provisions-bill-2019>>.

¹³ Law Council of Australia, 'Options for improving the family violence competency of legal practitioners: Consultation Paper' (30 September 2019) <<https://www.lawcouncil.asn.au/resources/submissions/options-for-improving-the-family-violence-competency-of-legal-practitioners-consultation-paper>>.

¹⁴ Law Council of Australia, 'Submission to Family Law Amendment (Parenting Management Hearings) Bill 2017' (7 February 2018) <<https://www.lawcouncil.asn.au/docs/cdad977e-3318-e811-93fb-005056be13b5/3400%20-%20FLA%20Parenting%20Management%20Hearings%20Bill%202017.pdf>>.

¹⁵ Law Council of Australia, 'Submission to Family Law Amendment (Family Violence and Other Measures) Bill 2017' (7 February 2018) <<https://www.lawcouncil.asn.au/docs/cd0e3c94-2718-e811-93fb-005056be13b5/3399%20-%20FLA%20Family%20Violence%20and%20Other%20Measures%20Bill%202017.pdf>>.

¹⁶ Law Council of Australia, 'Submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018' (16 July 2018) <<https://www.lawcouncil.asn.au/resources/submissions/family-law-amendment-family-violence-and-cross-examination-of-parties-bill-2018>>.

Term of Reference (a)

19. Term of Reference (a) requires the Committee to consider immediate and long-term measures to prevent violence against women and their children and improve gender equality.

Education and children

20. The Law Council considers that underlying structural and systemic gender inequalities must be addressed as a crucial long-term measure to prevent violence against women. The Australian Government should take an evidence-based approach¹⁷ to drive and implement change in the structures, norms and practices that lead to gender inequalities, with the aim of affecting long-term attitude and behavioural change.
21. As well as reducing the likelihood of family violence, addressing the structures of gender inequality may increase the likelihood women will seek legal redress. The fear of not being believed is a significant barrier to the women choosing not to do so. The 2017 'National Community Attitudes towards Violence against Women' survey revealed that around 40 percent of people believe women lie about or exaggerate reports of violence by men, including sexual assault and family violence, either as a means of revenge or to gain tactical advantage for custody battles.¹⁸ In contrast, extensive research confirms the difficulties that victims of family violence encounter when disclosing their experience to authorities. These include the fear of not being believed and the fear that disclosure will increase the risk of violence to them or their children.¹⁹ These phenomena are only amplified by racial bias, which compounds negative consequences for First Nations women and children, as discussed further below.
22. In the Justice Project, the Law Council also asserts that children should be better prioritised in policy responses to family violence, including through stronger recognition of the extent of harm to children who have been exposed to family violence and how it can manifest in intergenerational cycles of trauma, violence and disadvantage. Indeed, it is understood that cultural attitudes about gender are developed from a young age and become entrenched overtime.
23. Accordingly, prioritising education programs for children and young people on respectful relationships and the nature of family violence will assist in breaking harmful cycles and engender long term social benefits. One example is school-based respectful relationships programs, which attempt to challenge attitudes about violence and the gender constructs known to contribute to violence, as well as supporting the

¹⁷ Note that the importance of adopting an evidence-based approach is the subject of a wealth of information and expertise. See, for example, Australia's National Research Organisation for Women's Safety ('ANROWS'), *Counting on change: A guide to Prevention Monitoring* (Our Watch, 2017) <https://d2bb010tdzqaq7.cloudfront.net/wp-content/uploads/sites/2/2019/06/27043538/OurWatch_Counting-on-Change_AA.pdf>.

¹⁸ See, ANROWS, *Australians' Attitudes Towards Violence Against Women & Gender Equality - 2017 NCAS Summary Report* (2017) <<https://www.anrows.org.au/NCAS/2017/home/>>.

¹⁹ Australian Law Reform Commission, *Family Violence - A National Legal Response* (Report 114, October 2010) <<https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-114-summary/>>. Also see, Professor Richard Chisholm, *Family Courts Violence Review* (27 November 2009) <australianmensrights.com/Domestic_Violence_Statistics-Child_Abuse_Australia/Family_Courts_Violence_Review-Australian_Government-Professor_Richard_Chisholm_2009.pdf>; and Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (December 2009) <<https://www.ag.gov.au/sites/default/files/2020-03/Improving%20responses%20to%20family%20violence.pdf>>.

development of pro-social behaviours that lead to equitable and respectful relationships.²⁰ Another example is the Government's August 2019 funding commitment of \$20.9 million as part of the *Fourth Action Plan to Reduce Violence Against Women and Their Children* to national organisation Our Watch, for three years, for program and campaign delivery to 'improve coordination and maximise impact across primary prevention activities' in the recognition that women's safety is founded on women's equality.²¹

Education and Law Enforcement

24. In the Justice Project, police were also identified as playing a vital role in both the frontline responses to family violence and in the broader family violence system. However, some stakeholders noted concerns that some police do not always recognise nuance around relationship dynamics or exercise discretion appropriately.
25. Ongoing efforts to ensure adequate education and training on appropriate practices in the context of investigations and prosecutions is one means of addressing this concern. Reviewing police protocols to ensure that police do not act on outstanding warrants when responding to incidents of family violence, or inappropriately issue dual family violence orders, would also be a useful step forward. Such a review should prioritise the recognition and provision of support to Aboriginal and Torres Strait Islander women and children who are subject to family violence.

Term of Reference (b)

26. This Term of Reference asks the Committee to consider best practice and lessons learnt from international experience, ranging from prevention to early intervention and response, that could be considered in an Australian context.
27. A number of United States-based studies offer important lessons concerning men's behaviour intervention programs. One example is a meta-analysis conducted in 2006, which noted a higher rate of success in US-based intervention programs that made use of community influence to effect behavioural change in family violence perpetrators.²² Put simply, potential offenders are more likely to be influenced by anti-violence messaging from their own community than by messaging from the criminal justice system. The study showed that community-based messaging which is focused on changing social norms, particularly when delivered by community leaders, can help to overcome the influence of other social determinants of family violence such as gender inequality, poverty, social isolation, and norms of male aggression.²³

Term of Reference (c)

28. This Term of Reference asks the Committee to consider the level and impact of coordination, accountability for, and access to services and policy responses across the

²⁰ See, Queensland Government Department of Education, *Respectful Relationships Education Program* (online at 2020) <<https://education.qld.gov.au/curriculum/stages-of-schooling/respectful-relationships>>.

²¹ See, Our Watch, *Our Watch welcomes Fourth Action Plan to Reduce Violence Against Women and Their Children* (online at 10 August 2019) <<https://www.ourwatch.org.au/resource/our-watch-welcomes-fourth-action-plan-to-reduce-violence-against-women-and-their-children/>>. Note, the Commonwealth has committed \$20.9 million funding for Our Watch, the national organisation established to drive nationwide change in the structures, norms and practices that lead to violence against women.

²² D Halley, 'The Process of changing Battering Behaviour: an Integrated Approach: Integrated Theory' (Conference Paper, 32nd Annual Meetings of The Mid-South Sociological Association, October 2006) 1.

²³ *Ibid.*

Commonwealth, state and territory governments, local governments, non-government and community organisations, and business.

29. The Justice Project found that the family violence system is fragmented and complex. Split child protection, family law and family violence jurisdictions not only result in the lack of a single entry-point into the system and of coordination between services, but they create confusion and dissuade victims from seeking help. The different goals of the various systems can lead to obstructions, especially when some services do not have knowledge of how others operate and victims may be given contradictory information.
30. The consequences of fragmentation include that the risk of harm to children or their parents may be underestimated or overlooked, and that those who are required to recount traumatic experiences to multiple service providers are re-victimised.
31. Fragmentation can be addressed by the Australian Government in a number of ways, including by:
 - increasing jurisdictional links between courts and supporting them to specialise where possible;
 - creating single, visible gateways into the system that combine multiple services and are capable of providing referrals to specialised services; and
 - developing processes to facilitate information sharing, risk assessment and other forms of networking across different court jurisdictions, government agencies and services, accompanied by comprehensive privacy frameworks.
32. In addition, in terms of higher-level coordination and to ensure an Australia-wide, whole-community response to family violence, the Law Council suggests that public sector resources may be most effectively expended in bringing local, State, Territory and Australian Government agencies (as well as non-government and community organisations) together to formulate a collaborative and cohesive response to family violence issues. Axiomatically, all public funding towards family violence initiatives including preventative programs and crisis response services for State and Territory-based agencies or organisations is welcome, but it must be sustainable. If funding is insufficient or short-term (e.g. for 1-3 years) it is more difficult to implement programs, recruit staff and develop expertise in the field.

Jurisdictional divide

Family law, family violence and child protection

33. The Law Council considers that the divide between the family law jurisdiction for matrimonial, parenting and financial matters in the Federal courts on the one hand, and the family violence and child protection jurisdictions in State and Territory courts on the other, has resulted in unacceptable complexity, costs and delays for many families. These jurisdictions should be better integrated. The Law Council notes that in the ALRC Final Report, it was recommended that the Australian Government consider options to establish state and territory family courts in all states and territories, to exercise jurisdiction concurrently under the Family Law Act, as well as state and territory child protection and family violence jurisdiction.²⁴

²⁴ Australian Law Reform Commission, *Family Law for the Future - An Inquiry into the Family Law System* (Final Report, March 2019 <<https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc-report-135-final-report-web-min-12-optimized-1-1.pdf>> ('**ALRC Final Report**') recommendation 1.

34. The nexus between the child protection systems and the family law systems can sometimes appear at odds, as the systems have differing priorities. Victims may be discouraged from engaging with child protection because of a view it is non-responsive or non-supportive for a parent in a violent relationship. On the other hand, family violence services predominantly focus on the parent, and may not directly address the needs of children. It has been highlighted that victims may be given conflicting advice by child protection and family violence services, leading to confusion and distress navigating these systems.
35. The Law Council supports measures that identify and consider early in family law proceedings issues of family violence which have arisen either within those proceedings or in separate criminal proceedings. In the experience of the Law Council's members, delays in allocating family law hearing dates for family and criminal law matters, in particular, can leave children vulnerable.
36. Improvements can also be made to the interaction between the family law system and State and Territory child protection systems. The State and Territory child welfare agencies and the Family Court of Australia (**Family Court**) and Federal Circuit Court of Australia (**Federal Circuit Court**) (in its family law jurisdiction) regularly deal with similar issues relating to child abuse and neglect, family violence and the safety and welfare of children. Families in crisis often have their first interaction with the legal system via the care and protection or criminal jurisdictions, but in the experience of the Law Council's members, where there is family breakdown, the most effective solutions often lie within the family law jurisdiction.
37. The Law Council also suggests making coordinated reforms to State and Territory legislation that would enable the various State and Territory Children's Courts to make orders under the Family Law Act, including parenting orders, recovery orders and Family Law Watch List Orders. This proposal is consistent with the Family Law Council's 2016 recommendation²⁵ that sections 69J and 69N of the Family Law Act be amended to remove any doubt that Children's Courts, no matter how constituted, have the power to make orders under Part VII. In the Law Council's view, Children's Courts should also have the power to transfer appropriate cases to the family courts. Any reforms to this effect should be accompanied by appropriate training for Children's Court magistrates.

Legislative framework around family violence

38. As well as facilitating cooperation through informal mechanisms, there should also be consideration of the interjurisdictional legislative frameworks which set out vastly different approaches for each State and Territory in implementing policies that address family violence.²⁶
39. For example, definitions are very different from State to Territory in respect to who is classed as a 'victim' and what conduct constitutes family violence. There are also differences in conditions of restraining orders and police powers. For example, police in South Australia, Western Australia, Tasmania and the Northern Territory can issue 'police orders' or 'protection orders' as an interim risk mitigation or control measure in circumstances of family violence, but not all State and Territory police have this capacity

²⁵ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law System and Child Protection Systems* (Final report, June 2016) <<https://www.ag.gov.au/sites/default/files/2020-03/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF>> ('**Family Law Council Submission on Complex Needs**') 203.

²⁶ Note, this issue also falls within the scope of Terms of Reference (I) of the current inquiry ('any other related matters').

and these orders vary. The achievement of some level of harmonisation to simplify processes nationally is desirable.

Information sharing

40. As a further aspect to addressing the jurisdictional divide noted above, the Law Council supports initiatives to improve information sharing and achieve better collaboration between child welfare agencies, the police and the family courts to better protect children and family violence victims.

Domestic Violence Order scheme

41. An example of the ways that information sharing has already improved collaboration between stakeholders where child welfare and family violence may intersect is the introduction of the National Domestic Violence Order (**DVO**) scheme in 2017. This provided for all DVOs issued in State or Territory jurisdictions from 25 November 2017 to be automatically recognised and enforceable across Australia.²⁷ The Law Council has also welcomed, in relation to DVOs made before 25 November 2017, the ability to make an application to have the order declared to be recognised nationally.²⁸
42. However, one potential deficiency in the DVO scheme is the lack of a national electronic database giving State and Territory police and courts access to DVOs across jurisdictions. Victims of family violence can encounter significant procedural barriers to their orders being recognised, enforced or varied when they relocate or change State or Territory. National electronic access would make the process of enforcing DVOs outside the jurisdiction of issue easier for victims. As such, the Law Council notes the recommendations of the ALRC and NSW Law Reform Commission for a national register of family violence orders which is readily accessible by family courts.²⁹
43. For example, an apprehended violence order (**APVO**) made in New South Wales for the protection of a person who is not and has not been in a relationship with the defendant can be registered in another jurisdiction. If the protected person moves to another Australian State or Territory, they can apply to have the APVO registered with a court there. However, in the absence of a national database, this process is difficult to achieve and not straightforward for a victim to navigate. Additionally, if a protected person seeks to vary a DVO or to extend a DVO when it nears its expiry date, the process can also be complicated to navigate and may place the protected person at risk of exposure to the defendant.
44. The establishment of a national register should be accompanied by training of the relevant staff in data entry, to ensure entries to the register are standardised. The Law Society of New South Wales has suggested that it would be helpful for provisional, interim and final DVOs alike to be stored, as the grounds of a DVO are only recorded on the provisional DVO (which records the reasons asserted by the police or protected person as to what incidents or fears led to the application for the DVO).
45. The Law Council notes that while the early provision of information to courts is helpful, ultimately the court and the judicial officer retain the obligation to assess the evidence critically and undertake a thorough risk assessment.

²⁷ Attorney-General's Department, *National Domestic Violence Order Scheme* (online at 4 August 2020) <<https://www.ag.gov.au/families-and-marriage/families/family-violence/national-domestic-violence-order-scheme>>.

²⁸ *Ibid.*

²⁹ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence — A National Legal Response* (Report 114, 2010) Recommendations 30-13, 30-18.

Information sharing with the courts

46. The approach taken by State and Territory child safety agencies in providing information to the family law courts should be consistent, recognising that it is critical to a court's capacity to understand context and assess risk.
47. The Law Council supports initiatives announced on 5 March 2019 by the AGD, as part of its *Fourth Action Plan* for the National Plan, to improve information-sharing and co-ordination between family law, family violence and child protection systems.³⁰ The Law Council understands that funding will also be provided for improving technology to facilitate information sharing between family law courts and State and Territory child protection systems.
48. The Family Law Council's final report on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* made a number of recommendations that would reduce the need for families to engage with multiple courts. These recommendations should be considered as part of this Inquiry.³¹
49. In relation to information sharing between the police and the courts, the Law Council also supports amending the Family Law Act to include access to parenting orders and section 68B injunctions under that instrument. In matters where family court orders have been made restricting the access of a parent to children or providing for only supervised access due to risk of harm, access to this information would enable law enforcement agencies to assess risk issues. This would be particularly helpful if, for example, a welfare check was requested by a parent or if there was a need to interact with a victim or perpetrator.
50. Better information sharing would also reduce the need for victims to repeat their stories multiple times to different services which can be re-traumatising.
51. Finally, legal assistance funding must be available to assist families in circumstances where engaging with multiple courts and systems is necessary. Navigating these complex systems without proper legal advice can unnecessarily elongate proceedings and place victims of family violence at increased risk. This is discussed further below.

Term of Reference (d)

52. Term of Reference (d) asks the Committee to consider the way that health, housing, access to services, including legal services, and women's economic independence impact on the ability of women to escape domestic violence.
53. The ability of family violence victims to, and likelihood that they will, leave an abusive or dangerous relationship is often curtailed by financial, accommodation or legal issues.³² Victims are often dealing with one or more such forms of disadvantage, which add to the complexity of their legal needs and may also be 'triggered' or exacerbated by family breakdown, worsening credit issues and possibly resulting in debt, homelessness and even imprisonment.

³⁰ See, Attorney General's Department, *Family Violence* (online) <<https://www.ag.gov.au/families-and-marriage/families/family-violence>>.

³¹ See, *Family Law Council Submission on Complex Needs* (n 24).

³² For example, it has been shown that financial considerations such as whether affordable housing can be secured are significant determinative factors in whether women remain in violent relationships. See, Dr Natasha Cortis and Dr Jane Bullen, 'Domestic Violence and Women's Economic Security: Building Australia's Capacity for Prevention and Redress' (Final report, May 2016) *ANROWS Horizons* ('**ANROWS Economic Security Report**').

54. Therefore, fundamental to any effective response to family violence is the resourcing of multiple support services to help victims to access basic needs so that they are able to access justice.

Economic independence and financial services

55. Many victims of family violence experience financial abuse and control. Common perpetrator tactics include limiting access to funds and monitoring the victim's use of bank accounts, EFTPOS and ATM transactions, taking out loans in the victim's name, and forcing the victim into a loan guarantee.
56. Further, victims can find the prospect of leaving an abusive relationship challenging and risky if it would limit their access to financial resources or independent income sources (particularly victims who care for children). For example, the ability for victims to obtain financial assistance through Centrelink may be compromised by lack of access to the internet or transport, or by difficulties in accessing social benefits.
57. The Law Council therefore considers it essential that victims have access to adequate supports to enable them to leave violent relationships. In the experience of members of the Law Council's members, there were few such benefits available to women pre-COVID-19 (particularly where their children had reached school age) and this contributed to significant hardship. Inability to receive child support can compound the financial burden on women and create a cycle of financial disadvantage.
58. Other solutions could include initiatives by, or partnerships with, financial institutions that assist victims to achieve financial independence,³³ including the resourcing of social welfare officers to support victims who are in financial crisis. The Law Council also suggests that financial institutions continue to improve their protocols for identifying loan applications based on family violence and that the Centrelink processes that aim to assist family violence victims be streamlined.
59. Not only may economic inequality impede a woman from leaving a violent relationship, family violence typically worsens economic inequality. As well as potentially manifesting itself as financial abuse (as outlined above), family violence may generate other costs for women. The National Plan therefore recognises the importance of economic wellbeing to the capacity of women and their children to rebuild their lives following violence.³⁴ However, there continues to be a lack of concrete measures which address the factors underlying the persistent economic inequality and insecurity that women experience.
60. Economic inequality may be emphasised (and highlighted) by analysing the gender pay gap. The Australian Human Rights Commission reported in 2018 that the national gender pay gap sits at just over 15 percent and had remained stagnant at between 15 and 19 percent for the previous two decades.³⁵ The gender pay gap is influenced by a range of factors including:
- gender discrimination and bias in pay and hiring decisions;
 - women's disproportionate share of unpaid labour and care responsibilities;
 - occupational and industrial segregation across the workforce, with female dominated industries attracting lower wages; and

³³ For example, Westpac's Domestic and Family Violence 'Priority Assist' line.

³⁴ See, *ANROWS Economic Security Report* (n 32).

³⁵ See Australian Human Rights Commission, *Face the Facts: Gender Equality 2018* (online at 2018) <<https://www.humanrights.gov.au/our-work/education/face-facts-gender-equality-2018>>.

- a lack of flexibility across the workforce in accommodating flexible work arrangements which are necessary to meet care responsibilities, particularly in senior roles.³⁶
61. Further, even after removal from a situation of family violence, research consistently shows that women (particularly those with dependent children) face disproportionate economic disadvantage after separation.³⁷ In reviewing the family law system, the ALRC recently considered research which indicates women are financially disadvantaged, compared to men, in the division of property following separation.³⁸ This is the case even where the parties have no children, suggesting that role division in many relationships contributes to disadvantage.³⁹
62. Property law also has a tangible effect on this economic disadvantage. The 2018 Women’s Legal Service Victoria report, *Small Claims Large Battles*,⁴⁰ found that without the certainty of a property settlement women spend longer periods in unstable housing situations, experience difficulty re-entering the workforce and can be left with sole responsibility for joint debts and other liabilities. Timely and fair property settlements provide women with increased financial security and a measure of control, assisting them to rebuild their lives following separation.

Access to legal services

63. The Law Council considers the proportion of people experiencing family violence who are unable to access legal assistance unacceptable. Access to legal assistance in the early stages of a dispute can prevent or reduce the escalation of legal problems and reduce costs to the justice system overall. More importantly, understanding legal avenues and supports can empower people experiencing violence and improve safety for victims overall; victims may be unable to leave their abusive relationship without access to these services.
64. People experiencing family violence may not know what behaviours fall within the legal definition of the offence, or what legal protections are available to them. Societal attitudes that shift blame to the victim form a further barrier that inhibits help-seeking behaviour and tacitly encourages perpetrators. Additionally, engaging with the justice system can heighten trauma for victims, such as where a perpetrator initiates or prolongs justice processes as a means of maintaining control over their former partner.
65. Further, and in addition to the section on ‘Economic independence and financial services’ above, access to legal services is crucial to assist with economic independence. Although a victim may have entitlements to a family law property settlement, significant power imbalance, fear or intimidation may be operating as powerful disincentives to pursuing these entitlements or to seeking child support payments. In some cases, victims are unaware of their entitlements, such as the ability to split superannuation assets.

³⁶ See, KPMG, *She’s Price(d)less; The Economics of the Gender Pay Gap - Summary Report* (Summary Report, 29 September 2019) 7.

³⁷ B Fehlberg B and L Sarmas, ‘Australian Family Property Law - ‘Just and Equitable’ Outcomes?’ (August 2018) 32, 1/2 *Australian Journal of Family Law* 81-10. See, also, Australian Human Rights Commission, *Older Women’s risk of Homelessness: Background Paper* (2019).

³⁸ See, National Centre for Social and Economic Modelling, ‘For Richer, For Poorer: Divorce in Australia’ (2016) 39 *Income and Wealth Report* 6-10.

³⁹ *ALRC Final Report* n 24, 223.

⁴⁰ See, Workplace Gender Equality Agency, *Gendered impact of COVID-19* (online at June 2020) <<https://www.wgea.gov.au/topics/gendered-impact-of-covid-19>> (**‘Gendered impact’**).

66. Even where initial advice has been sought and is provided by a legal assistance service, limited resourcing means ongoing support throughout the litigation process is not always possible. To obtain the legal advice necessary to properly understand the relevant law and legal options available, as well as to be able to meaningfully engage in legal proceedings, a party must have capacity to pay for basic litigation costs including filing fees (where no exemption applies), process server fees, conduct money to issue subpoenas and costs associated with copying material produced under subpoena. These costs can be prohibitive for people seeking resolution of their matters through the court system. The Law Council therefore recommends that legal assistance providers, in particular Legal Aid, Community Legal Centres (**CLCs**), Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) (and equivalents) and Family Violence Prevention Legal Services (**FVPLS**) be provided with sufficient funding to assist their clients in meeting basic litigation costs in addition to providing family law legal advice, representation and alternative dispute resolution services.
67. It is also particularly important that support be given to self-represented litigants in matters involving family violence. A victim is likely to find the experience of engaging with authorities and appearing in court stressful and even traumatic. They may also lack the capacity to properly gather evidence and draft affidavit material. Testing the evidence of both parties is essential to ensure procedural fairness in legal processes, but stress, trauma and inexperience can impede a victim's capacity to properly present their case.
68. The recent policy focus on addressing family violence has led to positive movement. However, this focus has not generally included a sufficient investment by Governments in courts and legal services to manage the downstream impact of the crime. Legal assistance services are unable to keep up with the extent of demand due to insufficient resourcing and victims often cannot access legal representation, with many forced to self-represent. Research indicates that a result of a lack of legal representation may well be the continuation or escalation of violence. The funding of both the family courts and State and Territory courts has, similarly, failed to keep pace with the growth in the number of people who need access to the courts and with the breadth and complexity of the issues, resulting in long and unsustainable court delays.
69. These realities pose serious consequences for victims, threatening their physical safety and emotional wellbeing, as well as the safety of their children. As such, chief priorities directed toward Australian, State and Territory Governments include increasing funding to courts to match overarching family violence reforms. Ensuring stable and adequate funding of specialist legal assistance services as an immediate and urgent measure is also important in order to meet rising demand, including resourcing specialist service providers such as FVPLS to deliver culturally competent services. Community legal centre and legal aid programs are among the critical frontline services which ultimately assist those who are experiencing, or at risk of, family violence to build independent lives. The downstream consequences of policy initiatives in the justice system should be factored into upfront planning as a matter of course. Further, appropriate resourcing for specialist family violence courts at State and Territory level, and family law courts at Federal level, is critical to improving accessibility for litigants experiencing violence.
70. Recognising these areas for improvement, the Law Council nonetheless welcomes the recent announcement of five years of funding for the legal assistance sector commencing 1 July 2020 under the *National Legal Assistance Partnership 2020-25*, in particular the \$20 million allocation for Family Advocacy and Support Service (**FASS**), which provides legal and support services to people affected by family violence who have a family law issue.

Access to housing, critical support and joined up services

71. Critical support services are another key element of an integrated response to family violence. Victims of family violence often have multiple, complex needs and require a range of support services, which play an essential role in enabling victims to leave violent relationships.
72. In this regard, Justice Project stakeholders overwhelmingly stressed the multiple ways in which lack of housing and crisis accommodation contributes to homelessness and prevents victims from escaping their situation. In order to address critical shortages and gaps, legal, policy and service frameworks should be improved to prioritise homelessness prevention.
73. There should be investment in safe, secure and appropriate housing, including inclusive crisis accommodation that supports victims of family violence in the areas of highest need. Whilst many jurisdictions offer crisis accommodation to women and children leaving abusive relationships, the Law Council's members report that there is a huge demand for these services and a significant shortfall in their funding in high-demand areas. Further investment should be complemented by policies and practices that enable victims to remain in their family home (for example, through the use of ouster clauses, safe-at-home measures and alternative housing for perpetrators).
74. The Law Council also supports the Law and Justice Foundation's recommendations for the development of more accessible, 'joined-up' legal and non-legal services and bi-directional referrals.⁴¹ These are, namely:
 - Free or low-cost legal services that are accessible to disadvantaged people experiencing family violence. Given this group is disproportionately represented amongst victims of family violence, many do not have the resources to obtain legal services by themselves. There are benefits to providing duty lawyer services such as FASS and other initiatives that increase referrals more broadly.⁴²
 - Comprehensive 'legal diagnosis' to identify all the legal problems that accompany family violence, including the family, civil and criminal law problems that family violence compounds. Integrating these legal needs is key to unburdening victims of family violence.⁴³
 - Joining up between different types of legal services to address these broad-ranging legal problems. This relies on shared aims, good referral pathways, information sharing, communication and trust between service providers, as well as adequate resourcing and organisational commitment. Importantly, detecting the additional legal needs of people experiencing family violence and coordinating services to address these legal needs may well increase demand for certain types of legal services, necessitating additional resourcing.⁴⁴
 - Joining up between legal services and social services to address the adverse impacts of these legal problems on a person's life circumstances. The legal problems associated with family violence create broader problems such as significantly greater levels of stress-related illness, physical ill health, relationship

⁴¹ Christine Coumarelos, 'Quantifying the legal and broader life impacts of domestic and family violence' (June 2019) *Law and Justice Foundation of New South Wales, Justice Issues Paper No 32* ('**Quantifying the impacts**').

⁴² *Ibid* 23-4.

⁴³ *Ibid* 24.

⁴⁴ *Ibid* 25.

breakdown and financial strain, as well as negative impacts on housing circumstances.⁴⁵

- Bi-directional referrals between legal and human services to facilitate streamlined access to wrap-around assistance for the legal and related needs of people experiencing family violence. There are opportunities for health and welfare professionals to act as a gateway to legal services for victims, which can overcome reluctance on the part of victims to approach legal services for assistance.⁴⁶
75. One example of an integrated, intensive response to family violence is the NSW Legal Aid Domestic Violence Unit (**DVU**).⁴⁷ The DVU's approach to the issue of reducing the prevalence of family violence was to set a long-term goal of providing those who are experiencing or at risk of family violence with the legal and other assistance they require to 'build lives safer from' family violence.⁴⁸ The DVU aims to provide accessible, appropriate and proportionate services to people who are vulnerable to family violence, at a sustainable cost.
76. The DVU commenced in 2016 and underwent a process evaluation after its first nine months of operation. The evaluation found that the DVU was largely achieving its aim of reaching disadvantaged clients by:
- forming teams which include specialist solicitors trained in trauma-informed practice together with social workers and support staff;
 - locating duty lawyer services in Local Courts, alongside Apprehended Domestic Violence Order lists and in Family Court registries;
 - locating legal advice clinics at health centres;
 - providing legal advice remotely via telephone, email or video link; and
 - delivering legal education to community groups and organisations.⁴⁹
77. Tailoring services to each client was found to be another effective element in the DVU's approach. Each case involved an initial needs assessment followed, as appropriate, by various forms of legal services (e.g. advice, minor assistance, representation or assistance with other legal issues via Legal Aid referrals) or social services through social workers and nonlegal referrals. While recognising the challenges in assessing the impact of a program on its clients in the context of multiple external influences,⁵⁰ the evaluation found that a tailored approach resulted in better holistic outcomes for clients.⁵¹
78. The importance of tailoring services to the needs of clients was reinforced in a report prepared for the NSW Department of Family & Community Services (**FACS**, as it then was) concerning the Integrated Domestic and Family Violence Service program (**IDFVS**).⁵² Recommendations for the program included that:

⁴⁵ Ibid 25-6.

⁴⁶ Ibid 27.

⁴⁷ Christine Coumarelos, Suzie Forell, Amanda Wilson and Maria Karras, 'Legal Aid NSW Domestic Violence Unit: process evaluation of the first nine months' (Report, January 2018) *Law and Justice Foundation* ('**Process Evaluation**').

⁴⁸ *Process Evaluation* (n 47) 4.

⁴⁹ Ibid 4-5.

⁵⁰ Ibid 6.

⁵¹ Ibid 67.

⁵² University of New South Wales, *Evaluation of the Integrated Domestic and Family Violence Service Program* (Final Report, 2018).

- each IDFVS service report to FACS on their local partnerships and at the local level to see how best to tailor services to the population demographic;
- consideration be given to funding specific workers with the skills to work with children affected by family violence, particularly in relation to First Nations children; and
- priority be given to employing First Nations persons as well as providing training on cultural safety and competency. Stakeholders noted that the absence of First Nations employees in some services had resulted in unsuccessful referrals.

Term of Reference (e)

79. This Term of Reference asks the Committee to consider all forms of violence against women, including, but not limited to, coercive control and technology-facilitated abuse.
80. There are a wide range of coercive and controlling behaviours perpetrators use to establish power, and the impact this may have on the victim can vary. These behaviours can be compounded for vulnerable communities due to additional isolation and barriers to services. Abusive behaviours may range from acts of physical violence to ongoing verbal abuse denigration, sexual violence and coercion, property damage, psychological abuse and gaslighting, reproductive coercion, social isolation, financial control, monitoring and surveillance, technology abuse, and systems abuse where the perpetrator uses legal processes to harass, intimidate and exhaust their victim.⁵³
81. An example of possible ways to raise awareness about these behaviours is the recent launch by the Queensland Government of an awareness campaign to support people affected by domestic and family violence during the COVID-19 pandemic. The campaign identifies the profound and tragic impacts of family violence and the offence as the use of abuse or violence in order to maintain power and control over another person.⁵⁴ Importantly, the campaign attempts to educate Queenslanders about the many forms that family violence can take and identifies not only physical abuse, but also abuse that is emotional, sexual, financial, social, spiritual, verbal, psychological or technology-based.⁵⁵ The Law Council supports the development of a similar national education campaign.
82. Another option to ensure recognition of all forms of violence against women is to develop across Australian jurisdictions and agencies a consistent and expansive definition of family violence that incorporates all forms of family violence.
83. In relation to technology-based family violence, Law Council members have raised the concern that although there are specific offences under Commonwealth, State and Territory criminal legislation⁵⁶ capturing examples of this behaviour, such as distributing intimate images, it can be practically difficult and expensive in family law proceedings to obtain expert evidence of spyware on mobile phones or computers, or to obtain covert surveillance being used by an ex-partner to monitor a victim.
84. Another issue is that in property matters in the family law jurisdiction, the common law permits the parties to argue that family violence issues should be taken into account in

⁵³ See, Queensland Law Society, *Domestic and Family Violence Best Practice Guidelines* (July 2016). See, also, Domestic Violence Resource Centre Victoria, *What is Domestic Violence?* (online at 4 August 2020) <<https://www.dvrcv.org.au/about/what-domestic-violence>>.

⁵⁴ Queensland Government, *DFV Support* <<https://campaigns.premiers.qld.gov.au/dfvsupport/>>.

⁵⁵ Ibid.

⁵⁶ See, for example, the *Criminal Code Act 1995* (Cth) s 474.17; *Crimes Act 1900* (NSW) ss 91P, 91Q, 91R.

the property settlement outcome only in limited circumstances.⁵⁷ The Law Society of New South Wales has suggested that further consideration be given as to whether and how this principle should be legislated and in particular whether all aspects of family violence are relevant.

85. Finally, the Law Council supports the ALRC's recommendation that the Australian Government work with Legal Aid Commissions in each State and Territory to expand the FASS to appropriate court locations⁵⁸ and to provide case management services to clients who are engaged with the family law system.⁵⁹ Providing family violence specialist legal and support services in this context will assist clients who have experienced or are experiencing all forms of family violence.

Term of Reference (f)

86. This Term of Reference asks the Committee to consider the adequacy of the qualitative and quantitative evidence base around the prevalence of domestic and family violence and how to overcome limitations in the collection of nationally consistent and timely qualitative and quantitative data including, but not limited to, court, police, hospitalisation and housing.
87. The Law Council notes that the most recent relevant, large-scale representative survey is the Australian Bureau of Statistics (**ABS**) 2016 *Personal Safety Survey*.⁶⁰ The survey results indicated that:
- intimate partner violence was estimated to have been experienced by 17 percent of women and 6.1 percent of men since they were aged 15; and
 - partner violence was estimated to be experienced by 1.7 percent of women and 0.8 percent of men in the 12-month-period prior to the survey.
88. The Law Council notes, however, that some information on the ABS website appears to be out of date, and little data appears to have been provided to it by State and Territory agencies.
89. One useful (if not national) State-based resource is the NSW Bureau of Crime Statistics and Research's (**BOCSAR**) 'crime quarterly update'. For March 2020, this report found a 4.1 percent increase in domestic violence related assault between March 2018 and March 2020.⁶¹ However, it has been noted that due to underreporting, the recorded crime statistics may not be a reliable measure of family violence and there is a need for more representative and broader crime victim surveys which may be more accurate.⁶²
90. Further, as discussed in relation to Term of Reference (i) below, the Law Council understands anecdotally that there has been a strong increase in the prevalence of family violence since around March 2020, when social isolation measures were put in place in Australia in response to the COVID-19 pandemic. The Law Council expects this increase to be reflected, at least to some extent, in the NSW BOCSAR 'June 2020' crime quarterly update.

⁵⁷ *Kennon v Kennon* (1997) FLC 92-757.

⁵⁸ *ALRC Final Report* (n 24) recommendation 58.

⁵⁹ *Ibid* recommendation 57.

⁶⁰ Australian Bureau of Statistics, '4906.0 Personal Safety, Australia' (online at 2016) <www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0> ('**ABS Survey**').

⁶¹ NSW Bureau of Crime Statistics and Research, *New South Wales Recorded Crime Statistics Quarterly Update March 2020* (June 2020) 16.

⁶² *Quantifying the impacts* (n 41) 5.

91. Overall, there is a clear lack of consistency in approach to data collection across agencies and jurisdictions and the Law Council suggests the need for a more integrated approach. Inconsistent use of definitions by agencies, including in relation to statutory definitions in the laws dealing with family law and family violence, may hinder the ability to make comparisons and to compile a detailed national picture to inform resource allocation and service delivery.

Term of Reference (g)

92. This Term of Reference asks the Committee to consider the 'efficacy of perpetrator intervention programs and support services for men to help them change their behaviour.'

Importance of focusing on perpetrator

93. The Justice Project found that evidence-based early intervention and prevention initiatives, such as holistic family support programs and educational campaigns, are important elements of an integrated response to family violence. The Australian, State and Territory Governments should invest in these (without diverting funds from frontline legal responses).
94. More specifically and in a family context, when services do not engage with fathers who use violence, more focus is placed on mothers. This can result in mothers being held to account for a failure to protect their children rather than fathers being held responsible for exposing their children to harm.⁶³ Child protection services, for example, generally expect women to leave violent partners to protect the children, regardless of the potential danger of separating and the financial consequences that may result.
95. Maintaining focus on holding perpetrators to account is essential in effectively addressing violence against women. This appropriately shifts responsibility away from victims and recognises that using violence is a choice. It is one of the National Priority Areas under the *Second* and *Third Action Plans* and a key outcome of the National Plan.⁶⁴
96. As noted above, the end of a relationship does not mark the end of the risk of family violence. Frequently, the need to implement parenting arrangements for children can also pose a risk and requires careful consideration and management by family violence courts and family law services to minimise risk.
97. Engaging with fathers who use violence provides an opportunity to gain a thorough understanding of patterns of violent behaviour. This is valuable in properly assessing risk and informing safety planning.⁶⁵
98. The Law Council therefore supports ongoing research into effective, safe practices for co-parenting where there is a history of violence.

⁶³ See, Dr Lucy Healey, Prof Cathy Humphreys, Dr Menka Tsantefski, Dr Susan Heward-Belle, & David Mandel, 'Invisible Practices: Intervention with fathers who use violence' (April 2018) ANROWS <<https://www.anrows.org.au/publication/invisible-practices-intervention-with-fathers-who-use-violence/>>.

⁶⁴ See, *National Plan* (n 5).

⁶⁵ Queensland Government, *Safe and Together model - Child Safety Practice Manual* (online at 2019) <<https://cspm.csvw.qld.gov.au/practice-kits/domestic-and-family-violence/overview-of-domestic-and-family-violence/safe-and-together-model>>. The Law Council notes the Safe and Together principles underpin Child Safety's approach to matters involving domestic and family violence.

Perpetrator intervention programs

99. Perpetrator intervention programs recognise the importance of challenging and shifting violent behaviours and attitudes and represent an opportunity for men who use family violence to change. The Law Council acknowledge the range of complexities and challenges involved in perpetrator intervention and men's behavioural change programs.⁶⁶ It also notes that considerable work around program evaluation is yet to be undertaken.
100. In principle, the Law Council supports the development of men's behaviour change programs, provided they adopt a consent-based model. There is also need for intervention programs focused on young people and on women who are perpetrators. There are few robust evaluations of adolescent perpetrator programs and interventions. However, emerging evidence suggests that due to the differences between adolescent family violence and adult family violence, such programs need to be tailored to adolescents and not just adapted from adult programs. Examples of programs currently being trialled in NSW include:
- Youth on Track⁶⁷ (an early intervention program);
 - Name, Narrate, Navigate⁶⁸ (currently being trialled by University of Newcastle, NSW); and
 - Family Functional Therapy⁶⁹ (currently being trialled by OzChild in Gosford).
101. In the experience of the Law Society of New South Wales, perpetrator and/or behaviour change programs are likely to be more effective if they sit within an integrated service response and are closely connected to courts, police services, probation and parole services, child safety authorities and an advocate for the other party. Homelessness and addiction services and interventions are also key, and it is crucial that these broader services are sustainably funded to provide emergency housing, residential rehabilitation and other services so they can respond to issues underlying the need for behaviour change.
102. The importance of such integration is shown by recent findings of the NSW Law and Justice Foundation, which indicate an unmistakable intersection between family violence and other legal areas including criminal justice, victims of crime assistance applications and child protection. It was found that family violence perpetrators are over-represented amongst males, young people, First Nations people, people experiencing mental health problems, those living in disadvantaged areas and those who have committed a violent or other criminal offence. Factors that may exacerbate the risk of family violence include:
- drug and alcohol abuse (one in three incidents involving family violence involves the use of alcohol);

⁶⁶ See, Australian Attorney-General's Department, *AVERT Family Violence: Collaborative Responses in the Family Law System* (online at 4 August 2020)

<https://www.avertfamilyviolence.com.au/wpcontent/uploads/sites/4/2013/06/Prevention_Strategies.pdf>.

⁶⁷ See, NSW Government Communities & Justice, *Youth on Track* (online at 4 August 2020)

<www.youthontrack.justice.nsw.gov.au>.

⁶⁸ See, NewCastle Law School, *Name, narrate, navigate* (online at 4 August 2020)

<<https://www.newcastle.edu.au/school/newcastle-law-school/initiatives/newcastle-as-a-restorative-city/name-narrate-navigate>>.

⁶⁹ See, OzChild, *Family Functional Therapy* (online at 4 August 2020)

<<https://www.ozchild.org.au/service/functional-family-therapy-fft>>.

- stressful life events or circumstances such as divorce, separation and family or relationship problems, the death of someone close, serious illness, accident and disability; and
 - financial stressors such as unemployment and gambling problems.⁷⁰
103. It is critical that each component of a perpetrator intervention program takes a safety-oriented approach. Perpetrator programs are also more likely to be effective where they acknowledge the diversity of those participating. For First Nations men, for example, this may mean programs which acknowledge past and present injustices and promote cultural healing.
104. Finally, there is a substantial gap in understanding and availability of perpetrator intervention programs for fathers in family law matters. The Law Council encourages the Australian Government to explore ways in which these programs could be introduced and appropriately funded to better protect mothers and their children in matters where there is a history of violence.
105. Greater focus should be given to the prevention of family violence and to early intervention, to protect those experiencing violence before it escalates.⁷¹ Options should be available for courts to refer perpetrators to appropriate interventions, including therapy and programs aimed at increasing perpetrators' accountability for their actions, promoting compliance with court orders and changing attitudes and behaviour. Finally, Governments are encouraged to conduct ongoing evaluations of perpetrator intervention programs as a measure for improving safety for women and their children.⁷²

Term of Reference (h)

106. Term of Reference (h) asks the Committee to consider the experiences of all women, including Aboriginal and Torres Strait Islander women, rural women, culturally and linguistically diverse (**CALD**) women, LGBTI+ women, women with a disability, and women on temporary visas.
107. Family violence can affect any person, regardless of age, gender, socio-economic status or cultural background. However, the great majority of family violence is perpetrated against women, usually by men. Women experiencing intersectional disadvantage, such as First Nations women, are particularly at risk. Children and young people can also experience family violence, either directly or by witnessing it in the home.
108. It is recognised that the courts play a key role in assessing and responding to the risk of family violence and in promoting the safety of those at risk of harm.⁷³ The courts acknowledge that certain groups are at greater risk of experiencing family violence and may require particular judicial responses to ensure that all individuals are afforded fair and equal access to justice.⁷⁴ However, within and outside the courts, a number of different forms of family violence are insufficiently recognised and responses are not always tailored to the particular circumstances and needs of diverse victims, including CALD, lesbian, gay, bi-sexual, trans, intersex and/or queer (referred to, for the purposes

⁷⁰ *Quantifying the impacts* (n 41) 6.

⁷¹ Royal Commission into Family Violence, *Summary and Recommendations* (March 2016) 6 ('**2016 Royal Commission**').

⁷² ANROWS, *Men's Behaviour Change Programs: Measuring Outcomes and Improving Program Quality: Key Findings and Future Directions* (January 2019).

⁷³ Australasian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (2018) [4.4].

⁷⁴ *Ibid.*

of this submission, as **LGBTI+**) and First Nations people. In addition to funding specialist and community-controlled services, ongoing cultural competence training (designed in consultation with representative organisations) should be provided to personnel across the justice system and related agencies and services.

First Nations women

109. First Nations women are among the most vulnerable groups in terms of family violence, experiencing higher levels of violence and higher levels of injury and death as a result of family violence than other women.⁷⁵

Improvement of cultural competency

110. Numerous reviews have found that mainstream legal systems and services are not designed or delivered in a way that recognises the lived experiences of First Nations people. Resistance to engaging with the family law system, for example, must be viewed within the historical context of colonisation, dispossession of land and forced removal from country, as well as the separation of children from families, as a result of Government policy.
111. Importantly, resistance to engagement may also be the result of the lack of Governmental commitment to previous reviews and failure to implement their recommendations, lack of meaningful consultation and engagement with First Nations communities and organisations, hostile physical environments, policies and legislation that are not culturally safe and a dearth of First Nations people working within the system.
112. Discrimination is another barrier to First Nations women in accessing justice where they are victims of family violence. In a December 2019 paper, *Bias against Indigenous Australians: Implicit Association Test results for Australia*, PhD candidate Siddharth Shirodkar found that ‘most Australian participants [of a cross-section of 11,099 Australians over ten years] on average – regardless of background – hold an implicit bias against Indigenous Australians’, and that discrimination to First Nations people flows through to policing, support services and policy implementation.⁷⁶ There ought to be some assessment of the sector for the existence of such bias and its impact on the response.
113. Access to legal advice and representation through culturally competent legal services, such as Aboriginal and Torres Strait Islander Legal Service (**ATSILS**) and FVPLS, is essential to facilitating proper access to legal systems for First Nations people. From a practical perspective, the capacity for ATSILS, for example, to meet the needs of First Nations people is often limited by a lack of resources and, particularly for family law matters, conflict issues.
114. The Law Council renews calls for the resourcing and implementation by the Australian Government of the recommendations made by the Family Law Council in its 2012 reports ‘Improving the Family Law System for Aboriginal and Torres Strait Islander Clients’⁷⁷ and ‘Improving the Family Law System for Clients from Culturally and

⁷⁵ See, ANROWS, *Existing Knowledge, Practice and Responses to Violence against Women in Australia Indigenous Communities* (State of Knowledge Paper, 2019).

⁷⁶ See, Siddharth Shirodkar, ‘Bias against Indigenous Australians: Implicit association test results for Australia’ (December 2019) 22 *Journal of Australian Indigenous Issues* 3-34, 3.

⁷⁷ Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (February 2012).

Linguistically Diverse Backgrounds⁷⁸, particularly as they relate to recommendations 1-2 and 4-8 for First Nations clients, and recommendations 1-4 and 6 for clients from CALD backgrounds.

115. One compelling example of the effectiveness of importing cultural competency when engaging with family violence issues for First Nations people is the success of the Maranguka Just Reinvest Project (**Just Reinvestment Project**), which started in 2013 in the remote NSW town of Bourke (where 31.5 percent of the population are First Nations people)⁷⁹. This project, initially by the organisation Just Reinvest NSW under the auspices of the Aboriginal Legal Service NSW/ACT and now by the Bourke Tribal Council, comprises a coalition of over 20 non-government organisations and local Aboriginal leaders aiming to reduce the significant overrepresentation of First Nations people in custody in Australia.⁸⁰ Its focus on designing and implementing long-term and system change is achieved largely through community empowerment via self-governance, including through 'practical action and positive role modelling'.⁸¹ Areas of work include police force procedures and court processes.⁸²
116. In an Impact Assessment of the Just Reinvestment Project conducted in 2018, KPMG found a 23 percent reduction in the number of domestic violence incidents reported to police in Bourke between 2016 and 2017 alone, and a 19 percent reduction in domestic violence reoffending (by persons aged 26 and over) reported to police.⁸³
117. The Just Reinvestment Project provides valuable insight into the success of engaging culturally competent organisations and entrusting the relevant First Nations community to design and deliver its own services, consistently with the National Agreement on Closing the Gap which came into effect on 30 July 2020.⁸⁴ This includes First Nations community organisations but also, crucially, locally driven responses. Indeed, while providing higher levels of individual service and support to perpetrators is desirable, in First Nations communities the origin of the issues is often at a community level and whole of community support is necessary.
118. Other previous recommendations that should be considered as part of this Inquiry include:
 - implementation of strategies for the appointment of more First Nations solicitors, barristers, judicial officers, registrars, counsellors, dispute resolution practitioners and liaison officers in the courts, particularly family law courts and specialist domestic and family violence courts;
 - development of education programs about the family law and family violence systems for First Nations communities;
 - inclusion of First Nations communities and/or organisations in facilitating dispute resolution processes; and
 - development of a best practice guide for those working with First Nations clients.

⁷⁸ Ibid.

⁷⁹ KPMG, 'Maranguka Justice Reinvestment Project: Impact Assessment' (27 November 2018) *Maranguka Community Hub, Just Reinvest NSW ('KPMG Impact Assessment')* 8.

⁸⁰ Ibid 10.

⁸¹ Ibid 8.

⁸² Ibid.

⁸³ Ibid 22.

⁸⁴ See, for example, the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and the Australian Governments, *National Agreement on Closing the Gap* (July 2020), section 4 and clauses 28-41.

119. Ongoing, appropriate and culturally safe community legal education, including in language, must be developed with and delivered by First Nations organisations and legal practitioners to all areas around Australia, and in particular, in rural, regional and remote areas.

Experience of justice system

120. Legal assistance service providers, including Legal Aid, ATSILS, CLCs and FVPLS, must be established and appropriately funded (including in remote communities) to provide family law support and advice to First Nations people.

121. The experience of going to court may be particularly traumatic for First Nations people. The benefits of an alternative and culturally safe setting for dispute resolution are significant. In the experience of the Law Council's members, it is not uncommon for First Nations litigants to simply stop attending court for their matter after some time because they are disengaged with and traumatised by the process. In turn, this causes further delays within the court system.

122. Further, the Law Council calls for increased funding for Indigenous Liaison Officers employed by the courts to assist vulnerable and at risk First Nations families access the courts in a culturally safe way.

Right to enjoy culture

123. The Law Council's Indigenous Legal Issues Committee notes that in family law matters, paragraph 60CC(3)(h) of the Family Law Act provides that the court must consider a child's right to enjoy his or her Aboriginal or Torres Strait Islander culture. However, in the experience of some of the Law Council's members, meaningful consideration of this right can be limited. Often, there is insufficient evidence, including expert evidence, to demonstrate how this right could be properly exercised.

124. First Nations people hold distinct cultural rights which are protected in various States and Territories, for example, in Queensland, under the *Human Rights Act 2019* (Qld). That Act articulates these rights in a clear and comprehensive manner, including the right to enjoy and develop identity and cultural heritage such as traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings.⁸⁵ In the Law Council's view, some consideration should be given to amending this section of the Family Law Act to improve the practical application of this provision.

125. While cultural reports are infrequently incorporated into the report which a court may order a Family Consultant to prepare under section 62G of the Family Law Act (**Family Report**), in the Law Council's view cultural reports would be of immeasurable assistance to the courts in matters involving First Nations children. Family Reports provide valuable expert evidence about the family dynamic and the child's relationships with the important figures in their life, and incorporation of the family's cultural context is crucial to understanding these factors. Accordingly, it recommends that additional funding be provided to the court for the preparation of cultural reports in a Family Report.

126. The Law Council also emphasise the importance of building on systems and programs that are already working well in this area. For example, some of its members have had positive experiences with the Relationships Australia Aboriginal and Torres Strait Islander program, which facilitates alternative dispute resolution processes for First Nations people in a culturally safe manner.

⁸⁵ See, *Human Rights Act 2019* (Qld) s 29.

127. The Law Council also strongly recommends that, in the development of any Australian Government policies or initiatives, direct consultations be undertaken with appropriate Elders or First Nations community leaders, as well as Aboriginal Legal Services around Australia.

Service integration and the courts

128. Finally, concerns have also been raised regarding problematic approaches taken by some child protection workers towards mothers experiencing family violence, in particular First Nations mothers. Useful steps in this regard would involve Governments reviewing child protection protocols and oversight mechanisms and providing ongoing comprehensive training on the nature of family violence to child protection workers, in addition to cultural competence training.

129. The Law Council's suggestion to better integrate the family law, care and protection and family violence systems, as discussed above in relation to Term of Reference (b), has particular application to assisting First Nations peoples in their experience of family violence. In the experience of Law Council members, the family law system client base is evolving and the jurisdiction now regularly sees families with complex needs which may involve child welfare issues and family violence. In matters involving First Nations families, it may be meaningless to insist on a sharp distinction between the public child protection system on the one hand and the private family law system on the other. Both of these systems deal regularly with the safety and welfare of children, particularly from the perspective of finding safe arrangements for Indigenous children within their family structures.

130. Further, as noted above, while often First Nations families in conflict initially encounter the care and protection or criminal jurisdictions, the best solutions may be found in the family law jurisdiction. The family law system aims to protect a child's best interests, including consideration of a child's right to culture,⁸⁶ and this begins with a presumption that children should enjoy a meaningful relationship with both their parents.⁸⁷

131. Integrating the family law, child protection and family violence systems requires positioning all three jurisdictions to provide family law solutions for First Nations families regardless of the context in which family violence or child welfare issues have arisen. This includes ensuring that Children's Court and Local Court magistrates apply their available family law powers where appropriate, whether to make family law orders or to transfer appropriate matters to the family courts. The Law Society of New South Wales has suggested that consideration could also be given to amending subsection 69ZK(1) of the Family Law Act so that the consent of the Minister (or welfare officer) to allow a matter to proceed where Children's Court orders are in place is needed only where parental responsibility has been allocated to the Minister.

132. In addition to improving the integration of the family law, child protection and family violence jurisdictions, better outcomes will be achieved for Indigenous families experiencing family violence by properly equipping the family law system to provide more effective access and engagement for First Nations people. Options for consideration include the further development of specialised Indigenous lists or Indigenous family law courts, and other means such as dual commissions for judicial officers.⁸⁸

⁸⁶ *Family Law Act 1975* (Cth) ('**Family Law Act**') paras 60B(2)(e), 60B(3), 60CC(3)(h), sub-s 60CC(6) and s 61F.

⁸⁷ *Ibid* para 60CC(2)(a).

⁸⁸ See, further, Law Society of New South Wales, 'Submission to Australian Law Reform Commission – Review of the Family Law System – Issues Paper,' (25 May 2018) 12.

133. The Law Council notes the existence of the Indigenous List in select Federal Circuit Court registries, including in Sydney, and understands that the success of the List has arisen in large part because the legal framework is supported by comprehensive, culturally safe, wrap-around therapeutic support. First Nations community services identify and assess appropriate matters for diversion to the Court. Legal service providers, including, in NSW, the Family Law Early Intervention Unit of Legal Aid NSW, provide timely legal assistance to parties, supported by First Nations community workers. First Nations community services attend the otherwise closed court so that seamless and effective referrals can be made for assistance, including housing, drug and alcohol, mental health and other therapeutic assistance. Noting that this model is also in use in Adelaide, Alice Springs and Darwin, the Law Council strongly supports its application in other jurisdictions as appropriate, noting the importance of ensuring it develops and expands with a First Nations lens, led by First Nations experts.

Women from Culturally and Linguistically Diverse Backgrounds

134. The impact of violence experienced by women from CALD backgrounds can be exacerbated by a wide range of factors including language barriers and reliance on interpreters to seek help, lack of familiarity with Australian laws and processes, mistrust of police, isolation from family and mainstream society and a concern that speaking out would betray or bring shame to their extended family and community.⁸⁹
135. Women from CALD backgrounds are particularly vulnerable to financial abuse, including dowry abuse. The inability of temporary visa holders to access social supports can exacerbate the impacts of this abuse. Financial dependence is particularly problematic where a person experiencing violence is ineligible for Centrelink support.
136. Women from CALD backgrounds may experience particular forms of violence, including threats of deportation and threats of harm to relatives not living in Australia. In the Law Council's view, implementation of the reforms in relation to visas recommended at paragraph 148 below would considerably assist women from CALD backgrounds who are Temporary Visa Holders or Dependent Temporary Visa Holders.
137. The Law Council also supports the recommendations set out under the Blueprint for Reform: Removing Barriers to Safety for Victims/Survivors of Domestic and Family Violence who are on Temporary Visas (**the Blueprint**) prepared by the National Advocacy Group on Women on Temporary Visas Experiencing Violence.⁹⁰ In relation to recommendation 1.3 of the Blueprint, the Law Council notes its strong preference for the introduction of a permanent visa pathway for all mothers of Australian citizen children.⁹¹

LGBTI+ Communities

138. It is widely recognised that family violence is an endemic problem in Australian society. Family violence can affect any person, regardless of age, gender, socio-economic status or cultural background.

⁸⁹ Cathy Kezelman and Pam Stavropoulos, 'The Last Frontier' - Practice Guidelines for Treatment of Complex Trauma and Trauma Informed Care and Service Delivery' (2012) *Blue Knot Foundation*.

⁹⁰ National Advocacy Group on Women on Temporary Visas Experiencing Violence, *Blueprint for Reform: Removing Barriers to Safety for Victims/Survivors of Domestic and Family Violence who are on Temporary Visas* (online at 2019) <<https://awava.org.au/2019/10/02/research-and-reports/blueprint-for-reform>>.

⁹¹ See, *ibid*, recommendation 1.3: 'That the Australian Government introduces a permanent visa pathway for all people on temporary visas whose Australian citizen or permanent resident children are unable to leave Australia due to a final order under the family law jurisdiction.'

139. Indeed, the Law Council recognises the unique forms of family violence facing people who identify as LGBTI+. Tactics of control such as forced outing, where the perpetrator threatens or does disclose their victim's gender identity or sexual orientation to family, friends or colleagues without consent, can have profound detrimental impacts.⁹² People who identify as LGBTI+ can also experience additional systemic and service barriers including fear of encountering homophobia, biphobia or transphobia.⁹³
140. The Queensland Law Society has noted that while the Inquiry appropriately addresses the experience of women and their children in confronting the scourge of intimate partner abuse, in the context of the LGBTI+ community it is important to recognise the particular experiences of trans women, people who identify as non-binary and gay men. Further, the Law Society of Western Australia has submitted that in using gendered and heteronormative language in the Terms of Reference, it is important to be aware of the risk of framing the sole victims as female and the sole perpetrators as male, and excluding a significant proportion of family violence perpetration in our society, including violence in the LGBT community, violence against men and mutual family violence.
141. Family violence interventions and supports available for LGBTI+ communities are very limited. For example, there are no family violence shelters available for gay men in same-sex relationships. Further, there are very limited, if any, services available to assist people who identify as female and perpetrate abuse.
142. The comprehensive National Intimate Partner and Sexual Violence Survey⁹⁴ found that:
- The lifetime prevalence of rape, physical violence, and/or stalking by an intimate partner was highest for bisexual women (61 percent) and men (37 percent).
 - When contrasting heterosexual and homosexual relationships, the prevalence among lesbians (44 percent) was higher than among heterosexual women (35 percent).
 - For men, the reverse was true with prevalence among gay men (26 percent) was lower than the prevalence among heterosexual men (29 percent).
143. The existence of violence against persons other than women and an acknowledgement of the existence of mutual violence in no way diminishes the importance of addressing violence against women, which indisputably make up the largest victim group. In this regard, the Law Society of Western Australia has noted that limiting the Inquiry to a focus on female victims and male perpetrators may ignore the complexity of family, domestic and sexual violence and fails the LGBTI+ community and male victims who suffer from the same scourge.

People with Disability

144. People with disability, and women with disability in particular, experience disproportionately high rates of family violence. For example, in 2016 almost 16 percent of women with a physical or cognitive disability or long-term health condition reported

⁹² See, Monica Campo and Sarah Tayton, 'Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities' (December 2015) *Australian Institute of Family Studies*.

⁹³ See, Catalyst Foundation, *Towards a Safe Place* (online at 4 August 2020) <<http://www.catalystfoundation.com.au/our-services/lgbti/toward-safe-place-raising-awareness-domestic-violence-lgbtiq-communities>>.

⁹⁴ Mikel L Walters, Jieru Chen and Matthew J Brieding, 'The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation' (January 2013) *National Center for Injury Prevention and Control Centers for Disease Control and Prevention*.

experiences of violence in the past year, compared to just over four percent of women without a disability.⁹⁵

145. Women with disability experience distinct and particular forms of family violence, including, for example, threats and withdrawal of care, medication and other assistance. Increased social isolation, difficulties accessing appropriate services, communication barriers as well as difficulties associated with reporting violence can compound experiences of violence.⁹⁶ In the current environment, it is also important to note the particular impact that crisis and emergency response situations can have on rates of violence, the ability of service systems to respond, and available supports for women with disability.
146. An issue often highlighted for women with disability relates to the category of relationships within which violence occurs. For example, women with disability who live in group homes or other shared accommodation, or who rely on carers and others for support, are at particular risk of violence in an intimate setting. However, this type of violence is not always recognised or captured by legislative and policy frameworks as constituting family violence given it occurs beyond the typical intimate partner relationship.
147. The issues noted above in relation to women not being believed are exacerbated for women with disability when reporting their experiences of violence. Ableism and problematic assumptions around the credibility of victims is particularly pronounced for this cohort.⁹⁷ Finally, the impact of family violence is often compounded by the intersectional discrimination and disadvantage experienced by women with disability. This is particularly so for First Nations women with disability.

Dependent Temporary Visa Holders

148. The experience of violence for women who hold visas is rarely acknowledged or considered separately to the experience of other women in Australia. However, violence has a disproportionate impact on women who hold temporary visas. Women in this group have limited access to crisis payment funds from Centrelink. They are not usually eligible for refuge accommodation and a lack of access to housing, finance or other support has a direct impact on their safety and welfare, as well as that of their children. It is critical that the Australian Government acknowledge its responsibility to all women experiencing family violence, not just Australian citizens or permanent residents.
149. Victims of family violence who are also facing deportation may be required to bring or respond to a parenting application in the Family Court in order to protect their children by relocating them internationally. Such proceedings are often protracted, leaving the victim and their children stranded for long periods without means of support.
150. Further, threats by a perpetrator in relation to visa status and deportation can be used as acts of violence. Temporary migration status creates significant leverage for control and intimidation by an abusive partner. In the experience of members of the Law Council's Constituent Bodies and Sections, visa dependence is a key barrier to accessing legal support for family violence. Where a victim of family violence holds a visa that is conditional upon the existence of the relationship with their perpetrator, the capacity for the victim to access support and escape the violence is limited.

⁹⁵ ABS Survey (n 60).

⁹⁶ See, eg, ANROWS, *Women, Disability and Violence: Barriers To Accessing Justice: Key Findings and Future Directions* (February 2018).

⁹⁷ Ibid 30.

151. The *Migration Regulations 1994* (Cth) (**Migration Regulations**) currently provide permanent residency pathways for survivors of family violence who:

- have applied onshore for a Partner visa (subclass 820);
- have applied onshore for a Distinguished Talent visa (subclass 858);
- hold a Partner visa (subclass 820 or subclass 309); or
- hold a Prospective Marriage visa, have married their sponsor and are onshore (subclass 300).

Expansion of family violence provisions

152. The Law Council acknowledges the value of the family violence provisions under the Migration Regulations, which were introduced to avoid circumstances where visa applicants and holders are compelled to remain in violent relationships for migration reasons. While accessing these provisions involves a range of complexities and difficulties, the family violence provisions allow applicants or holders of Temporary Partner Visas and Distinguished Talent Visa applicants access to permanent residency if they can demonstrate that:

- the relationship was genuine;
- family violence occurred; and
- the violence occurred during the course of the relationship.

153. While the family violence provisions are commendable, they are currently limited in scope and can only be accessed by applicants and holders of a small number of visas.

154. For example, as the Migration Regulations are currently drafted, a subclass 300 visa holder who has been in a relationship with their partner but has not yet formally married is excluded from accessing the family violence provisions.⁹⁸ The Law Council recommends that the Migration Regulations are amended to ensure that unmarried subclass 300 visa holders are also protected by the family violence division.

155. Further, Dependent Temporary Visa Holders (such as international students or skilled workers) cannot access the family violence provisions. As a requirement of their visa, the Dependent Temporary Visa Holders must remain in a relationship with their primary visa-holding partner. Equally, if they have made an application for permanent residency based on their relationship with the primary visa holder, they must remain in a relationship with the perpetrator to be eligible for permanent residency. As a consequence, a Dependent Temporary Visa Holder experiencing family violence may be compelled to either remain in a violent relationship or leave Australia.

156. This gap empowers perpetrators, creating a tool for exercising coercive control. In the Law Council's view, this contradicts the intention of the family violence provisions. To ensure the safety of Dependent Temporary Visa Holders and to ensure consistency of approach, the Law Council recommends that the family violence provisions in the Migration Regulations be expanded to provide a pathway to permanent residency for those who have applied for permanent residency as dependents.

'Evidence' of family violence

157. In order to be eligible for the grant of a permanent visa under the current family violence exceptions in Division 1.5 of the Migration Regulations described above, an applicant

⁹⁸ See, regs 820.211(7)(b), 820.211(8)(b) and 820.211(9)(c).

must provide evidence that the family violence occurred. This may be either through 'judicially determined' evidence (such as an injunction, court order or conviction) or 'non-judicially determined' evidence (such as either a joint undertaking made in court in relation to proceedings or a statutory declaration outlining the nature of the violence plus two items of evidence outlined in Legislative Instrument 12/116).⁹⁹ If an applicant provides evidence in line with the 'non-judicially determined' requirements and the decision-maker is not satisfied that the applicant suffered family violence, the decision-maker must seek the opinion of an independent expert as to whether the applicant has suffered family violence.¹⁰⁰

158. Possible items of evidence include reports issued by medical practitioners, police, welfare agencies, crisis centres or a statutory declaration by psychologists, social workers, Family Consultants or school counsellors or principals. Members of the Law Council's Family Law Section have reported examples in which genuine survivors of extreme forms of family violence have not been able to meet these evidentiary requirements. This may be a result of language barriers, fear of authorities, inability to access or afford medical assistance or legal advice.
159. The Law Council suggests there is scope to amend the Migration Regulations to provide for the power for a decision-maker to refer an applicant to an independent expert where the documentary evidence has not been provided in strict compliance with Legislative Instrument 12/116, and where the decision-maker is satisfied that there are compelling and compassionate circumstances that warrant the referral to an independent expert.

New Temporary Visa

160. The Law Council also proposes that a new temporary visa be available for temporary visa holders who have not lodged permanent residence applications, but who have experienced family violence and therefore are:
- unable to comply with their current visa conditions; or
 - at risk of having, or have had, their visas cancelled.
161. The creation of a new temporary visa category would allow Dependent Temporary Visa Holders experiencing family violence to remain in Australia for a minimum of one year or longer and to access and consider legal advice, including other possible visa options.
162. The availability of a further visa option for victims of family violence would limit the use of migration status as a means to coerce and control. It would allow Dependent Temporary Visa Holders to take control of their own visa status and migration pathway and would address the dangerous power imbalance that exists between them and the primary visa holder with whom they are in a relationship.
163. Importantly, the visa would allow victims of family violence time to secure their own and their family members' safety and seek the support they need. Work and study rights would attach to the visa and holders would be entitled to Medicare and Centrelink benefits. The visa would not create a guaranteed pathway to permanent residency but would allow holders to apply for any further onshore visas they might be eligible to obtain.
164. The efficacy of this visa is dependent on it being accessible and this requires recognition that people fleeing relationships characterised by violence may not have access to

⁹⁹ See, *Migration Regulations 1994* (Cth) regs 1.23, 1.24.

¹⁰⁰ *Ibid* reg 1.23(10).

documents commonly used to evidence strict visa criteria. This reality must be taken into account in developing eligibility criteria so that visa extensions are readily available to those who need them.

165. The Law Council further suggests that temporary visa holders who are family violence victims be able to access appropriate housing and financial support through Centrelink and be granted visa extensions through any family law proceedings.

Term of Reference (i)

166. Term of Reference (i) asks the Committee to consider the impact of natural disasters and other significant events such as COVID-19, including health requirements such as staying at home, on the prevalence of domestic violence and provision of support services.
167. The Law Council considers that in light of the bushfires of the Summer of 2019/20 and the ongoing COVID-19 pandemic, the provision of a suite of legal, social support and health and well-being services to Australian families in a holistic and co-ordinated way is more important now than ever before. The increased legal need is clear: Chief Justice Alstergren has reported that since the end of March 2020, there has been a 40 percent increase in urgent applications in the Family Court and a rise of 23 percent in the Federal Circuit Court.¹⁰¹
168. In terms of family violence, self-isolation and social distancing measures have led to an increased risk for many people experiencing violence as a result of increased physical contact with perpetrators, limited contact with people from outside their immediate family unit, reduced ability to leave relationships and increased financial insecurity.¹⁰² Anecdotally, the Law Council's members note a rise in the prevalence of family violence during COVID-19. In many cases, this is due to heightened family tensions during lockdown conditions or to economic stress. The risk is also higher in cases where public health restrictions make compliance with parenting arrangements difficult, or when one party uses the restrictions as a basis for noncompliance.
169. The Law Council welcomes the additional Australian Government funding provided to frontline family violence services in response to these issues, as well as the prompt response from the Australian Government and non-government organisations in providing information on various supports available to people experiencing violence throughout this period.¹⁰³
170. In April 2020, the Family and Federal Circuit Courts each established a court list dedicated to dealing with urgent family law disputes which have arisen as a result of the COVID-19 pandemic. The Law Council understands this list was developed in close collaboration with Women's Legal Service Queensland and that the courts are continuing to work with Women's Legal Services across Australia. The Law Council acknowledges the agility and collaborative attitude of the Courts in implementing this response.

¹⁰¹ Bianca Hall, 'Surge in 'urgent' Family Court cases as COVID-19 pressures boil over' (online at 25 April 2020), *Sydney Morning Herald* <<https://www.smh.com.au/national/surge-in-urgent-family-court-cases-as-covid-19-pressures-boil-over-20200424-p54mxi.html>>.

¹⁰² Domestic Violence Resource Centre Victoria, *For Survivors during Coronavirus* (online at 2020) <<https://www.dvrcv.org.au/help-advice/coronavirus-covid-19-and-family-violence/survivors-during-coronavirus>>.

¹⁰³ Queensland Government - Queensland Health, *Revised Resources to Support Clinicians* (online at 2020) <<https://www.health.qld.gov.au/clinical-practice/quidelines-procedures/patient-safetv/dutv-of-care/domestic-familv-violence/healthcare-workers>>.

171. The Law Council notes that the allocation of existing court resources to meet increased demand and to address matters of particular crisis is commended. However, it is inescapable that absent additional funding for that purpose, resources are being diverted to this response. For those families already within the court system or who do not meet the COVID-19 List criteria, serious delays in the resolution of their matters remain a reality. Many of those matters will involve serious allegations of family violence.
172. Other measures implemented by the courts included electronic filing of documents, use of technology for the conduct of court events (including final hearings) by way of Microsoft Teams, implementation of the National Arbitration List and release of a public statement providing guidance to families on parenting orders. In respect to the move to holding procedural and directions hearings, as well as interim hearings, by video link and teleconference, this has been generally positive for parties affected by family violence. In the Law Council's view, the use of the electronic format may not be appropriate in certain contexts (e.g. in final hearings that involve cross-examination, large volumes of documents or complex issues). However, for procedural and interim hearings and straightforward matters, this format can provide a safe environment for vulnerable parties, which in turn supports the resolution of their matters. It also enables the courts to be agile in deploying judicial resources to provide a timely response in urgent matters.
173. The Law Council also notes the innovative, apposite and timely court initiative, the 'Lighthouse Project'.¹⁰⁴ This is a risk screening and triage pilot to assess families at risk, which will be rolled out over the next two years in the Parramatta, Brisbane and Adelaide Registries in conjunction with the specialist list, known as the 'Evatt List', to hear high risk matters.
174. Despite these important measures, the Law Council notes that current resourcing pressures on the courts have continued and that notwithstanding the courts' innovative changes and initiatives, there are still families who are at increased risk by virtue of delays in having their matters adjudicated.
175. In terms of a cohesive response, there is also an ongoing need to provide support for those affected by the 2019-20 bushfires, particularly persons in temporary accommodation who are now under further pressure due to the pandemic. The trauma which has been felt in varying degrees by those impacted by the recent bushfires and/or COVID-19 is exacerbated for victims of family violence. In these circumstances it can be difficult to access multiple services and retain and collate information from each service, and there is often an immediate need to prioritise housing and access to funds. Victims of family violence who have been further impacted by the bushfires and COVID-19 require wraparound holistic services, where their short and long -term needs can be triaged and managed.
176. Looking beyond the pandemic, the Law Council encourages the Australian Government to draw upon its experience responding to COVID-19 and engage in coordinated responses and collaborative work to address to significant and emergency events in future.
177. Finally, the Law Council asks the Australian Government to consider the ways in which Australian Government policy and decision-making influences and reinforces cultural biases and perpetuates gender inequality. The COVID-19 pandemic, for example, has

¹⁰⁴ Family Court of Australia, *The Lighthouse Project* (online at 2020) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-violence/lighthouse-project/>>.

had clear gendered impacts.¹⁰⁵ It is important for the Government to consider whether policies implemented in response to national emergencies and health crises have the effect of exacerbating women's economic disadvantage and widening gender employment gaps.¹⁰⁶

Term of Reference (j)

178. Term of Reference (j) seeks the views and experiences of frontline services, advocacy groups and others throughout this unprecedented time.
179. The Law Council acknowledges the limited capacity of frontline services to engage in formal, resource-intensive advocacy processes like providing a submission to the current Inquiry. However, frontline services should play a central role in formulating legislative and policy change in this area given their unique expertise and ability to identify systemic issues arising from real life experiences.
180. Therefore, the Law Council strongly encourages the Australian Government to proactively consult and work collaboratively with frontline services in shaping domestic and family violence reforms.
181. In addition to some of the Law Council's Constituent Bodies whose members may have experience practising in these areas, much of the below feedback on this Term of Reference is derived from the Law Council's Family Law Section. The Family Law Section comprises more than 4,200 practising family lawyers around Australia who work at the coalface of the intersection of family violence and the civil justice system. Family lawyers act for and provide advice to both victims and perpetrators of family violence in the Federal courts exercising Federal family law jurisdiction, in State and Territory courts exercising Federal family law jurisdiction, in State and Territory courts exercising child protection jurisdiction and in State and Territory courts exercising personal protection jurisdiction. Family lawyers also give advice to and represent both victims and perpetrators of family violence outside of court proceedings, assisting them to reach agreement about parenting arrangements and financial settlements using negotiation, mediation, collaboration, and arbitration. In this sense, the below (and much of the input to this submission) also answers to Term of Reference (j) by reflecting '[t]he views and experiences of frontline services, advocacy groups and others throughout this unprecedented time'.
182. The Family Law Section has long advocated for substantive changes to policy responses by the Australian Government to improve responsiveness to issues of family violence between separated couples, including to improve the safety of children who have been victims of or exposed to family violence. There have been a significant number of inquiries undertaken, and whilst some progress has been made, many recommendations of those inquiries have been ignored.
183. In the view and experience of the Family Law Section and the Law Council, the family law related policy responses within the Federal jurisdiction that could be changed or adopted to made real and lasting improvements to the safety of victims of family violence (and which have not been referred to above) fall within three categories:

¹⁰⁵ *Gendered impact* (n 40); United Nations Department of Economic and Social Affairs, *COVID-19 and Older Persons: A Defining Moment for an Informed, Inclusive and Targeted Response* (online), 8 May 2020 <<https://www.un.org/development/desa/ageinq/news/2020/05/covid19/>>.

¹⁰⁶ J. De Henau and S. Himmelwelt, *The Gendered Employment Gains of Investing in Social vs Physical Infrastructure: Evidence from Simulations Across Seven OECD Countries* (2020).

- substantive reforms of Federal laws, primarily to the Family Law Act, but also to laws related to Federal courts exercising family law jurisdiction;
- increased resourcing of Federal family law services including to Federal courts exercising family law jurisdiction, Legal Aid and Legal Assistance services, national mediation services and family services; and
- improving the skills of professionals working within the family law system, including, importantly, by only appointing judges to courts exercising family law jurisdiction who have knowledge, experience, skills and aptitude relevant to hearing family law cases, including cases involving family violence.

184. The views of the Family Law Section and other members of the Law Council on these three matters, as echoed and endorsed by the Law Council, are addressed below.

Substantive reforms to the family law jurisdiction

Reforms to parenting provisions of the Family Law Act

185. In September 2017, then Commonwealth Attorney-General, the Hon Senator Brandis QC, announced the first ‘root and branch’ inquiry into the family law system for 40 years. The ALRC’s review was far-reaching, with 480 submissions received and public consultations held in a range of locations. The ALRC Final Report was released in March 2019.¹⁰⁷
186. There are 60 recommendations in the ALRC Final Report and many of them involve direct consideration of and responses to family violence and its impact in family law matters. The Law Council respectfully refers to and relies upon the submissions made to the ALRC Discussion Paper and subsequently, including its recommendations to the Attorney General about matters that might be capable of immediate reform.
187. One such important reform that is informed by the ALRC Discussion Paper and which the Law Council continues to support is the comprehensive re-writing of the parenting provisions at Part VII of the Family Law Act to allow for simplification of the presently complex provisions, noting that the current legislative pathway for making parenting orders involves 42 steps.¹⁰⁸ Many parents and others interested in the care of children must try to understand and navigate these principles without the assistance of a court or lawyer, a task rendered fraught by their complexity. This can add to pressures for vulnerable people who are trying to reach agreement with former partners and exacerbates the risk of poor parenting outcomes, in circumstances where an informed choice could not be made because the legal framework was not understood.
188. The Law Council also notes long-standing concerns and debate around the presumption of equal shared parental responsibility (**ESPR**) under section 61DA in Part VII. The presumption of ESPR has been widely misunderstood as a requirement that children should spend equal amounts of time with each parent (or a substantial and significant time with each parent),¹⁰⁹ setting up false expectations for parents. Fathers who use violence may assume they are entitled to spend equal time with their children, whilst mothers experiencing violence may believe they are unable to protect their children from contact with their abuser and may enter negotiations around parenting under these false

¹⁰⁷ ALRC Final Report (n 24).

¹⁰⁸ Grant Riethmuller, ‘Deciding Parenting Cases Under Part VII: 42 Easy Steps,’ (2015) *Australian Family Lawyer* 24, 38.

¹⁰⁹ See, ALRC Final Report (n 24) at 42.

beliefs.¹¹⁰ In this way, it is the experience of members of the Law Council that Part VII has posed particular problems in matters involving family violence.

189. In the experience of the Queensland Law Society, while many parents may be able to exercise ESPR in a respectful and cooperative manner, this arrangement may not accurately represent the best interests of all children.¹¹¹ As such, the Queensland Law Society has suggested that presumptions in relation to parental responsibility unreasonably fetter the discretion of the court. Further, in matters involving allegations of family violence the process requires a complexity of analysis that is unhelpful, with the relevant legislative pathway difficult for even lawyers and judges alike to navigate.
190. Despite this, typically past exposure to or experience of family violence does not significantly influence time arrangements made in family law matters.¹¹² It is very common for orders for equal time, or substantial and significant time, to be made in circumstances where there is a history of family violence. In some circumstances, these outcomes are extremely dangerous for victims and their children.
191. Accordingly, the Law Council calls for the removal of the presumption of ESPR and the requirement for the consideration of equal time which flows from the making of an ESPR order under section 65DAA of the Family Law Act. Parental responsibility should be a matter for the court to determine in the circumstances of each case, guided by the paramount consideration principle.¹¹³ The Law Council notes that the ALRC recommended this legislative reform as part of the ALRC Final Report.¹¹⁴
192. Lastly, provisions around parenting should not favour particular parenting arrangements. Artificially prioritising certain arrangements represents a departure from the paramountcy principle as it pre-emptively determines what is in a child's best interest without regard for the circumstances of the case.¹¹⁵

The conduct of interim hearings where family violence is alleged

193. An interim hearing in the family law courts is an abridged process where cross-examination of parties seldom occurs and where findings about disputed facts can rarely be made. One piece of evidence may be a DVO. On the strength of the DVO, a judge may, on an interim basis, determine to act cautiously (balancing risk) and constrain the child's time with the alleged perpetrator (for example, by supervision, or day-time time only and in a public place) until the matters of family violence can be properly tested at a trial.
194. Delays between an interim hearing and the final trial can be lengthy. If the relevant allegations are not ultimately made out at final trial, then the time shared between the child and the accused parent has been constrained between interim hearing (where the judge determined to act cautiously), and final trial (where the evidence is tested). The impact of such a delay between interim hearing and final hearing in the family law courts (which in some instances may be measured in years) is clear when it is considered that

¹¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 June 2020 (Graham Perrett MP). Mr Perrett was making the Second Reading Speech for the Family Law Amendment (A Step Towards a Safer Family Law System) Bill 2020..

¹¹¹ The Law Council acknowledges this is a rebuttable presumption but maintains it is problematic.

¹¹² See, Rachel Carson et al, 'Identifying and responding to family violence and child safety concerns' (November 2016) *Australian Institute of Family Studies Family Matters No. 98*.

¹¹³ Richard Chisholm, 'Rewriting Part VII of the Family Law Act: A modest proposal' (2015) 24/3 *Australian Family Lawyer* ('*Rewriting Part VII*').

¹¹⁴ See, *ALRC Final Report* (n 24).

¹¹⁵ See, *Rewriting Part VII* (n 113).

the months or years where the parent-child relationship has been constrained can never be restored.

195. The use of discrete issue hearings to determine the risk allegations as soon as possible has been embraced in some courts. However, the Law Council understands that the experience of those judges is that having effectively two trials (the risk trial and then the parenting dispute) is more expensive and time consuming for the parties. It also serves to double-up judicial resources, which can negatively impact upon the progress of other, equally deserving matters. A risk trial may also give rise to circumstances where a judge, having made credit findings in the first hearing, then cannot sit in judgment at subsequent hearings for the same parties. Given the sheer number of matters where family violence is alleged, there would likely be so many matters that fall into the category as to make the scheme self-defeating.
196. When engagement in a timely and appropriate way with the allegations made in order to ensure the safety of victims of family violence cannot be achieved because of crushing court lists, risk increases for those turning to the court for resolution of their parenting disputes. The Law Council is aware of the experience of members where urgent hearings of recovery applications (brought in response to the wrongful removal of a child from a parent or from a care arrangement and the child's usual living arrangements) are not listed for hearing for extended periods, if at all (being listed for directions instead). It is understood that these delays are a consequence of lack of resources and of court time simply not being available to permit the timely hearing of the applications. This has the obvious consequence of rewarding the conduct of one parent, potentially penalising a child, and the impacts may be more serious where family violence allegations are also made.
197. The Federal Circuit Court deals with the bulk of parenting disputes and the judges of that Court can have up to 500 or 600 case in their docket, being the cases assigned to and remaining with that judge for management and determination. The Law Council understands that the workload is crushing, with serious consequences for the parties: ballooning delay will mean that urgent issues may languish, and that inadequate parenting arrangements and risk dynamics may continue.
198. Where it is recognised that around 70 percent of matters before the court will involve allegations of family violence, it is essential that the courts are sufficiently resourced to identify, address and respond swiftly to family violence.
199. A key challenge for the courts, then, is how to respond appropriately to the specific and at times acute issues in complex matters involving such allegations. In this regard, Women's Legal Services Australia (**WLSA**) has recommended¹¹⁶ that a separate family violence triage system, properly funded, should be created and implemented. The WLSA recommendation would involve a number of changes to how family law courts respond to matters involving family violence, including:
 - strengthening the family violence response through a specialist family violence pathway or specialist courts;
 - introducing specialist court-based family violence risk assessment practices;
 - promoting and resourcing the early determination of family violence through an informed case management process and the early testing (in a court process) of evidence of family violence; and

¹¹⁶ Women's Legal Services Australia, *Safety First in Family Law Plan* (online at 4 August 2020) <http://www.wlsa.org.au/uploads/campaign-resources/Safety_First_in_Family_Law_Plan.pdf>.

- removing the presumption of ESPR and shifting the focus under the Family Law Act to the safety of and risk to children.
200. A range of ancillary suggestions were made by the WLSA, including increased funding to CLCs and other agencies involved in the support of victims of family violence.
201. Earlier preparation of Family Reports by Family Consultants would also assist in assessing risk and safety issues for many families before the courts, including by having a Family Report available at an interim hearing. In some instances, this would have the important added benefit of enabling the views of children to be obtained and heard (subject to considerations of their age, maturity and protective concerns). This would aid in ensuring, before any interim hearing takes place, that a range of risk considerations has been explored and recommendations made at an earlier stage in the court process.
202. If this is to occur, it is imperative that the Government prioritises resourcing for the preparation of Family Reports (noting that the cost of these reports varies but generally falls within the range of \$5,000-\$10,000 and in some metropolitan areas, like Sydney, can regularly cost or exceed \$15,000 plus GST).
203. Similarly, funding to the courts should be increased to enable them to engage Family Consultants. Family Consultants undertake crucial and timely risk assessments for vulnerable children and their families and provide information for case management planning, including through preparation of a Family Report.

Family violence in property matters

204. The circumstances in which family violence may presently be taken into account in property proceedings are explored more fully in the Law Council's submission to the ALRC Discussion Paper.¹¹⁷ In short, under common law the court may adjust for the consequences of family violence in property settlement cases where it can be established that there has been a course of conduct (family violence) which has made the contributions of the (victim) more onerous.¹¹⁸
205. The challenges in pursuing such a claim or additional adjustment are well known. They include the considerable burden to the alleged victim in being required to revisit and particularise the details of their past experiences, in circumstances where any eventual adjustment is usually modest. The cost of this additional focus can be considerable, particularly if a preliminary hearing occurs as to whether such an adjustment would be reasonably open were that party's evidence accepted at its highest.
206. Certain recommendations made in the ALRC Final Report consider the impact of family violence allegations in property settlement matters. The ALRC recommended the introduction of a statutory tort of family violence;¹¹⁹ the Law Council's Family Law Section has expressed neither support nor opposition to this suggestion.

Merger of the courts and other initiatives

207. A properly functioning family court system is of critical importance to the protection of victims of family violence and for the Australian families who ask judges to discharge the grave responsibility of making orders about their children when they have been unable to agree those matters.

¹¹⁷ *LCA Issues Paper 48* (n 11) 53-62.

¹¹⁸ See, *Marriage of Kennon* (1997) 22 Fam LR 1.

¹¹⁹ Recommendation 19.

208. The problems with the proposed merger of the Family and Federal Circuit Courts as set out the Federal Circuit and Family Court of Australia Bill 2019 (Cth) have been fully identified and articulated by the Law Council in a number of submissions explaining its opposition to a merger (including those noted at paragraph 17 above). The proposal would, in the Law Council's view, result in a highly undesirable move away from family law specialisation within the court.
209. The proper determination of family law matters requires a high level of skill and extensive knowledge of a wide range of issues and areas of substantial law. A lack of expertise in family law can result in erroneous decisions and poorer outcomes for families. This increases the risk that the quality and propriety of family law decisions will be compromised where determinations are made by judicial officers with limited or no family law expertise.
210. These challenges are only more acute when the matter before the court includes the complex dynamics of family violence and its safe disposition is critically dependent on the identification of risk. Court users who are already vulnerable, especially self-represented litigants, are rendered even more so in a court with diminished specialisation and continuing resource crises, leading to extensive delays.
211. The merger as proposed would result in the abolition of the Family Court, a specialised and focused forum for dealing with family law issues. The proposed single court would have jurisdiction across the entirety of Federal law from immigration to bankruptcy, employment issues to copyright, along with family law issues. Australian families and children would compete with all such matters for resources and hearing time and would have the same rights of appeal.
212. The Law Council suggests that there are alternative steps that can be taken which may immediately assist in improved experience in and access to the courts without eliminating a specialised court. These are, namely:
- to harmonise the Family and Federal Circuit Court Rules. Presently, the two Courts have their own sets of Rules and different Forms. This creates confusion and uncertainty, particularly for self-represented litigants. One set of rules to apply in both courts, with one set of forms, has been long sought and is currently the subject of much anticipated reform at the hands of a Joint Rules Harmonisation Working Group chaired by Dr Chris Jessup QC;¹²⁰ and
 - the making of short form judgments, an action which is now permissible in interim parenting matters under section 69ZL of the Family Law Act and is safeguarded by the fact that the court still has an obligation to give 'adequate' reasons. However, the Law Council notes that without simplifying the parenting pathway under the Family Law Act (as outlined at paragraphs 185 to 192 above), it is unlikely that encouraging greater reliance upon short form judgments will assist in reducing time and other pressures upon the court.

Increased resourcing of Federal family law services

213. Adding to the risk and complexity of families and their circumstances has been the chronic under-resourcing of the family courts and family law system itself over decades and by multiple Governments.

¹²⁰ Family Court of Australia, 'The courts take vital steps towards reform with development of unified family law processes' (Media Release, online at 5 April 2019) <www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/m050419>.

214. The ALRC Final Report found that:

...the family law system has been deprived of resources to such an extent that it cannot deliver the quality of justice expected of a country like Australia...There is a chronic lack of funding for the appointment and proper training of judicial resources (including judges, judicial registrars – none of whom are currently employed within the courts, and registrars), court-based social services professionals (including Family Consultants and Indigenous Liaison Officers), and legal aid services (including Independent Children's Lawyers). As a consequence, children and families are deprived of sufficient time and attention being given to their matter at all stages of the process, with the obvious risks that this entails...[t]he lack of resources has been a matter of concern at the highest levels for 30 years.¹²¹

215. In the 2014 KPMG review of the performance and funding of the federal law courts commissioned by the Australian Government, it was recognised that the impact of under-funding means that the Family Court, Federal Court of Australia and Federal Circuit Court operate:

...in a broader (constrained) fiscal environment which necessarily impacts on timely, efficient, equitable access to justice and facilitation of judicial decision-making. Equally, reported increases in case complexity and changes to the client profile mean that the courts are operating in a new landscape which presents challenges to the timely, equitable and efficient administration of justice.

These concerns have not gone unnoticed; the ongoing financial viability of the Courts has been raised as a concern amongst the judiciary, policymakers and Members of Parliament for some time.¹²²

216. The Law Council submits that a properly resourced family law court system would assist in meeting the demands placed on the courts by the number of filings and the increasing complexity of matters.

217. The current demand on court services is such that the capacity to hear family law matters in a timely and effective manner is limited. It often takes considerable time for parties to receive a first return date, secure trial dates and, following trial, to receive judgment. To echo the Law Institute of Victoria (one of the Law Council's Constituent Bodies): 'overwhelming lists and time pressures placed on decision makers [judges] exercising family law jurisdiction can...lead to a dubious application of proper process, compromised decision making and unjust outcomes for Australian children and families'.¹²³ Extensive delays can exacerbate frustration and conflict between parties, leading to detrimental outcomes for children and families. In matters involving family violence, these delays potentially expose a person experiencing violence, and children, to greater risk.

218. To the extent that there are delays in the system, the Law Council submits that this is a result of:

¹²¹ ALRC Final Report (n 24) 32.

¹²² Attorney-General's Department, *Review of the performance and funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia* (March 2014) 24.

¹²³ Law Institute of Victoria, 'Submission to the Legal and Constitutional Affairs Legislation Committee: Inquiry into the Family Law Courts' (23 November 2018) 9.

- increasingly complex cases;
- persistent and long-term and under-resourcing of the family law courts;
- inadequate funding for court supports (such as Legal Aid Commissions and CLCs); and
- delays in judicial appointments.

219. These deficiencies must be addressed and the Law Council strongly recommends that family law courts be provided with appropriate, additional resources to allow matters to be heard and determined in a timely manner.

Areas of focus and initiatives to identify risk and increase safety

Dispute and alternative dispute resolution

220. In addition to (and/or echoing) many of the above suggestions, the Law Council points to its 2017 Submission to the Standing Committee on Social Policy and Legal Affairs (**LCA FV Submission 2017**),¹²⁴ which proposed several initiatives to better protect families at risk of family violence as they go through the dispute resolution process. These included to:

- appoint more judges, registrars and family consultants in the family courts;
- improve integration between the family courts, child protection and family violence jurisdictions;
- conduct preliminary risk assessments in each parenting matter;
- improve and enhance case management by the courts where risk of family violence has been identified, improved safety of court buildings and facilities;
- fund culturally appropriate legal services in the critical areas in which family violence intersects with the legal system, including court outreach programmes; and
- provide adequate funding for legal assistance and the family courts to reduce the possibility that vulnerable litigations will agree to consent orders due to impecuniousness or delays, and so judicial officers can properly assess any risk of family violence.

221. The Law Council refers the Inquiry to the LCA FV Submission 2017 because of its strong focus on protecting families affected by family violence who find themselves in the family law system because of relationship breakdown and disputes.

222. Indeed, this Inquiry may avail itself of the work undertaken through a range of prior inquiries, including, but not limited to, the recommendations in the ALRC Final Report.¹²⁵ By way of concrete law reform to increase the safety of litigants whose dispute requires judicial determination, the Law Council endorses Recommendation 10 of the ALRC Final Report: that the proposed combined rules for the Family and Federal Circuit Courts provide for judges of both courts to be able to conduct proceedings under Pt VII Division 13A of the Family Law Act.¹²⁶ Both courts should be adequately resourced to carry out the statutory mandate in subsection 69ZN(1) of the Family Law Act, being to observe particular 'principles for conducting child-related proceedings'.

¹²⁴ *LCA FV Submission 2017* (n 9).

¹²⁵ See, for example, Recommendations 2 (implement a national information sharing framework) and 3 (expanding the NDVO Scheme to include family court orders and orders made under state and territory child protection legislation) of the ALRC Final Report, and the reasoning behind these Recommendations.

¹²⁶ Note, Division 13A deals with the consequences of failure to comply with orders, and other obligations, that affect children.

223. The Law Council also draws the Inquiry's attention to a report commissioned of consultancy organisation, Inside Policy, by the AGD and entitled: *An Evaluation of the Family Advocacy and Support Services*.¹²⁷ This report evaluated various initiatives designed to assist parties with complex needs (related to family violence and child protection) through the court process as efficiently as possible. The Law Council notes the success and, to some degree, level of foresight involved in the design and implementation of the FASS, which have secured funding for an additional three years and will go some way in supporting families affected by family violence and appearing before the family courts.
224. Concurrently to the above, there is a more overarching need for the Government should focus on providing adequate funding to Federal courts exercising family law jurisdiction. This includes funding of appropriate and safe court buildings and infrastructure to meet the needs of family law litigants in both capital cities and regional areas. It also goes to the appointment of judges, Family Consultants and support staff so that cases can be dealt with a timely and expert way, and so that such staff are paid commensurate with their workload and its complexities.
225. Families experiencing relationship breakdown and family violence are supported by other family law services which play an integral part in the dispute resolution continuum and require adequate resourcing to ensure safe and effective resolution of their legal and social needs.
226. Indeed, important court and non-court based services forming part of the dispute resolution pathway such as Family Counsellors, Family Dispute Resolution Practitioners, Family Consultants, and Independent Children's Lawyers, were observed by the ALRC Final Report to be under resourced. It was noted that some of these services have existed since the inception of the Family Court but there have been instances where the roles have changed or diminished, or levels of funding have not been maintained to support the sheer number and complexity of families requiring the services.¹²⁸
227. The role of Family Consultants was particularly noted as being reduced and underfunded such that these professionals no longer have the 'capacity to undertake the breadth of clinical practice which the role initially comprehended. Further, the lack of resourcing has resulted in the need to outsource report writing to practitioners who are not within the court system and who therefore lack the oversight and clinical peer review that exists amongst the court-based Family Consultants'.¹²⁹
228. The Law Council submits that increasing the capacity of Family Consultants will enable greater risk identification, triaging and safety planning for families at risk entering the litigation pathway and ensure greater quality assurance of family report writing outsourced by the courts.
229. Family mediation can also provide important opportunities for the voices of the parties and children in family law disputes to be heard. In particular contexts, including where there is a history of domestic and family violence and the parties' capacity to negotiate effectively is diminished, this process must be practised with care and with a focus on ensuring that the participants' voices can be heard safely.

¹²⁷ Inside Policy, 'An Evaluation of the Family Advocacy and Support Services' (Final Report, 18 October 2018) *Attorney-General's Department*.

¹²⁸ *ALRC Final Report* (n 24) 50.

¹²⁹ *Ibid*.

230. Accordingly, the Law Council echoes calls for funding for the development and delivery of Lawyer Assisted Dispute Resolution (**LADR**) for families with complex needs, as highlighted in the ALRC Final Report.¹³⁰ The ALRC noted it had received submissions recommending model designs which involve the following:

- a case management component;
- involvement of services with family violence expertise to develop screening assessment and support procedures;
- models with two Family Dispute Resolution Practitioners and other support services;
- suitability guidelines for LADR; and
- greater availability of LADR at all points of the dispute resolution continuum.

231. As noted above, litigation itself is a family violence risk factor. Minimising delays and maximising the availability of alternate dispute resolution models will increase safety and better outcomes.

232. As an example of another possible form of alternative dispute resolution, the Law Council supports the model of mediation developed by Women's Legal Service Queensland, which addresses safety issues and concerns in matters where there is a history of domestic and family violence.¹³¹ Coordinated Family Dispute Resolution (**CFDR**) is a multidisciplinary and specialised approach to mediation where past or current family violence exists. It is a professionally case-managed, flexible process which aims to respond to the particular and individual needs of each family and to support them in achieving safe parenting outcomes. A range of professionals work collaboratively, including mediators, lawyers, family violence support workers (who conduct specialist risk assessments and provide counselling and advocacy for victims), men's workers (who work with gendered analyses of violence and provide counselling and advice to perpetrators) and, in some cases, specialist children's practitioners.

233. CFDR builds on and enhances the current practice of mediation in the family law system. It acknowledges that in some (though not all) matters involving family violence, it is not appropriate to conduct mediation because participation in the process may be dangerous, or the risk of reaching an unsafe agreement may be too great. CFDR involves the following four phases:

- Initial specialist family violence risk assessment and preparation of a safety plan.
- Preparation phase, involving legal advice, communication coaching and counselling and coaching about participating in Family Dispute Resolution (**FDR**).
- Participation in a facilitative, problem-solving focussed, legally assisted model of mediation.
- Follow-up to assess how agreements are progressing, including any issues around ongoing safety of parties and children.

234. The Law Council encourages the Australian Government to capitalise on the proven efficacy of CFDR to protect the safety of families and to achieve sustainable outcomes in FDR where there is a history of family violence. As a tested model grounded in theory

¹³⁰ Ibid 273.

¹³¹ This was commissioned by the Attorney-General's Department in 2009.

and scholarship, this approach should inform future developments and improvements to dispute resolution processes in the family law system.¹³²

235. The Law Council also commends the Australian Government on recent funding injections arising out of the Women's Economic Security Package which has seen the establishment of the Lawyer-assisted Property Mediation: Legal Aid Commission Trial for small value property matters up to \$500,000. The Law Council looks forward to seeing the evaluation of this by the Australian Institute of Family Studies due in April 2022.
236. The Law Council calls for continued and sustained funding to the Legal Aid Commission lawyer-assisted FDR programmes which provide safe and trauma informed dispute resolution programs for families affected by or at risk of family violence and diverting them from the litigation pathway wherever possible.

Other support services

237. One crucial means of increasing safety in the family law system is supervised contact centres. In some centres, it is necessary to first allow time between a child and parent on a supervised basis. Government-funded supervised contact centres play an important role in those cases as they provide a secure but child-focused environment in which the contact visit may take place, which is priced accessibly, and the visits are supervised by appropriately qualified professionals. Contact centre supervisors are able to provide the court with independent evidence about the progress of the visits. Further, where there may be significant distrust and conflict between parties, the availability of independent evidence enables the court to make decisions about the development of contact with a parent.
238. The demand for supervised contact centres is considerable. In some cases, the waiting list may be nine months or longer. This impacts on the courts' capacity to deal with cases in an expeditious way. Accordingly, the government should increase resourcing of supervised contact centres to improve the safety of children and their families.
239. In addition to supervised contact centres, the Law Council also recognises the great benefit that separating or high-conflict families derive from universal services such as the Victorian Orange Door Support and Safety Hubs. These organisations provide holistic services ranging from risk and needs assessments to referrals to social, emotional, legal and mental health services, similar to the 'Families Hubs' mentioned (though left from its recommendations by virtue of being a social, rather than legal, policy)¹³³ in the ALRC Final Report. Funding such central 'first point of contact' services is key to harm minimisation and prevention, ensuring that social, emotional and legal problems do not escalate. The Inquiry should also refer to examples of the health justice partnerships and legal information, advice and referral services used by Family Relationship Centres and Legal Aid Commissions.¹³⁴
240. Finally, Independent Children's Lawyers (**ICLs**) play a critical role in parenting cases where a child may be at risk of harm, including from exposure to family violence. They are essential in objectively presenting to the court a position that reflects the best interests of a child. This is enormously beneficial to the court in determining parenting matters and ultimately leads to better outcomes for children. ICLs are funded, primarily,

¹³² See, Australian Institute of Family Studies, *Evaluation of a Pilot of Legally Assisted and Supported Family Dispute Resolution in Family Violence Cases* (Final Report, 2012).

¹³³ The ALRC also referred to the need to avoid the duplication of existing services. See, *ALRC Final Report* (n 24) 455-6.

¹³⁴ See, for example, Family Relationships Online, *Family and domestic violence support* (online at 5 August 2020) <<https://www.familyrelationships.gov.au/dealing-violence/family-domestic-violence-support>>.

by legal aid commissions around the country, which in turn rely on Australian Government funding. Funding for legal aid in family law has failed to keep pace with demand. In many States and Territories, legal aid is no longer available for an ICL in cases where there are allegations of family violence. Accordingly, the Law Council calls for additional funding for ICLs. As well as ensuring adequate funding for all practitioners, this may facilitate the engagement of experienced private practitioners who have the skill and expertise necessary to manage complex matters.

Improving the skills of professionals working within the family law system

Training and appointments to Federal courts exercising family law jurisdiction

241. Subsection 22(2) of the Family Law Act provides that a person shall not be appointed a Judge of the Family Court unless:

(a) *The person is or has been a Judge of another court created by the Parliament or of a court of a State or has been enrolled as a legal practitioner of the High Court or of the Supreme Court of a State or Territory for not less than 5 years; and*

(b) *By reason of training, experience and personality, the person is a suitable person to deal with matters of family law.*

242. Paragraph 22(2)(b) is replicated in the *Family Court Act 1997 (WA)* (**Family Court Act**) in relation to the appointment of Judges to the Family Court of Western Australia.¹³⁵

243. However, even though the Federal Circuit Court also hears family law matters, there is no equivalent provision to paragraph 22(2)(b) of the Family Law Act or paragraph 11(3)(b) of the Family Court Act in the *Federal Circuit Court of Australia Act 1999* (Cth). It is perhaps unsurprising then that it is not uncommon for judges to be appointed to the Federal Circuit Court who have had very little or no previous experience practicing family law. Many go on to hear and determine a significant caseload of family law work. Indeed, according to the 2018-19 Annual Report of the Federal Circuit Court, 90 percent of all family law work filed at the Federal level is filed in the Federal Circuit Court and in most cases, their judicial docket ranges 'anywhere between 300 and 500 matters'.¹³⁶

244. The training, background and skills of judges appointed to hear family law cases has been considered by a number of recent inquiries, that of the House of Representatives Standing Committee on Social Policy and Legal Affairs into a better family law system to support and protect those affected by family violence, as well as the ALRC Final Report.

245. In its Final Report, entitled: A better family law system to support and protect those affected by family violence: Recommendations for an accessible, equitable and responsive family law system which better prioritises safety of those affected by family violence, the Standing Committee on Social Policy and Legal Affairs noted:

...the vast majority of family law matters are heard in the Federal Circuit Court. It is therefore particularly concerning that judges appointed to the Federal Circuit Court may not have the expertise in family law or identifying the presence of family violence or child abuse, prior to presiding over such cases.

¹³⁵ See, section 11(3)(b).

¹³⁶ See, Federal Circuit Court of Australia, *Annual Report 2018-19* (6 September 2019) 3, 27.

*The Committee notes that judicial officers cannot be compelled to attend or participate in training once appointed. It is therefore critical that judges with family law and family violence expertise are appointed to the federal family courts, and for current and up-to-date training be made available to judicial officers. Given the high family law caseload in the Federal Circuit Court, it is fundamental that the professional experience of the judicial appointees to the Federal Circuit Court possess sufficient expertise to reflect that caseload.*¹³⁷

246. The Hon. Robert French AC, former Chief Justice of the High Court of Australia, has reflected on the benefits of judicial specialisation:

*Legal professional and judicial specialisation can offer efficiencies. People familiar with a particular area of law and practice are more likely to be able to advise and to adjudicate in such areas economically and expeditiously. As a general observation, there are areas in which specialist judges are particularly beneficial...At the primary level, in the exercise of a trial court's original jurisdiction, common sense would suggest that judges burdened with the responsibility for a high volume of decision-making in difficult areas of judicial discretion should have a thorough familiarity with the law they are administering and the practice of the court. They will also have or acquire the important lived experience over time of hearing and deciding cases in which the facts are contested, the parties are not always represented, if represented at all, and in which a high level of interpersonal skills and communication skills is required to manage emotionally fraught and stressed people.*¹³⁸

247. In the context of cases involving allegations of family violence, the expertise of presiding judges is particularly necessary for the following reasons:

- At the early stages of family law litigation, when critical decisions are made about risk of family violence, the least amount of time and resources are available to judicial officers. The Law Council understands that it is not uncommon, at the first hearing date of such cases, for a judge to have 25 or more cases in the list for determination that day. Quick decisions must be made, often with limited expert evidence available and certainly with no cross examination of witnesses. A judge who does not have a significant history of experience in identifying risks of family violence, particularly in understanding the complex and nuanced features of coercive and controlling violence (which often involve no overt signs of physical violence, but which are commonly represented in family homicide), can unwittingly make orders placing women and children at significant risk of harm.
- Many litigants in Federal family law courts are not legally represented. Judges without family law experience can struggle to identify risks of family violence without the assistance of lawyers, again placing women and children at further risk.
- If a judge demonstrates over time that they do not prioritise the prevention of risk from harm of family violence (that is, if they demonstrate a propensity to undervalue or to misunderstand the seriousness of family violence), a culture

¹³⁷ House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence* (December 2017) 285 ('**A better family law system**').

¹³⁸ Robert French AC, 'Specialists, Generalists and Legal Intersections in Family Law' (Speech, 18th Biennial National Family Law Conference, 4 October 2018).

develops around that judge. Lawyers must advise their clients about the likely outcome of a hearing, and when allocated to a judge in this category, clients may settle their case in a way that might not adequately protect themselves or their children rather than risk an adverse judgment from the judge.

- Due in part to the long delays in the family law courts between first hearing and a trial, decisions made by judges at interim hearings about parenting arrangements can have a significant effect on the likely outcome at a trial. If a Judge makes an order at the first hearing that does not adequately take into account the impact of family violence on a child, it can be very difficult to reverse the impact of that order at a trial. That is, lack of identification of risk of family violence at an interim hearing is critical to the way that family violence is taken into account in the balance of that litigation.

248. Acknowledging this, the ALRC recommended in its Final Report an amended version of section 22 of the Family Law Act be applied to the appointment of all Federal judges exercising family law jurisdiction. It suggested that in making such appointment, there be 'consideration of the person's knowledge, experience, skills, and aptitude relevant to hearing family law cases, including cases involving family violence'.¹³⁹ The Law Council has also long advocated for the extension of section 22 of the Family Law Act to be applicable to the appointment of Federal Circuit Court judges.

249. In addition, the Law Council has encouraged a bi-partisan and independent approach to the appointment of judges to family law courts. In its response to the ALRC Discussion Paper, the Law Council stated:

There have been calls for decades to changes to the way that the Commonwealth (and States and Territories) appoints Judges. Those calls have largely focused on the need for greater transparency and greater independence from the Executive in the appointment process. The options canvassed include the application, interview and panel process highlighted by the ALRC through to the establishment of an independent body such as that which operates in the UK (the Judicial Appointments Commission). The LCA advocates for a process that is less open to political interference and which focuses on the proper assessment of a candidate's knowledge, skill and aptitude for appointment, in this case, to the family law jurisdiction.¹⁴⁰

250. In the context of family violence, the Law Council contends that a transparent process of judicial appointment, which includes a rigorous assessment of a candidate's understanding in relation to family violence and related issues, is essential to the safety of women and children.

251. The Law Council also supports the provision of ongoing training and education for judges on family violence and related matters, including: post-separation family dynamics; diverse family structures; and impacts and experiences of violence for First Nations women, women from CALD backgrounds, women with disability and LGBTI+ people. Ongoing judicial education on family violence is crucial to a court's capacity to properly assess matters involving domestic, family and sexual violence.

252. Through the anecdotal evidence of its members, the Law Council understands that a lack of expertise and understanding of the complex dynamics of family violence can result in decisions which are not founded in applicable law and do not prioritise safety.

¹³⁹ ALRC Final Report (n 24) recommendation 51.

¹⁴⁰ LCA submission to ALRC (n 11) 67.

By way of example, trauma can manifest in ways which affect the way a party presents, or can result in fragmented memories. Without an understanding of these impacts on victims, a judge may make adverse findings around credibility. The binding nature of court decisions means that the consequences for people experiencing violence are significant.

253. Research around good practices and initiatives for judicial education on family violence identifies the following as important aims for training:¹⁴¹

- the development of a comprehensive understanding of the dynamics and complexities of family violence;
- the examination of the myths and realities of family violence;
- the promotion of understanding and empathy towards victims; and
- the promotion of an understanding of, and the ability to evaluate, patterns of family violence behaviour.

Training and skills of other professionals working in the family law system

254. In addition to judges, many recent inquiries and reports have investigated the need to enhance family violence training and skills of other professionals working in the family law system.

255. In relation to lawyers, the Law Council has advocated a position that goes beyond that recommended in any recent report.¹⁴² Its view is that the effects of family violence are not just relevant to family law but may also be relevant to a range of other legal issues, including property purchases and sale, personal injuries, criminal law and the operation of family businesses. Accordingly, all legal practitioners should undertake compulsory family violence training. The Law Council recently provided input to the AGD in relation to its proposition of such compulsory family violence training for lawyers.

256. In terms of developing the recommended Continuing Professional Development (CPD) units, there are a number of best practice guidelines and frameworks which have been developed to assist the legal profession and judiciary improve their understanding of family violence and which Government should draw upon. For example, in 2016, the Queensland Law Society published the *Domestic and Family Violence Best Practice Guidelines*. These Guidelines were developed in direct response to Recommendation 107 of the report by the Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever - Putting an End to Domestic Violence in Queensland*. The Guidelines aim to assist practitioners in dealing with legal matters impacted by domestic and family violence.¹⁴³

257. The Law Council suggests that the following skills could be incorporated into any mandatory CPD unit:

- professional development and skills advancement in recognising and responding to family violence;

¹⁴¹ S Wakefield & A Taylor, 'Judicial Education for Domestic and Family Violence: State of Knowledge Paper' (February 2015) *ANROWS Landscapes* ('**Judicial Education**').

¹⁴² For example, the ALRC in its Final Report recommended that lawyers undertaking family law work should complete one unit annually of continuing professional development (CPD) relating to family violence. See, *ALRC Final Report* (n 24) recommendation 52.

¹⁴³ Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015) ('**Not Now, Not Ever**') recommendation 107.

- skills in managing client relationships to minimise the risks of physical danger to oneself and of vicarious trauma;¹⁴⁴
- an understanding of professional obligations regarding client confidentiality and taking instructions if the mental capacity of the client is in question (emphasising, however, that practitioners should not be required to assist beyond providing legal information, legal advice and appropriate referrals);
- awareness of referral pathways and options to enhance client safety or mitigate the risk their client may pose;
- sound knowledge and understanding of the dynamics of family violence, including how control may manifest and the impact of additional vulnerabilities and trauma, with a view to contributing to safer outcomes and to mitigating risks posed by the perpetrator;
- the ability and accountability to recognise when legal systems are being used to further intimidate and harass victims and to not be complicit in this. Examples of how legal systems may be used in this way include commencing multiple court processes across multiple jurisdictions to intimidate, harass and wear the victim down;¹⁴⁵
- the ability to encourage behavioural change and non-collusion, where a practitioner is representing a perpetrator, including through an improved understanding that the use of violence and control in personal relationships is a choice;¹⁴⁶
- the ability to respond to the physical, psychological and financial abuse of vulnerable people including survivors of family violence, elder abuse, child abuse and discrimination; and
- the ability to meaningfully assess and reassess risk at each contact, to ensure the victim's safety needs (including physical, emotional and psychological) are considered when providing services, including through the ability to:
 - screen for immediate risks;
 - recognise safety concerns inherent in the various means of contact and communication;
 - recognise any risk implications of particular legal courses of action;
 - recognise and take any precautions needed for client travel to and from legal appointments or court; and
 - take particular caution where indicators of escalating risk or homicide are present, including non-fatal strangulation, forced sexual acts, assaults during sex or sexual jealousy, threats of suicide by the perpetrator, violence

¹⁴⁴ Examples of this type of training include the Law Society of New South Wales' continuing professional development programs which incorporate skills-based training in areas such as family violence and 'fundamentals' for family law practitioners. The Law Council understands that Legal Aid NSW also offers comprehensive training for panel solicitors, and that private consultancies offer training on trauma informed practice.

¹⁴⁵ See, Heather Douglas et al, 'Legal Systems abuse and coercive control' (2018) 18(1) *Criminology & Criminal Justice* 84-99.

¹⁴⁶ See, Centre for Innovative Justice, *Pathways towards accountability: Mapping the journey of perpetrators in family violence - Phase 1*, 2016.

against companion animals, victim pregnancy, access to weapons and separation.¹⁴⁷

258. In addition, consideration should be given to incorporating these subjects into the core mandatory curricula in all Practical Legal Training (**PLT**) courses (rather than into elective units). Not all lawyers who practise in family law form the intention to do so as PLT students. Moreover, in the experience of the Law Council's members, family violence issues can arise in the context of many other areas of practice.
259. Recent inquiries and reports have also considered the family violence training needs of private Family Report writers (who provide expert evidence in family courts about parenting arrangements), contact service providers (who supervise contact between a child and a parent) and ICLs (who provide assistance to the court to ensure that all evidence relevant to assessing a child's best interests is put before the court, as outlined at paragraph 240 above).¹⁴⁸ The Law Council encourages the funding of ongoing training for these specialists, including, critically, to be directed to the family courts to enable them to increase the number of their in-house Family Consultants and to increase payment to Family Consultants whom they may engage privately under regulation 7 of the *Family Law Regulations 1984* (Cth).

Children and young people

260. A separate yet related issue which the Law Council asks the Inquiry to consider is that its Terms of Reference focus on women and their children, but make no reference to children and young people as a separate group. To the extent that the majority of people who experience family violence are women, this crime is correctly understood as being of a gendered nature.¹⁴⁹ However, the Inquiry would benefit from also focussing on young people, who are involved independently in family violence (as both victims and perpetrators) and who may be in different or extended family relationships.
261. As stated by the NSW BOCSAR,¹⁵⁰ relatively little research has been done to date into adolescent perpetrators of family violence. The NSW BOCSAR and Youth Justice NSW have found several differences between adolescent and adult family violence offending. The Law Council notes, in particular, that:
- adolescent family violence offenders are often victims of family violence themselves, and have experienced trauma;
 - adolescents reoffend at double the rate of adults;
 - there are substantially more adolescent females charged compared with adult females;

¹⁴⁷ Stephanie Folkes, Zoe Hilton and Grant T Harris, 'Weapon Use Increases the Severity of Domestic Violence but Neither Weapon Use Nor Firearm Access Increases the Risk or Severity of Recidivism' (2012) 28(6) *Journal of Interpersonal Violence* 1143; Jacquelyn Campbell et al, 'Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study' (2003a) 93(7) *American Journal of Public Health* 1089; Carolyn Block, 'Reducing Intimate Partner Homicide Rates: What are the Risk Factors for Death when a Woman is being Abused?' (2009) 104 *Australian Institute of Criminology, Domestic-related Homicide: Keynote Papers from the 2008 International Conference on Homicide* 62; Office of the State Coroner (Qld), *Annual Report 2013-2014* (2014); Australian Domestic and Family Violence Death Review Network, *Data Report* (online, 2018) <https://www.magistratescourt.tas.gov.au/_data/assets/pdf_file/0008/416474/ADFVDRN_Data_Report_2018_.pdf>; Australian Bureau of Statistics, *4510.0 - Recorded Crime - Victims, Australia* (2017); *Judicial Education* (n 141).

¹⁴⁸ See, for example, *ALRC Final Report* (n 24); *A better family law system* (n 137).

¹⁴⁹ *Not Now, Not Ever* (n 143) 7, 49; 72-73.

¹⁵⁰ Karen Freeman, 'Domestic and family violence by juvenile offenders: offender, victim and incident characteristics' (2 October 2018) 136 *NSW Bureau of Crime Statistics and Research Bureau*.

- the majority of victims of adolescent violence in the home are the young person's mother and younger siblings, compared to female intimate partners for adult family violence;
- adolescents using violence in the home are likely to be experiencing mental health issues and trauma; and
- there is a lack of awareness about adolescent violence in the home which has an impact on the availability of services for children and young people in family violence strategies.¹⁵¹

262. These differences suggest that adolescents require a tailored approach to prevention and intervention.

263. Despite the relative shortage of research, the Law Council notes it is aware of several emerging efforts to implement and evaluate prevention and intervention initiatives specific to family violence perpetrated by juveniles. Analysis of the efficacy of these interventions has proven problematic, due to a lack of rigorous program evaluations. Whilst the effectiveness of some interventions has been subject to evaluation, using pre and post-test qualitative assessment, only a very small number have conducted quantitative and longitudinal evaluations. There are also several interventions being implemented internationally and nationally that are yet to be evaluated. Many interventions are based on cognitive behavioural therapy and motivational interactions, approaches which have strong evidence of success in changing offending behaviour of young people generally.¹⁵²

264. The Law Council suggests the Inquiry investigate the following adolescent family violence programs and interventions that have strong evidence internationally or are being trialled in Australian jurisdictions:

- 'STEP UP' Program (Washington USA);¹⁵³
- 'Love Bites',¹⁵⁴ as a primary prevention program;
- Gwent Domestic Abuse Services 'Youth Respect Pilot' Program UK;¹⁵⁵
- ROPES43 (Victoria) an early intervention program; and
- KIND Program (currently being trialled by Youth Justice in South Australia).

Term of Reference (k)

265. Term of Reference (k) asks the Committee to consider an audit of previous parliamentary reviews focussed on domestic and family violence.

266. The Law Council welcomes the current Inquiry, but inquiries and reviews in themselves do not represent meaningful progress unless outcomes are properly considered and subsequent action is implemented.

267. The Law Council notes the number of reviews and inquiries undertaken at a Federal level, including the review which produced the ALRC Final Report, the current Joint

¹⁵¹ Youth Justice NSW, *Domestic and Family Violence Strategy 2019-2022*.

¹⁵² Youth Justice NSW, *What Works with Young Offenders: Youth On Track Guidelines* (2016).

¹⁵³ King County, *Step-Up Program Curriculum: Building Respectful Family Relationships* (online at 4 August 2020) <<https://www.kingcounty.gov/courts/superior-court/juvenile/step-up.aspx>>.

¹⁵⁴ M Flood and V Kendrick, *LOVEBiTES: An evaluation of the LOVEBiTES and respectful relationships programs in a Sydney school* (2012).

¹⁵⁵ Joanne Payton and Amanda Robinson, *Motivating Respect: A Welsh intervention into youth-perpetrated domestic abuse* (2015).

Select Committee Inquiry into Australia’s Family Law System, the ALRC Family Violence Inquiries and the numerous others to which it has referred in this submission – not to mention State and Territory based reviews and inquiries.¹⁵⁶ To avoid an interminable cycle of research and review with no result, the Law Council encourages the Australian Government to promptly engage with the outcomes of the current Inquiry and take concrete action in response.

¹⁵⁶ *Not Now, Not Ever* (n 143) recommendation 107.