



## SUBMISSION

ALRC REVIEW OF THE FAMILY LAW SYSTEM

RESPONSE TO ISSUES PAPER

PREPARED BY WOMEN'S LEGAL SERVICE VICTORIA

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About Women’s Legal Service Victoria

Women’s Legal Service Victoria (WLSV), established in 1981, is a state-wide not for profit organisation providing free and confidential legal information, advice, referral and representation to women across Victoria. Our principal areas of work are family law, child protection, family violence intervention orders and victims of crime compensation.

In addition to providing legal services to women, WLSV also ensures that clients’ experiences inform the development of policy and legislation. Our client group consists of women from a range of different cultural, ethnic and religious backgrounds. The majority of women we represent are family violence victim survivors and financially disadvantaged.

## Summary of Recommendations

### **Early identification of family violence and Early Judicial decision making**

- The ALRC consider how the early identification of family violence, through effective risk assessment and risk management practices, can be embedded into the family law system. This is to ensure that family violence can be identified and appropriately managed in the early stages of matters, so that victims and children can feel safe and supported.
- The ALRC consider how the judicial scrutiny of consent orders can be improved through the early identification of family violence and decision making.
- The Australian Government introduce to the Parliament amendments to the Family Law Act 1975 (Cth) (“FLA”) to require a relevant court to determine family violence allegations at the earliest practicable opportunity after filing proceedings<sup>1</sup>. This may be by way of a preliminary hearing and, where appropriate, may refer to findings made, and evidence presented, in other courts<sup>2</sup>

### **Access to justice through the use of interpreters**

- The Australian Government increase funding to the family courts to adequately resource family violence trained interpreters at all stages of proceedings, including at supervised contact centres.
- The ALRC undertake a comprehensive study of interpreter services available to refugee and immigrant parties in the family law system.

### **Expansion of Legally Assisted Dispute Resolution (“LAFDR” )**

- The Australian Government fund an expansion of existing models of Legally Assisted Family Dispute Resolution (LAFDR) in both parenting and property matters.

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<sup>1</sup> 2017 report of the House of Representatives Standing Committee on Social Policy and Legal (“SPLA Committee”), A Better Family Law System to Support and Protect Those Affected by Family Violence (“SPLA Family Violence Report”)

<sup>2</sup> Ibid , Recommendation 7

- The Australian Government resource Legal Aid Commissions to broaden availability of funding for priority clients. This would enable them to access existing models of legally assisted family dispute resolution, with better outcomes for the most vulnerable.
- A nationally consistent Risk Assessment Framework should apply to all LAFDR models to ensure that safety risks are effectively identified and managed throughout the process.

### **Removal of the Legislative Presumption of Equal Shared Parental Responsibility**

- That Parliament remove the presumption of equal shared parental responsibility and the language of equal shared time from Part VII of the Family Law Act.

### **WLSV's Small Claims, Large Battles report and recommendations**

We refer the ALRC to, and reiterate, recommendations 1-15 of WLSV's [Small Claims, Large Battles report](#),<sup>3</sup> that advocate for:

- Streamlining court processes ( recommendations 1-3)
- Improving financial disclosure (recommendation 4)
- Superannuation (recommendations 5-8)
- Dealing with joint debts (recommendation 9)
- Responding to family violence (recommendations 10-12)
- Role of state and territory courts (recommendation 13)
- Transfer of property and enforcing orders (recommendation 14 and 15)

### **Systems abuse**

- The Australian Government consider amending the FLA to include 'abuse of process' in the definition of family violence as recommended by the SPLA Committee's Family Violence report<sup>4</sup>

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<sup>3</sup> Women's Legal Service Victoria, Small Claims, Large Battles: Achieving economic equality in the family law system (2018). For a copy visit:  
<http://womenslegal.org.au/files/file/WLSV%20Small%20Claims%2C%20Large%20Battles%20Research%20Report%202018.pdf>

<sup>4</sup> Ibid 1, Recommendation 8

- We recommend that the ALRC develop a recommendation for a “one family, one court” model for family law and family violence matters, to be piloted in both metropolitan and regional settings and then comprehensively evaluated before being expanded.
- In a similar vein, we support legislation that will strengthen the powers of the court to summarily dismiss applications without merit and if they would be frivolous, vexatious or an abuse of process. To this end, the Australian government should also introduce legislation to improve financial disclosure, as recommended in the Small Claims Large Battles report (recommendations 4-8).

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## Introduction

Women's Legal Service Victoria (WLSV) welcomes the opportunity to participate in the ALRC review of the family law system, and to comment on the Issues Paper.

WLSV is a member of Women's Legal Services Australia (WLSA) and has contributed to the drafting of WLSA's submission to the review. We endorse WLSA's submission to this review.

This separate submission provides additional background to the main priorities and recommendations that WLSV will be focussing on throughout the ALRC's review of the family law system. These priorities have been informed by our casework practice. Where directly on point, we have attempted to reference the relevant questions in the Issues Paper. We have also posed new questions for the ALRC to consider for its Discussion Paper.

The relevant WLSV's priorities, set out in this submission, are:

- Reforms aimed at the early identification of family violence and early decision judicial making in the family law system;
- Access to justice through the use of interpreters;
- Expansion of Legally Assisted Dispute Resolution;
- Removal of the Legislative Presumption of Equal Shared Parental Responsibility;
- Implementation of WLSV's *Small Claims, Large Battles* report recommendations;
- Reforms aimed at addressing systems abuse which prevents perpetrators from using the system to commit further abuse.

Over the past decade WLSV has dedicated significant resources to participating in various inquiries and reviews, as well as generating its own research to inform advocacy. This work has informed our response to the issues paper.

Recent work includes a recently launched major report titled *Small Claims, Large Battles*. WLSV established the Small Claims, Large Battles project (“small claims project”) to investigate the barriers to fair financial outcomes in the family law system for vulnerable and disadvantaged women, many of whom had experienced family violence. The small claims project was a collaboration between WLSV, Lander & Rogers and Herbert Smith Freehills. Lawyers at WLSV and Lander & Rogers provided free legal representation to women with limited assets or significant debt. The report details the project findings and makes recommendations for reform to law and policy to improve access to fair property settlements for disadvantaged women. WLSV encourages the ALRC to consider the findings and recommendations from the Small Claims, Large Battles report in the review and to develop those recommendations further.

We are pleased to share our insight and experience in response to the discussion paper and review consultations, and look forward to their full consideration.

We pay our respects to the women whose de-identified stories appear in these pages, and to their courage in sharing their traumatic experiences in the hope that others in similar circumstances may avoid the systems abuse they have endured, sometimes for many years.

## 1 Early identification of family violence and early judicial decision making

Identifying and managing family violence in the early stages of a matter, both in the agreement making stages and when proceedings are issued, is critical in cases where there has been a history of family violence. Too often, the safety of women and children who are victims of family violence is not adequately raised, assessed or responded to in the family law system because family violence information often remains effectively invisible. When considering how early identification of family violence and early judicial decision making can ensure that family violence is responded to, it is important to consider the context of the legislative framework that encourages parties to reach agreement over parenting arrangements.

One of the ways that family violence can be identified quickly is for the family law system to take on the responsibility for ensuring that family violence victims are identified early and risks are appropriately managed. As it currently stands, the system places an onerous responsibility on the victims themselves for managing their safety and the safety of their children. In our experience the evidence of family violence is not tested early enough in proceedings. It needs to be tested and determined earlier on, to ensure the safety of women and children throughout proceedings. Applications in the family and federal courts can take months and sometimes years to be heard properly before a final decision is made on whether family violence has occurred. This can have serious consequences for the safety of women and children.

### *Agreement making and consent order applications:*

One of the main objectives of Part VII of the FLA is to encourage parties to a dispute to reach agreement. However women are often faced with the intimidating task of managing safety and risk when negotiating interim and final consent arrangements with their abusive ex-partners.

One of the main problems related to the lack of early identification of family violence in the system is the dearth of evidence available to the courts to effectively scrutinise consent applications for parenting orders. Research has demonstrated the extent to

which family violence victims do not disclose the family violence – and for a range of reasons. WLSV lawyers have represented clients on many occasions seeking to change a parenting order after falling into the trap of agreeing to orders, which were approved by the court but did not adequately take into account the family violence history.

A significant issue for our clients is the pressure they can experience at an early stage to enter into interim arrangements by agreement, from the family law system itself, in combination with an abusive parent. In practice, this places a heavy burden on the family violence victim to negotiate an interim arrangement with a coercive former partner, despite their concerns regarding safety and their own experiences of violence. This situation places victims of violence and their children at considerable risk as they feel pressured to agree to interim time arrangements that a court might well consider inappropriate, had a finding been made on the allegation of violence or the questions of risk.

The evidence that the court currently relies on to exercise its discretion to make parenting orders, in matters initiated by an application for consent orders is very limited. It is obtained from the application for consent orders. An examination of the Family Courts' application for consent orders kit<sup>5</sup> reveals that the responsibility for disclosing family violence lies with the victim and does not take into account the dynamics of non-disclosure, particularly in cases where a family violence victim is unrepresented. The form assumes a high level of literacy. Despite the fact that the parties are requesting that the court approve a consent arrangement the form still requests information relating to family violence and child abuse in a "tick a box" form. The form places a heavy emphasis on family violence and child protection court proceedings (including orders or proceedings to address family violence safety risks) being in train already and assumes that non-disclosure is uncommon. This demonstrates the problem for judicial scrutiny that leaves the responsibility for managing risk and safety up to the family violence victim.

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<sup>5</sup> <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/forms-and-fees/court-forms/diy-kits/kit-diy-application-consent-orders>

Improved judicial scrutiny of consent orders would go some way to addressing the issues relating to consent but without addressing how family violence is disclosed and evidence collected, in the early stages of consideration of an application, judicial scrutiny will be rendered ineffective. One solution, for the ALRC's consideration, would be for the court to hold a hearing to examine whether any of the parties had experienced or were experiencing family violence and whether the orders were in the best interests of children, taking into account any determination of family violence. An examination of this solution would also require consideration of how Registrars in the courts or magistrates exercising federal jurisdiction in the state courts (particularly in regional areas) could conduct such a hearing. We note, in considering this option that any solution should operate to comply with the objectives of the FLA aimed at promoting and encouraging agreement making. The hearing option may also involve a re-examination of how information is provided to the court at the stage where applications for consent orders are being lodged. The ALRC may wish to review the Family courts' application for consent orders kit to ensure it addresses the problem of parties, particularly those that are self-represented, who do not disclose the family violence.

A comprehensive risk assessment could also be relied on to inform the court of safety risks. Ani's story demonstrates how applying an ongoing risk assessment framework to agreement making may work to ensure that consent arrangements, including parenting plans, are in the best interests of children in terms of their safety.

### ***Ani's story***

*Ani, mother to two children, six years and under, presented to the FASS duty lawyer service to seek advice in relation to reversing an agreement that she had entered into under the coercion of her abusive ex-partner, Rafi. English is not Ani's first language and she requires things to be explained to her with care. Parenting orders, were made by consent on a final basis at the first hearing date of family law proceedings, which provided the children were to live with Ani and on alternate weekends travel from metropolitan Melbourne to northern Victoria to spend time with Rafi. The parties' lawyers' submissions, and therefore the orders made by the judge, did not take into account the impact this travel would have on future schooling arrangements. Additionally, no attention was paid to*

*the risk posed to Ani by changeovers taking place at a halfway point despite the long history of Rafi's violence toward her.*

*Despite the orders being made and out of sight of their lawyers, after the hearing Ani agreed to a different arrangement in a parenting plan proposed by Rafi for the children to live with him for 2 weeks each month. This has meant the elder child has attended two different kindergartens for the past two years. That child is now about to start school so the agreement is unworkable as would be the orders in their current form.*

One of the advantages of strengthening the judicial scrutiny of consent orders is that it can minimise the need to re-litigate a final parenting order based on the fact that family violence wasn't taken into account by the court. Litigants can arguably rely on the rule in *Rice v Asplund*<sup>6</sup> to argue that a parenting order by consent should be discharged or varied. We have represented women after they have consented to an order which was later approved by the court without consideration of the impacts on family violence.

Relevant to the discussion of early identification of family violence is how agreements are reached through LAFDR processes. We refer to our submissions on LAFDR herein and note the importance of applying a nationally consistent Risk Assessment Framework to a LAFDR model. WLSV supports a nationally consistent Risk Assessment Framework to ensure consistency in decision making across the family violence system at both the state and federal levels. We support the development of a national risk assessment and risk management framework that draws from good practice both within Australia and internationally. We note that work is currently underway at the national level to develop a national risk assessment, and that KPMG is coordinating this important work. Further we note the importance of understanding that family violence often occurs over a period of time and the severity of family violence can vary depending on the circumstances. This leads us to the conclusion that any risk assessment process should occur continually throughout a matter, from beginning to end, and apply to all family resolutions processes.

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<sup>6</sup> (1978) 6 Fam LR 570

### *Court proceedings and early judicial decision making:*

If consent can't be reached over parenting arrangements, then an application is lodged with the court for parenting orders. Most cases resolve. Others, usually involving the most serious family violence, will require an early determination of the family violence allegations to ensure the burden of managing safety and risk concerns is not placed entirely on the family violence victim. Under the current system the general focus is that, in the early stages of a matter, procedural issues are dealt with and evidence of family violence, which is central to a case, is not determined on the facts. The review should examine how early decision-making, upon an application being received for parenting orders, could identify and manage family violence earlier. For instance could a small hearing be held to determine the facts of family violence which would involve the examination of the parties? In the examination, the ALRC could consider the evidentiary role the risk assessment conducted by the court could play in the court informing itself of the extent and nature of the family violence.

We note that the SPLA report considered these issues in relation to court proceedings and the Committee recommended that:

*“the Australian Government introduces to the Parliament amendments to the Family Law Act 1975 (Cth) to require a relevant court to determine family violence allegations at the earliest practicable opportunity **after filing proceedings**, such as by way of an urgent preliminary hearing and, where appropriate, refer to findings made, and evidence presented, in other courts.”<sup>7</sup>*

WLSV supports this recommendation.

#### ***Recommendations:***

*The ALRC consider how the early identification of family violence, through effective risk assessment and risk management practices, can be embedded into the family law system. This is to ensure that family violence can be identified*

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<sup>7</sup> Ibid 1, Recommendation 7.

*and appropriately managed in the early stages of matters, so that victims and children can feel safe and supported.*

*The ALRC consider how the judicial scrutiny of consent orders can be improved through the early identification of family violence and decision making*

*The Australian Government introduce to the Parliament amendments to the Family Law Act 1975 (Cth) (FLA) to require a relevant court to determine family violence allegations at the earliest practicable opportunity after filing proceedings. This may be by way of a preliminary hearing and, where appropriate, may refer to findings made, and evidence presented, in other courts.<sup>8</sup>*

## 2 Access to justice through the use of interpreters

The accessibility of the family law system could be improved for people from culturally and linguistically diverse communities and clients with profound hearing impairments (**Questions 6 and 7**) through improving access to quality interpreting services.

WLSV's immigrant and refugee clients represent approximately 20% of our total client base.

Our legal practitioners have observed, when representing clients from an immigrant or refugee background, or clients with profound hearing impairments, that current levels of availability and the overall quality of the family law courts interpreter service is inadequate. This is despite the existence of the Family courts interpreter policy which aims to ensure:

*“uniform access to interpreter services throughout the Family Court of Australia and the Federal Circuit Court of Australia. The basic principles of access and equity are that no court client should be disadvantaged in proceedings before the Court or in understanding the procedures and conduct of court business,*

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<sup>8</sup> Ibid 1, Recommendation 7.

*because of a language barrier. The two-way process of communication and understanding between the client and the Court may require that the Court engage an interpreter or a translator.”<sup>9</sup>*

The following case studies highlight the problems that immigrant and refugee clients and clients requiring Auslan interpreters are facing.

### ***Barbara’s story***

*Barbara experienced significant family violence throughout her relationship. She was born with a profound hearing impairment. She is a mother of two children aged 3 and 5. Her ex-partner was convicted on 5 criminal charges of persistently breaching an intervention order. Barbara sought the advice and assistance of WLSV during family law proceedings for parenting and property orders that had been going on for some time. The legal practitioner assisting Barbara concluded that, in order to communicate effectively with her and also the court, Barbara required the assistance of an Auslan interpreter during all legal proceedings and client-lawyer interviews. This was arranged for the first lawyer-client interview. When interviewing Barbara with the Auslan interpreter, the legal practitioner discovered that the family report had been conducted without an Auslan interpreter. Barbara felt that she had been misunderstood and misrepresented by the Family Consultant. The family report had excluded vital information about the history of family violence. Barbara’s previous lawyer and the family consultant had both determined that she did not require an interpreter. The consequences of not interviewing Barbara with an Auslan interpreter could have seen the court rely on incorrect information that would potentially have put Barbara and her children at risk.*

### ***Than’s story***

*Than is of Vietnamese origin and is the mother of 6 children aged between 1 to 19 years of age. Than’s ex-partner was charged with sexual assault involving three of her children and has been in prison for the past 5 years. Than sought*

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<sup>9</sup> <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/family-law-matters/getting-help/interpreter-services/>

*the assistance and representation of WLSV to argue for access to her property entitlements under the family law system. English was her second language and she found it very difficult to communicate. In the initial interaction with her legal practitioner, it became clear that she needed an interpreter. Prior to the hearing an interpreter request was made and confirmed. The matter was complicated by the involvement of a third party. No interpreter was provided at court, and when the WLSV lawyer raised this, she was told that as the hearing was procedural in nature an interpreter would not be provided.. This denied Than and her lawyer the ability to ensure that Than understood all aspects of her case. Than's adult child acted in a limited way as an interpreter for her mother, which was inappropriate due to the potential conflict of interest and also lack of knowledge about court processes. Than requires the urgent resolution of her property matter because she needs the funds to gain financial independence and pay off the debts that have been accumulating since her ex-partner's incarceration.*

### ***Hadil's story***

*Hadil is a family violence victim who was represented by WLSV throughout her proceedings for parenting and property orders, intervention order and divorce. Hadil requires an interpreter as she is a newly arrived migrant and cannot speak English. On the day her matter was listed the court had failed to arrange an interpreter to assist Hadil The matter was adjourned twice due to the fact that an interpreter was not available at court. This was a waste of her time, as well that of the Court, the lawyers and Independent Children's Lawyer involved.*

### ***Recommendation:***

*The Australian Government increase funding to the family courts to adequately resource family violence trained interpreters at all stages of proceedings, including at supervised contact centres.*

*The ALRC undertake a more comprehensive study of interpreter services available to refugee and immigrant parties in the family law system.*

### 3 Expansion of Legally Assisted Dispute Resolution ( “LAFDR”)

WLSV is of the strong view that legally-assisted family dispute resolution processes should play a greater role in the resolution of disputes involving family violence or abuse for both property and parenting matters (**Questions 24 and 26**). We strongly support the roll out of a legally assisted family dispute resolution (LAFDR) model as a form of alternative dispute resolution in the family law system.

WLSV has been providing legal representation in mediation services since 2009 and has developed a sophisticated understanding of the benefits of legally assisted dispute resolution through this experience. WLSV provides legal representation through a number of services including Victoria Legal Aid’s Family Dispute Resolution Service (VLA FDR service) as well as through a partnership with the Melbourne Family Relationship Centre and the FMC Mediation Centre.

There is a common belief within the family law sector that FDR is inappropriate in cases where there is family violence and litigants are self-represented. However, mediation through FDR is not solely the domain of self-represented litigants. The experience of WLSV in providing Legally Assisted FDR (LAFDR) is that with the support of trauma-informed mediators and lawyers, potential power imbalances between parties can be addressed. Family violence cases can be safely and effectively be supported in the mediation process.

Based on our experience, we can identify advantages of a LAFDR model as follows:

- it is cost effective and can often be the only avenue available to parties who do not want to or cannot access court processes (for reasons the ALRC has identified at paras 110-116 of the Issues Paper);
- the confidentiality of the process and the supportive assistance of a legal adviser has enabled parties to engage in a meaningful way in negotiating and reaching a resolution;
- legal assistance can easily and quickly dispel the myths of equal shared time (refer to pp 19, 20 for a discussion of the presumption of equal shared parental responsibility and why it needs to be removed);

- it allows parties to disclose allegations of family violence and for such allegations to be recognised and managed by legal representatives and skilled FDR practitioners because safety concerns can be discussed freely;
- it allows dialogue to open up because parties feel safer, with proper support, in admitting to past behaviour and agreeing to change behaviour.
- Parties can raise or take into account vulnerabilities such as mental health issues and drug and alcohol issues;
- LAFDR can be done safely by shuttle conference either over the phone or in safe rooms and therefore is able to provide access to vulnerable clients in regional areas who wouldn't otherwise have access to legal representation and support;
- it can be child inclusive and responsive to the needs of families.

A VLA report published in 2012 highlighted the value of lawyer-assisted family dispute resolution in the VLA's Roundtable Dispute Management service and supports our experience of LAFDR. The report titled, "*Thinking Outside the Square: the role of lawyers in Roundtable Dispute Management*"<sup>10</sup> found clients valued the ongoing legal advice and reality checking provided by lawyers. The report also found that clients felt their lawyers supported them through by explaining the process and options and advocating important points when needed. This was particularly helpful for clients who experience additional complex factors such as family violence.

The AIFS evaluation of the CFDR pilots, in 2012<sup>11</sup> also provides useful insights into how a multi-disciplinary approach to the LAFDR model could be developed.

Relevant to any discussion around LAFDR is the access to legal representation for family violence victims in the family law system and an increase in government funding for LAFDR models. There is a growing number of family violence victims who are falling through the ever growing cracks of the legal aid system. Women find themselves unable to access legal aid due to the narrowing of the legal aid family law guidelines and who are without the financial means to pay the fees of private family practitioners.

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<sup>10</sup> Allie Bailey, *Thinking Outside the Square: the role of lawyers in Roundtable Dispute Management*, VLA, 2012

<sup>11</sup> citation

As the ALRC issues paper notes, self-representation, and its correlation with poorer outcomes for those parties, is an issue that needs to be addressed.

We note that WLSV's Small Claims, Large Battles report includes recommendations that the Australian Government fund an expansion of existing models of legally assisted Family Dispute Resolution, to give greater access to vulnerable parties seeking property settlements.<sup>12</sup>

We note that a nationally consistent national risk assessment framework should also apply to a FDRS model *to ensure that safety risks are effectively identified and managed throughout the process.*

***Recommendations:***

*The Australian Government fund an expansion of existing models of legally assisted Family Dispute (“LAFDR”) resolution in both parenting and property matters.*

*The Australian Government resource Legal Aid Commissions to broaden availability of funding for priority clients. This would enable them to access existing models of legally assisted family dispute resolution with better outcomes for the most vulnerable.*

*A nationally consistent Risk Assessment Framework should apply to all LAFDR models to ensure that safety risks are effectively identified and managed throughout the process.*

## 4 Removal of the Legislative Presumption of Equal Shared Parental Responsibility

WLSV strongly supports changes to the provisions in Part VII of the *Family Law Act* which would see the removal of the presumption of equal shared parental responsibility and the language of equal shared time (**Question 14**).

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<sup>12</sup> Recommendations 11 & 12

The references in the *Family Law Act* to “equal time” and “equal shared parental responsibility” inappropriately privilege the expectations of parents and some community members over the best interests of children, and their safety. As noted above, it can also place undue pressure on victims of family violence to allow children to spend time with an abusive parent. The story highlighted below demonstrates how this plays out in agreement making, particular for interim orders made by consent.

Equal time does not apply in cases where family violence is established in a proceeding. However, because it is often difficult to “prove” violence/abuse to the satisfaction of the Court, the presumption and consideration of equal time is sometimes still applied when the child has been abused or exposed to family violence. This can result in courts making orders/agreements that include shared parenting provisions which unnecessarily put women and their children at risk of further harm from a perpetrator they are trying to escape.

An interview with a WLSV’s Principal lawyer highlighted the following case:

*“When representing a young 19 year old single mother in a LAFDR process, I discovered, before the LAFDR took place, that she had agreed to an arrangement with the father of the child, that up until the child turned 1 she would be the primary carer of the infant and upon the child turning 1 the arrangement would be that the child would spend one week on and one week off with the father. When I quizzed her about this arrangement she simply said they both agreed to this because they believed that “the law says that it has to be equal time for both parents”. The reason for the LAFDR process was that the infant’s father was seeking to formalise the arrangement in either a parenting plan or via consent orders. Fortunately with the assistance of the lawyers, the arrangement reverted back to something more appropriate for the needs of the infant child, which included short periods of time with the secondary attachment figure (in this case the father) and the ongoing primary care giving with the primary attachment figure (in this case the mother).*

*Interview: Helen Matthews, Principal Lawyer, WLSV May 2018*

**Recommendation:**

*That Parliament remove the presumption of equal shared parental responsibility and the language of equal shared time from Part VII of the Family Law Act.*

## 5 WLSV's *Small Claims, Large Battles* report and recommendations

WLSV's Small Claims, Large Battles report and recommendations directly address a number of the questions raised in the issues paper, in particular **Question 10** (affordable system), **Questions 11 & 12** (self-represented parties), **Question 17** (property adjustment), **Question 20** (improving court processes), **Question 21** (FDR) and **Question 22** (small property dispute resolution).

We encourage the ALRC to examine closely the 15 recommendations outlined in the Small Claims Large Battles report. We note that the suggestions outlined in the issues paper do not cover all the areas of reform that need to be considered for a comprehensive and meaningful review of the barriers that small claimants in the family law system face. For instance, financial disclosure by an uncooperative former partner was one of the major barriers that small claimants faced in the Small Claims, Large Battles project but is not, for example, listed as a suggested reform in para 152. The community of property and presumption of equal sharing presumptions suggestions in our view ignore the many barriers that family violence victims face. These have been highlighted in the Small Claims, Large Battles report.

We note also that the SPLA report, in response to WLSA's supplementary submission to the inquiry<sup>13</sup> also considered and supported the recommendations aimed at improving access to small claims for financially disadvantaged women<sup>14</sup>. SPLA's report drew heavily on WLSA's supplementary submission, which presented the

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[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Social\\_Policy\\_and\\_Legal\\_Affairs/FVlawreform/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Submissions)

<sup>14</sup> Ibid 1, pp 168-182

preliminary findings and recommendations from the Small Claims, Large Battles project.<sup>15</sup>

The Small Claims, Large Battles report recommendations place much of the responsibility for developing final proposals for reform on the Australian Government, the courts and Industry. WLSV has therefore formed the view that the ALRC review presents all stakeholders with a unique opportunity to assist in further developing recommendations. To assist in this process we have come up with the following issues and questions that the ALRC may wish to consider in the discussion paper. These take the form of recommendations in relation to the recommendations on streamlined court processes, financial disclosure, superannuation and joint debts.

### **Streamlined court processes**

Women in WLSV's Small Claims, Large Battles project found the family law process complex and daunting, and the delay they experienced in resolving disputes exacerbated the financial hardship and stress they were experiencing. A case management process, available upon application to the court, with simplified procedural and evidentiary requirements would improve vulnerable women's access to fair, expedited and cost-effective property settlements, reducing their risk of post-separation financial hardship.

We support the Productivity Commission's suggestion that the resolution of less complex family law matters is best achieved through the expanded availability of low – cost family dispute resolution (FDR) services.<sup>16</sup> We further recommend that this suggestion be supported by increased funding for legal assistance, and refer the ALRC to our earlier submissions (above). We also refer the ALRC to relevant recommendations in the Small Claims, Large Battles report that include further detail of how streamlined court processes can improve access to fair property entitlements for financially vulnerable women and their children.

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<sup>15</sup> Ibid 1, Recommendations 13, 14, 15, 16, 17

<sup>16</sup> Issues Paper para 107

We note that without also considering the other recommendations outlined in the report, particularly those relating to strengthening financial disclosure and access to superannuation fund information, a streamlined case management process, no matter how streamlined, may be inaccessible.

The relevant questions and issues related to the streamlined case management process recommendations are:

- What procedural and evidentiary requirements need to be created to establish a streamlined case management process to allow easy and affordable access for small claimants?
- Eligibility for the small claims process: should it be based on a party's potential share of the asset pool as opposed to the total size of the pool? Should eligibility requirements also take into account the party's financial vulnerability, the particular issues in dispute and the nature and value of assets?

### **Improving financial disclosure and superannuation**

There is an obligation on parties to family law proceedings to make full and frank disclosure of their financial position. Failure to comply with this obligation can lead the court to apply penalties or exercise its discretion adversely to the non-disclosing party when deciding property settlements. For women in our project, however, issues with obtaining proper financial disclosure arose before matters reached adjudication, causing delay and inhibiting effective negotiation (as discussed above). In the Small Claims Large Battles project, over two-thirds of clients experienced delay caused by difficulties obtaining full financial disclosure from their former partner. Many clients were forced to initiate court proceedings where they otherwise might have negotiated a property settlement. There are few effective disincentives for non-disclosure. Alternative information-finding processes, such as issuing subpoenas, are costly and by no means guaranteed to return the required information.

Strengthening mandatory financial disclosure, through more intensive case management, greater use of registrar powers, or by permitting courts to obtain information about parties' assets from sources such as the Australian Taxation Office (ATO), would greatly improve the speed and fairness of property settlements for vulnerable parties.

**Superannuation:**

The FLA recognises superannuation as a relationship asset, but the process for obtaining superannuation splitting orders is too complex for vulnerable parties to navigate. First, without a former spouse voluntarily disclosing the name of their superannuation fund, there are no other mechanisms which allow a party to locate the fund of their former partner. Second, the complex, legalistic format of orders and procedural requirements makes it extremely difficult to obtain superannuation splitting orders without legal assistance.

Particularly for low-income households with few assets, superannuation can sometimes comprise the greatest share of the property pool. For 21% of women in the Small Claims project, superannuation was the only significant asset, and in 39% of all Small Claims cases there was a superannuation split.

There have been recent calls to make family violence a ground for early access to superannuation. However, without first considering whether superannuation splitting is practically accessible to women in family law property disputes, allowing early release for family violence could serve to further financially disadvantage women. If women are unable to obtain a share of their former partner's superannuation after separation, early release of superannuation on the grounds of family violence could further diminish the small amount of property many women in violent relationships often walk away with.

The SPLA committee report recommended that an administrative mechanism to find the name of a former partner's superannuation fund should be made available<sup>17</sup>. The recommendation is in the process of being considered and feedback we have received from our stakeholder engagement has been positive. Our investigations have revealed that the ATO: 1) holds a significant amount of real time financial information and 2) stores this information centrally online and can release it easily and quickly if it is given the authority to do so.

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<sup>17</sup> Ibid 3, recommendation 15

The relevant questions and issues related to the improving financial disclosure and superannuation recommendations are:

- How can the *Family Law Act* or other legislation be amended to permit courts to obtain information about parties' superannuation from the ATO?
- Should the information obtained also include other information including assets and tax information to assist the courts?
- What processes for obtaining the information could be set up to ensure that disclosure is affordable and timely?
- How should the privacy rights of parties be weighed up against the right of parties to financial disclosure for fair property outcomes?
- How can superannuation splitting orders be made easy and more accessible for all parties?

### **Responding to family violence;**

The Issues Paper discusses the possible codification of the Full Court of the Family Court's decision in **Kennon & Kennon**, or otherwise providing clearer guidance about how family violence should be taken into account in property matters. This suggestion mirrors recommendation 10 in the Small Claims, Large Battles report.

The majority of women in WLSV's Small Claims, Large Battles project (87%) had experienced some form of family violence, including economic abuse (for which most were referred into the project). In addition to physical and psychological effects, family violence can have ongoing financial repercussions. These clients were also at a distinct disadvantage in navigating the legal system. Economic abuse left the women effectively unable to seek a property settlement, while power imbalances and ongoing violence or intimidation in any case made them fearful of seeking their share of property through the family law system. Obstructive former partners also continued their abuse through the family law system by delaying or frustrating efforts to resolve property disputes. Our project confirmed the view that family violence is only rarely taken into account in determining property settlements. Family violence is not a specific factor for consideration by the courts in determining property matters under the existing legislation. The case law, led by **Kennon & Kennon** which provides precedent for property settlements which take account of family violence, is careful to avoid

introducing the notion of a fault-based determination. Reviews of case law have shown this precedent has been narrowly applied. In practice the “Kennon argument” in negotiations has not proved particularly persuasive.

The FLA should therefore be amended to reflect current understandings of the impact of family violence on victims by directing courts to consider family violence in making property divisions.

### **Joint debt:**

**Question 17** of the Issues Paper raises issues in relation to how joint debt is dealt with by the courts, in particular how the power to alter property interests is applied in practice. WLSV’s Small Claims, Large Battles project findings revealed how the courts have been dealing with economic abuse in the form of joint debt. We note that WLSV’s recommendation that “amendments to allow greater use of court orders for the split or transfer of unsecured joint debt and liabilities”<sup>18</sup> was picked up in the SPLA report<sup>19</sup>. The Small Claims, Large Battles report demonstrated that s.90AE powers are not being used effectively by the courts, as applications are being rendered by and large ineffective, without the cooperation of industry bodies.

The relevant questions and issues related to dealing with joint debt recommendations are:

- When one party receives no benefit (usually the family violence victim suffering economic abuse), should they remain liable for the joint debt in property adjustments under the FLA?
- Should s.90AE of the FLA be amended to ensure that when considering s.90AE applications, financial hardship and economic abuse is taken into account when exercising discretion?
- If a remedy is available under either the credit or administrative law systems, how should and could the family law system intersect with these systems to ensure that a family violence victim is relieved of the debt liability? For instance, if the Financial Ombudsman Service (FOS) resolves the issue, what impact

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<sup>18</sup> Ibid 3, Recommendation 9

<sup>19</sup> Ibid 1, Recommendation 16

would the outcome have on any family law property agreements or proceedings?

- Should credit providers and banks be able to seek costs when applicants join banks to their s.90AE application to sever liability?
- Could a streamlined case management process be set up in the family courts to ensure that small claimants, when applying to sever or alter debts, can do so easily and cost effectively? Such a process could be managed by expert professionals who have a sound knowledge of credit law, family law and family violence (including economic abuse).

We do not agree with the proposals that suggest a community of property regime or a presumption of equal contributions are viable proposals for reform.

### **WLSV's Small Claims, Large Battles report and recommendations**

We refer the ALRC to, and reiterate, recommendations 1-15 of WLSV's [Small Claims, Large Battles report](#), that advocate for:

- Streamlining court processes ( recommendations 1-3)
- Improving financial disclosure (recommendation 4)
- Superannuation (recommendations 5-8)
- Dealing with joint debts (recommendation 9)
- Responding to family violence (recommendations 10-12)
- Role of state and territory courts (recommendation 13)
- Transfer of property and enforcing orders (recommendation 14 and 15)

## 6 Systems abuse reform

In addressing **Question 25** of the issues paper it is important to understand the misuse of process as it applies across the family violence, family law and child protection legal systems.

The intersection between family violence and relationship breakdown often means that victims of family violence are faced with a confusing and complex legal framework

which they are required to navigate without legal representation. Victims whose legal problems arise in the context of family violence and relationship breakdown regularly deal with multiple pieces of legislation and several different jurisdictions. For example, a victim may be required to have contact with:

- The Commonwealth family law system in the Federal Circuit Court or Family Court for parenting matters, spousal maintenance, property and divorce proceedings;
- The Victorian civil justice system in the Magistrates' Court because they are the subject of an intervention order or they require the protection of one;
- The Children's Court in child protection cases;

The Victorian criminal justice system in the Magistrates' Court, County Court or Supreme Court because their partner has also been charged with a criminal offence against them.

There has been a significant amount of work undertaken over the last decade with respect to the intersection between family violence, family law and child protection. Much of this work sits at a national level and has been conducted by the ALRC and Royal Commissions in both Victoria and NSW.<sup>20</sup> Unfortunately progress is slow. Without significant systemic reform, perpetrators have continued to misuse and manipulate processes to continue to exert power and control over victims. One family violence victim that we interviewed last month and who was in the midst of family law proceedings, said that she had been *"in 31 court hearings in different courts in both the state and family courts, in civil, family and criminal matters over the past 3 years"*. She also told us that she was being financially and emotionally drained by her ex-partner being able to use the system against her. We acknowledge that the Australian Government has been working to develop reforms such as those relating to cross sector collaboration, information sharing and the banning of direct cross examination of family violence victims in court. Progress is slow and systemic abuse continues to inflict a second layer of coercion and control on survivors of family violence.

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<sup>20</sup> Eg. recommendations of the Australian Law Reform Commission (ALRC) and New South Wales Royal Commission report from October 2010 – *Family Violence A National Legal Response* as well as the ALRC's report *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, February 2012.) and New South Wales Royal Commission report from October 2010 – *Family Violence A National Legal Response* as well as the ALRC's report *Family Violence and Commonwealth Laws—Improving Legal Frameworks*, February 2012; Victorian Royal Commission into Family Violence report 2015.

The range of behaviours well-summarised in the Issues Paper at p.59 reflect our clients' experiences. The following story demonstrates how the majority of behaviours listed at p. 59 are playing out towards one victim to disempower and weaken a family violence victim to the point of emotional exhaustion. It also demonstrates how court proceedings and other family law system processes are being misused to maintain a dynamic of abuse.

### ***Mae's story***

*Mae speaks English as a second language and is the mother of 2 children, of primary school age. Her ex-partner Tin has perpetrated family violence against her over an extended period, and has continued to do so since she separated from him over two years ago. In that time, Tin has also been using the family violence and family law systems to continue to abuse her financially and emotionally, and has also continued to be physically and sexually violent since separation*

*Soon after Mae managed to leave the relationship, Tin initiated family law proceedings seeking parenting orders for the children. He has repeatedly obstructed proceedings by causing adjournments and delays by failing to engage in good faith with court-ordered processes. There have been three scheduled final hearings which have all been adjourned.*

*The children continue to live with Mae, but have supervised contact with Tin at a contact centre. The contact centre has expressed concerns about Tin's behaviour with the children at supervised contact.*

*Parallel proceedings have also been taking place in the Magistrates Court in relation to police-initiated intervention orders against Tin for the safety of Mae and the children. The family law proceedings have been adjourned to a fixed date by the family court, to await the outcome of proceedings in the intervention order contest and to avoid the risk of Tin's self-incrimination.*

*In response to being charged for a breach of IVO, Tin claimed it was Mae who was violent towards him and applied for and obtained an Interim Intervention Order against Mae. WLSV are supporting Mae to challenge the application.*

*The contest hearing for the IVO proceedings have been adjourned multiple times. Initially, the magistrate preferred the IVO hearing take place after family law proceedings had finalised. A subsequent scheduled contest hearing was adjourned because no interpreter was available.*

*Despite there being an IVO to protect Mae and her children, Tin has continued to breach the IVO and has been convicted numerous times. Tin has breached the IVO by assaulting Mae and continuing to contact her. In doing so, he has continued to control Mae. Mae is now in the position of having to defend criminal charges for breaching the intervention order in circumstances where she did so following Tin's directions.*

*Mae has endured multiple visits to courts, adjournments, delays and uncertainty. In the meantime she has been caring for 2 children while maintaining employment to financially support them.*

*Tin has been represented by several lawyers at different times and has on occasions represented himself. There has been no court warning or systemic push back against Tin's use of the courts to continue to attempt to exert coercion and control over her. Tin has maintained steady employment in the past, but in the course of proceedings has not worked and has not paid child support. As discussed below, WLSV has formed the view that as it stands the threshold test is likely too high for us to succeed in having the parenting and cross applications dismissed as vexatious.*

*Mae's mental health is at risk and is continually triggered by being forced to navigate the family violence and family law systems. She is now preparing for the IVO cross application hearing, and the hearing for the criminal charges against her. Family law proceedings are also ongoing. On top of the trauma and*

*uncertainty of her situation, Mae is tired of having to re-tell her story and re-litigate the question of risk and safety in the many forums.*

Further evidence of systems abuse was highlighted in the Small Claims, Large Battles project. For some women, negotiations and legal proceedings were drawn out intentionally by uncooperative former partners. This included failure by a former partner to make proper financial disclosure, failure to respond to correspondence or the making of unreasonable offers which meant our clients needed to initiate proceedings. In some cases this appeared to be a result of parties, who had the means to do so, deliberately not obtaining legal representation.<sup>21</sup>

We also note that systems abuse was also discussed widely and included in the SPLA report.<sup>22</sup>

As the ALRC has noted in the issues paper there have been a number of suggestions for reform over the years.

In 2015 WLSV's submission to the Royal Commission into Family Violence<sup>23</sup> recommended the piloting of a "one family, one court model". We refer the ALRC to this submission which considered this proposal in detail to enable Magistrates greater capacity to exercise the family law jurisdiction. One of the major issues that needs to be considered for a pilot model is the need for increased resources, time and training to ensure that family law matters are managed properly in the best interests of children. Where there are no *Family Law Act* orders in force, women can be pressured by some Magistrates and legal practitioners to negotiate child arrangements with the perpetrator while at court. In some instances "notations" on the court file relating to the agreement are made. We have seen cases where Magistrates refuse to make a decision in relation to the intervention order until a parenting plan has been negotiated. We believe it is not appropriate for parties to be pressured into negotiating a parenting agreement at court during an intervention order proceeding. The stress, trauma and power imbalance that can occur in this setting can lead to women being pressured into

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<sup>21</sup> Ibid , p.18

<sup>22</sup> Ibid 1, PP64-68

<sup>23</sup> <http://womenslegal.org.au/files/file/FINAL%20FAMILY%20LAW%20SUBMISSION.pdf>

agreeing to arrangements that put their safety, and that of their children, at risk. While a parenting plan is not legally enforceable, it alters the operation of most intervention orders naming children and its impact on subsequent family law proceedings is significant.

We refer the ALRC to WLSA's Submission to the Senate Legal and Constitutional Affairs Committee in response to the Family Law Amendment (Family Violence and Other Measures) Bill 2017<sup>24</sup>. The submission outlines the conditions upon which WLSA supports the broadening of state and territory courts' family law jurisdiction is contingent on sufficient additional resourcing and training. Para 12.2 of the submission states:

*That prior to the implementation of the amendments the Federal Government make additional resourcing available to state and territory courts, including by way of training for court staff and judicial officers, in order to ensure these courts can provide a high quality service to litigants and meet increased family law demand.*

We strongly support these submissions.

As noted earlier, whilst we support the SPLA committee's suggestion in answer to **Question 25** that the *Family Law Act* be amended to include 'abuse of process' in the definition of family violence, viewed in isolation, it probably will not go far enough to address the systems abuse highlighted in the Mae's case whereby both family law court proceedings and also other family violence system processes were being misused. A package of measures, reflecting the recommendations included in the SLPA report should be considered in the discussion paper.

As noted above in Mae's case, in order for a litigant to be declared vexatious the current threshold test is high. We therefore support draft legislation aimed at

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<sup>24</sup> WLSA Submission to the Senate Legal and Constitutional Affairs Committee in response to the Family Law Amendment (Family Violence and Other Measures) Bill 2017, Feb 2018

strengthening powers of the court to summarily dismiss applications without merit and if they would be frivolous, vexatious or an abuse of process.

We also support measures aimed at cross-jurisdictional collaboration as in our view they will go some way to preventing systems abuse (**Question 33**). One of the advantages that perpetrators have is being able to rely on the fact that he would not be made accountable for the systems abuse. We agree that the Family Law Council's recommendations, listed in para 249 of the issues paper should be duly considered as part of this review into the family law system.

We also support in principle, the development of a national information-sharing regime and refer the ALRC to the submissions WLSV made in response to the Victorian Government's proposed information sharing scheme which includes submission on necessary safeguards.

***Recommendation:***

*The Australian Government consider amending the FLA to include 'abuse of process' in the definition of family violence as recommended by the SPLA Committee's Family Violence report:*

*We recommend that the ALRC develop a recommendation for a "one family, one court" model for family law and family violence matters, to be piloted in both metropolitan and regional settings and then comprehensively evaluated before being expanded.*

*In a similar vein, we support legislation that will strengthen the powers of the court to summarily dismiss applications without merit and if they would be frivolous, vexatious or an abuse of process. To this end, the Australian government should also introduce legislation to improve financial disclosure, as recommended in the Small Claims Large Battles report (recommendations 4-8).*