

ANROWS

AUSTRALIA'S NATIONAL RESEARCH
ORGANISATION FOR WOMEN'S SAFETY
to Reduce Violence against Women & their Children

Joint Select Committee on Australia's Family Law System

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Canberra ACT 2600

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Re: Joint Select Committee on Australia's Family Law System

Dear Chair

Australia's National Research Organisation for Women's Safety (ANROWS) would like to thank the Joint Select Committee on Australia's Family Law System for the opportunity to respond to this inquiry into Australia's family law system.

ANROWS is an independent, not-for-profit organisation established as an initiative under Australia's *National Plan to Reduce Violence against Women and their Children 2010-2022*. ANROWS is jointly funded by the Commonwealth and all state and territory governments of Australia. ANROWS was set up with the purpose of establishing a national level approach to systematically address violence against women and their children.

Our mission is to deliver relevant and translatable research evidence which drives policy and practice leading to a reduction in the incidence and impacts of violence against women and their children. Every aspect of our work is motivated by the right of women and their children to live free from violence and in safe communities. We recognise, respect and respond to diversity among women and their children, and we are committed to reconciliation with Aboriginal and Torres Strait Islander Australians.

This submission applies relevant ANROWS research evidence to the terms of reference set out for the Committee to inquire into, and report back upon. We would be very pleased to assist the Joint Select Committee further, as required.

Yours sincerely

Dr Heather Nancarrow

Chief Executive Officer

30 January 2020

Introduction

There is little doubt that the Australian family law system is in need of reform. It has, as its legislative basis, the *Family Law Act 1975 (Cth)*; which came into force on 5 January 1976 along with the Family Court of Australia. Now, 44 years on, there is a considerable body of work inquiring into, reviewing, and proposing recommendations to government, all designed to improve the family law system, and ensure it remains relevant to a country that has experienced significant social and legal change across the last four decades.

Despite the volume of recommendations, implementation been harder to achieve. For example, the 2015 parliamentary inquiry into child support entitled [*From conflict to cooperation: Inquiry into the Child Support Program*](#) made 25 recommendations. The government accepted 18 of those recommendations in a response tabled in parliament in August 2016. Only three key recommendations were implemented in the 2017-2018 Budget, resulting in the *Family Assistance and Child Support Legislation Amendment (Protecting Children) Act 2018* that was passed on 9 May 2018 with Royal Assent granted on 22 May 2018.

The most recent inquiry was undertaken by the Australian Law Reform Commission (ALRC), and resulted in a final report, [*Family Law for the Future—An Inquiry into the Family Law System*](#) (ALRC Report 135, 2019), that was delivered to the Commonwealth Attorney-General, the Hon. Christian Porter MP on 31 March 2019. As part of their investigation, the ALRC identified and examined 11 inquiries conducted between 2001 and 2017, and found that all inquiries across the last two decades have broadly made recommendations along three key themes. These three themes are, that the family law system must:

- deal with violence better;
- share information between the Family Court and state/territory child protection agencies; and
- deal concurrently with matters involving family law, family violence and child abuse in the same place.

ANROWS supports these three consistently repeated themes as the main drivers for making positive change to the family law system. As all of these themes are relevant to domestic and family violence, we have included background information to assist Committee members.

The ALRC report contained 60 recommendations, of which to date, none have been implemented. As a first point of call, ANROWS recommends that the Committee considers the recommendations from this comprehensive report. ANROWS continues to support the information we provided in [our submission](#) dated 12 November 2018, that is reflected in a number of the ALRC recommendations.

GUIDING PRINCIPLE 1: Consider the recommendations *from Family Law for the Future—An Inquiry into the Family Law System* (ALRC Report 135, 2019).

Background information on domestic and family violence

Domestic and family violence (DFV) are gendered crimes

The *National Plan to Reduce Violence against Women and their Children 2010-2022* (Council of Australian Governments, 2011) identifies domestic and family violence and sexual assault as gendered crimes that have an unequal impact on women. Domestic and family violence, and sexual assault, are the most pervasive forms of violence experienced by women in Australia (COAG, 2011). The majority of people who experience DFV are women in their homes, at the hands of men they know (Cox, 2015).

Evan Stark argues in his book, *Coercive control: How men entrap women in personal life*, that it is not violence per se, but the assault on autonomy, liberty and equality that makes intimate partner violence particularly insidious, and distinguishes between men's and women's violence in intimate partner relationships (Stark, 2007). Intimate partner violence (IPV) against women is often motivated by a desire for general control over the life of a woman (an attack on her autonomy), and might involve strategies like physical, sexual, verbal and/or emotional abuse, financial abuse, systems abuse, stalking, deprivation of liberty, intimidation and harassment.

ANROWS leads the [National Community Attitudes to Violence against Women Survey](#) (NCAS), one of the two key national surveys administered under the National Plan. NCAS is the world's longest-running survey of community attitudes towards violence against women. In 2017, NCAS showed a decline in community understanding that perpetration and impacts of violence are gendered: that men are more likely to commit domestic violence and that women are more likely to suffer physical harm from domestic violence (Webster et al., 2018). NCAS also showed that although men face a slightly higher risk of interpersonal violence overall, men also represent the majority of perpetrators, and women are more likely to experience IPV and sexual violence (Webster et al., 2018).

DFV is under-reported

The Australian Bureau of Statistics (ABS) 2016 Personal Safety Survey found that an estimated 82 percent of women (225,700) who experienced current partner violence never contacted the police. Of the 47,900 women who experienced current partner violence who had contacted the police, approximately half (55%) reported that their partner was not charged (Webster et al., 2018). Even studies that show higher disclosure rates, report that when women did seek help, many still found that nobody assisted them (Fanslow & Robinson cited in Day, Casey & Gerace, 2018). Research has shown that those who reach out and have a negative experience, feel deserted, silenced, and blamed for their victimisation (Moe cited in Day et al., 2018).

Despite these low reporting numbers, there remains a pervasive belief that women fabricate claims of DFV. In 2017, NCAS found that 43 percent of respondents agreed that women going through custody

battles often make up or exaggerate claims of DFV in order to improve their case (Webster et al., 2018). It is also concerning that 23 percent of NCAS respondents agreed that many women tend to exaggerate the problem of male violence; and 32 percent agreed that a female victim who does not leave an abusive partner is partly responsible for the abuse continuing (Webster et al., 2018). By contrast to these social attitudes, research has shown that both women and some of the professionals they had contact with, are fearful to raise allegations of DFV in the family court system lest they be seen as an alienating parent (Kaspiew et al., 2017). Research has also shown that a majority of victims/survivors of DFV have negative experiences with the family court system concerning safety issues, further coercion or re-traumatising, and traumatic legal processes (Kaspiew et al., 2017; Taylor et al., 2017). In many cases, these negative experiences resulted in “[n]ot all participants rais[ing] their experiences of family violence with family law system professionals” (Kaspiew et al., 2017, p. 193).

DFV affects different women differently

Gender inequality and male dominance send a message to both men and women, that women have a lower social value, are less worthy of respect, and thus are more legitimate targets of violence (Gilgun and McLeod, 1999 in Our Watch, ANROWS & VicHealth, 2015). This is particularly relevant for women who experience other forms of discrimination that impact upon their perceived worth. While gender inequality is a primary driver of coercive controlling violence against women, other forms of structural inequality and discrimination, including, but not limited to, patriarchy, colonisation, racism, sexism, ableism, ageism, homophobia and transphobia, can also be used to perpetrate violence against women.

When these forms of systemic social, political and economic discrimination and disadvantage, influence and intersect with gender inequality, they can, in some cases, increase the frequency, severity and prevalence of violence against women. The same groups - Aboriginal and Torres Strait Islanders, women with disability, culturally and linguistically diverse women, women with the experience of immigrating, lesbian, bisexual and queer women, transgender, and sex and gender diverse people, and women in rural and regional locations - who might be disproportionately affected by DFV, can also face challenges with accessing justice within the family law system. Ensuring fairness through the recognition of diversity should be a key driver for family law system reform.

GUIDING PRINCIPLE 2: Ensure fairness through the recognition of diversity as a key driver for reform of the family law system.

In addition to these two ANROWS guiding principles for reform, this submission will comment upon the Terms of Reference set out for the Joint Select Committee.

Summary of recommendations from the Joint Select Committee on Australia's Family Law System Terms of Reference

RECOMMENDATION 1: Take measures to ensure the early identification and response to DFV to curtail systems abuse through litigation.

RECOMMENDATION 2: Reduce opportunity for DFV systems abuse through better integration and interaction between the family law system, state and territory child protection systems, and family and domestic violence jurisdictions, employing a victim-centred approach.

RECOMMENDATION 3: Implement WLSA's five-step *Safety First in family law* plan to create a family law system that prioritises keeping women and children safe.

RECOMMENDATION 4: Adapt, test and implement a screening tool to detect instances or risk of economic/financial abuse in the Australian family law system.

RECOMMENDATION 5: Section 61DA of the *Family Law Act 1975* (Cth) should be amended to replace the presumption of 'equal shared parental responsibility' with a presumption of 'joint decision making about major long-term issues'.

RECOMMENDATION 6: Establish state and territory family courts in all states and territories, to exercise jurisdiction concurrently under the *Family Law Act 1975* (Cth), as well as state and territory child protection and family violence jurisdiction, with view to eventually abolishing federal family courts.

RECOMMENDATION 7: Explore evidence-based tailored approaches for groups whose access to justice is curtailed in the current family law system, including Aboriginal & Torres Strait Islander women, women with disability, culturally and linguistically diverse women & women with the experience of migration, women living in rural and remote areas, and LGBTQI+ people.

RECOMMENDATION 8: Improve identification of, and response to, women experiencing financial and systems abuse as part of DFV.

RECOMMENDATION 9: Increase support to assist DFV victim/survivors to resolve property and child support arrangements quickly and fairly, so the economic disadvantage of DFV is not entrenched.

RECOMMENDATION 10: Implement the recommendations from *Debts and disappointment: mothers' experiences of the child support system* to reduce the economic disadvantage of unpaid and incorrectly calculated child support for mothers experiencing DFV.

RECOMMENDATION 11: Investigate and trial a limited guarantee child support system.

RECOMMENDATION 12: Reform the FDR system so there is a clear pathway for complex needs *s60I* certificate holders who lack the financial means to pursue a court-based outcome, ensuring appropriate guidance for FDRPs working with these clients toward the resolution of their disputes.

RECOMMENDATION 13: Ensure that a child-centric principle is used when reforming the family law system, and that the specific cultural and spiritual needs of Aboriginal and Torres Strait Islander children are separately considered.

RECOMMENDATION 14: Investigate whether a mandatory MARAM Framework approach legislated in *Family Law Act 1975 (Cth)* would work to improve the system-wide performance of professionals involved in family law proceedings and the resolution of disputes.

Interaction, information sharing, and safety improvements

- a. ongoing issues and further improvements relating to the interaction and information sharing between the family law system and state and territory child protection systems, and family and domestic violence jurisdictions, including:
 - i. the process, and evidential and legal standards and onuses of proof, in relation to the granting of domestic violence orders and apprehended violence orders, and
 - ii. the visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings;

Systems abuse

A common theme in ANROWS research is a concern that perpetrators are able to inflict further harm on victims/survivors by manipulating systems, which is termed systems abuse. This concern has been expressed by both victims/survivors themselves (Kaspiew et al., 2017) and by the service providers working with them (Cortis & Bullen, 2016).

Dr. Rae Kaspiew and her colleagues highlight the significant concerns raised by systems abuse in ANROWS research entitled *Domestic and family violence and parenting: Mixed method insights into impact and support needs*. Of the women interviewed for this study who were separated from their partner, a substantial number reported perpetrator tactics of systems abuse including one or more of the following:

- Exploiting the intersections between family law, child protection, and criminal legal systems to their advantage.
- Raising counter-allegations and unjustifiable applications in family law or personal protection orders.
- Manipulative engagement with family law services.
- Non-compliance with court orders.
- Exhausting women's legal and financial resources.
- Using civil law processes to cross-examine women as self-represented litigants (Kaspiew et al., 2017).

Early identification of, and response to, DFV would assist in curtailing system abuse through litigation (Connolly, Healy & Humphreys, 2017). ANROWS research also points to a lack of co-ordination between different parts of the response system, particularly between child protection systems and the Family Court. The PATRICIA project found that connections between the DFV and child protection systems, and the family law courts were disturbingly absent (Connolly et al., 2017). The child protection system's emphasis on child safety and the family law system's focus on shared parental care means that mothers impacted by DFV can be trapped in the middle of two systems with competing demands (Kaspiew et al., 2017).

There is also a detrimental impact from siloed knowledges operating within the family law system, which can mean that women's access to justice is contingent upon partial knowledge, insights, skills and service delivery models (Maher et al., 2018). Siloed knowledge can create the opportunity for

systems abuse. DFV commonly arises during marital separation, and perpetrators can use the family law system to reassert their power and control over the victim through a range of litigation tactics (Connolly et al., 2017; Kaspiew et al., 2017). Abusive perpetrators can also use migration law, policy and visa status as leverage for control over migrant women and their children; or misuse carer payments for control over women with disability.

The family law system also interacts with other forms of administrative decision-making, including social security decisions. For example, Centrelink's couple rule, which is used to determine whether a person should be considered a member of a couple for social security purposes, can adversely affect DFV victims/survivors. Recent ANROWS research examined 70 Administrative Appeals Tribunal (AAT) decisions that involved domestic violence and the couple rule from 1992 to 2016 (Sleep, 2019). The researcher found data that could be used to identify and locate women was publicly available in the AAT decisions, exposing those who have experienced DFV to their perpetrator. This research also found that information collected through the application for a once-off crisis payment might be used against women later on as evidence that they were in a relationship (Sleep, 2019), demonstrating the need for DFV-informed systems that communicate with each other more effectively.

Partnership supportive collaborations focused upon the safety needs of women and their children allow for effective information sharing and risk assessment (Connolly et al., 2017). Information sharing in the family law system must be focused on perpetrator risk and history, as this prevents compromising the safety of women and their children (Connolly et al., 2017). Research illuminates that information sharing must be designed using a victim-centred approach that requires the victim/survivor's informed consent, ensuring the victim/survivor has a clear understanding of what information will be shared, when it will be shared, and with whom it will be shared (Jones, 2016). A better integrated court response when DFV is present would provide better protection to victim/survivors and their children, and reduce the opportunity for systems abuse, as long as it employs a victim-centred approach.

RECOMMENDATION 1: Take measures to ensure the early identification and response to DFV to curtail systems abuse through litigation.

RECOMMENDATION 2: Reduce opportunity for DFV systems abuse through better integration and interaction between the family law system, state and territory child protection systems, and family and domestic violence jurisdictions, employing a victim-centred approach.

Safety

With integration and information sharing between the family law system, state and territory child protection systems, and family and domestic violence jurisdictions, the safety of women and children needs to be paramount. ANROWS research highlights that two key factors are essential to improving

collaborative partnerships between the family law system, state and territory child protection and domestic and family violence system (Connolly et al., 2017):

- A need to focus on the issues of safety for victims and children; and
- A need to pivot to the perpetrator, shifting attention away from the protective parent (as if she were in control of the violence and abuse through her decisions) as the source of safety and risk concerns, and placing it back onto the perpetrator's use of violence and how it impacts the safety and well-being of children and their mothers.

The application of these two key factors is also recommended for state and territory-based Domestic Violence Protection Orders (DVPOs), where currently there remains considerable variance in the terminology, scope of behaviours and types of relationships covered, range of conditions on court orders, approaches to aiding and abetting breaches of orders, breach penalties, and local police and court practice (Australian Government Solicitor, 2009; Australian Law Reform Commission & NSW Law Reform Commission, 2010; Jeffries, Bond, & Field, 2013; Wilcox, 2010). Such differences compromise the safety of victims and children, and impede collaboration and information sharing between the family law system, state and territory child protection, and the domestic and family violence system.

Consequently, improving collaboration and information sharing between these systems requires the following changes:

- Allowing further training in DFV, information-sharing, and privacy laws, including enforcing existing legislation for professionals in support services and agencies (Taylor et al., 2017).
- Reducing the impact of decisions made under the *Family Law Act 1975* (Cth) on the enforcement of DVPOs by addressing the intersecting and competing interests of child protection and DVPO legislation, and family law orders and decisions (Taylor et al., 2017).
- Establishing specific legislation that facilitates the process of information-sharing between states and territories on DVPOs (Taylor et al., 2017), and across legal jurisdictions.
- Establishing an integrated system response across jurisdictions which allows the development of protocols for courts and service delivery agencies to share information about family violence matters (Taylor et al., 2017).
- Ensuring that information-sharing protocols and guidelines place an emphasis on the safety of women and their children within an ethical framework (Taylor et al., 2017).

Women's Legal Services Australia (WLSA) have proposed a five step plan called *Safety First in family law*, aimed at creating a family law system that keeps women and children safe. The steps are:

- Step 1** – Develop a specialist response for domestic violence cases in family courts
- Step 2** – Reduce trauma and support those who are most at risk of future violence and death
- Step 3** – Intervene early and provide effective legal help for the most disadvantaged
- Step 4** – Support women and children to financially recover from domestic violence
- Step 5** – Strengthen the understanding of all family law professionals on domestic violence and trauma (WLSA, 2019).

ANROWS supports the implementation of this [Safety First in family law](#) plan, and the proposed actions it outlines for each step.

RECOMMENDATION 3: Implement WLSA's five-step *Safety First in family law* plan to create a family law system that prioritises keeping women and children safe.

Truthful and complete evidence

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

Economic/ financial abuse

Economic/financial abuse is insidious and not well understood by the public, or often even by victims of DFV, despite it being formally recognised in definitions of family violence in Victoria, South Australia, Tasmania and the Northern Territory (Cortis & Bullen, 2015). As an act of family violence, economic/financial abuse involves a perpetrator restricting their victim's access to economic resources, to apply control and hinder their victims' independence (Cortis & Bullen, 2015).

Economic/financial abuse can take place pre-separation, throughout legal processes, as well as post-separation. For example, perpetrators can use the cost of dealing with the family law system to create a financial strain on their victims (Cortis & Bullen, 2016).

Economic/financial abuse can relate to the provision of truthful and complete evidence in Family Court matters concerning to the allocation of assets following separation, and child support. Perpetrators of DFV can mask or minimise their income (for example, using cash-in-hand work, listing income under a business name, changing assets into other peoples' names, or not declaring their full income) to reduce the amount they have to pay in child support. They can also enact financial abuse by paying child support late or irregularly, paying less than the assessment or not paying at all (Macdonald et al., 2012). To address non-compliance, ANROWS research has proposed that "the Commonwealth could become responsible for claiming child support and could carry the burden of non-payment of child support, so that women affected by economic abuse of non-payment are not unfairly penalised" (Cortis & Bullen, 2016, p. 74).

In the United States there are screening tools (Adams, 2011 cited in UNSW, 2019) designed to detect economic/financial abuse, which, if successfully adapted to, and tested within, the Australian context, could assist to detect instances or risks of financial/economic abuse in family law matters. Such tools could monitor prevalence and be used by practitioners to help determine the influence this abuse has had on women's financial wellbeing; guide conversations with women about financial matters; and mobilise resources to address barriers (UNSW, 2019).

RECOMMENDATION 4: Adapt, test and implement a screening tool to detect instances or risk of economic/financial abuse in the Australian family law system.

False claims

Mistrusting women's voices is a prevalent, violence-supportive attitude stemming from gender inequality. In 2017, NCAS showed that men were more likely to endorse that women make up or exaggerate claims of domestic violence to improve their case in custody battles (51% of men compared to 37% of women) (Parton, 2019). Contrary to persistent community attitudes mistrusting the voices of women, many women decide not to refuse contact time with fathers who perpetrate DFV for fear of being perceived as an unfriendly parent and being penalised in a way that would lead to children residing with the father and risk exposing them to further violence (Laing, 2003; McIntosh et al., 2016). In this regard, the use of the unfriendly parent provision is often counter-productive, as it tends to be used against women who report DFV. Research indicates that the prevalence of false allegations of child sexual abuse is approximately the same when compared to the prevalence of false allegations in other Family Court matters (Brown et al., 1998 cited in Death, Ferguson & Burgess, 2019), so the evidence does not support disbelieving women who report child sexual abuse.

Recent Australian research into family law cases shows that parental alienation, which has been widely discredited in a clinical sense, continues to be raised by fathers as a defence to child sexual abuse allegations (Death, Ferguson & Burgess, 2019). The raising of these issues is gendered, with "mothers primarily being constructed as manipulative, mentally unwell, suffering from delusions, and ultimately harming their children with the intent of punishing the other parent" (Death, Ferguson & Burgess, 2019, p. 2). Other Australian research has found that our family law system does not respond as well as it should to child sexual abuse, and sometimes accepts perpetrator generated narratives of mental illness to explain allegations, rather than investigate them (McInnes, 2013). Mental health in Family Court matters is also gendered, with it being given as the "reason limiting child contact with mothers in 30% of such cases, but only in 2% of cases limiting fathers", which does not align with general mental health prevalence (McInnes, 2014 cited in Death, Ferguson & Burgess, 2019, p. 7).

Research conducted by the Australian Institute of Family Studies shows that court orders for no contact with one parent (3%) are rare (AIFS, 2019). Using a sample of about 6000 parents about 18-months after separation, this study found that about three percent of separated parents use courts as their main pathway to making parenting arrangements (97% do not go to court, although 16% of those do use dispute resolution or lawyers) (AIFS, 2019). This three percent are predominantly families affected by family violence, child safety concerns and other complex issues. In the small proportion of cases determined by a judge, 45 percent of court orders provide for sole parental responsibility by the mother, and 11 percent for sole parental responsibility by the father (AIFS, 2019). When you compare court orders and arrangements in the wider separated population, court ordered arrangements (3%) are actually less likely to involve no contact between the children and their father

than arrangements in the general separated population (9%) (AIFS, 2019). Arrangements where children spend most of their time with their father are more common in orders made where litigation occurs (10–19%) than in the separated population generally (2%) (AIFS, 2019).

Under the *Family Law Act 1975* (Cth), the Family Court is required to put the best interests of the child first (*s60CA*) when making orders about two separate aspects of parenting - parental responsibility and care time (Kaspiew et al., 2015). The Act requires the court to apply a presumption of equal shared parental responsibility (*s61DA*), unless a parent can show it should not be applied because of family violence or child safety concerns, or should be rebutted for other reasons. When an order is made for equal shared parental responsibility, the court also needs to decide whether it is practical, and in the child's best interest, to spend equal or substantial and significant time with each parent (*s65DAA*). This is also the case when orders are not made for equal shared responsibility – a court can still decide equal or substantial and significant time is best for the child. Even in the rare (3%) cases where a court makes an order for the child not to see a parent, it can order supervised contact to try to make it safe for the child to keep seeing a parent (AIFS, 2019).

The two pronged focus of Family Court orders relating to child custody creates confusion, particularly for self-represented parties, who often mistake shared parental responsibility to mean equal time with each parent (ALRC, 2019). Forthcoming ANROWS research by Wangmann et al. (2020) will highlight issues with self-representation in Family Court matters when there have been allegations of abuse. With this in mind, ANROWS supports clarifying the presumption of equal shared parental responsibility in *s61DA*, so these words are replaced with a presumption of joint decision making about major long-term issues as per Recommendation 7 in the Australian Law Reform Commission's report, *Family Law for the Future—An Inquiry into the Family Law System*. (ALRC Report 135, 2019). This recommendation will only be effective however if there are simultaneous improvements to the family law system relating to the early identification of, and response to DFV, because DVF is a limiting case to the equal shared parental responsibility presumption.

RECOMMENDATION 5: Section 61DA of the *Family Law Act 1975* (Cth) should be amended to replace the presumption of 'equal shared parental responsibility' with a presumption of 'joint decision making about major long-term issues'.

Proposed merger of Family Court and Federal Circuit Court

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

Proposed merger

It is very clear that structural reform of the family law system is needed. Lengthy Family Court delays do not serve the safety of women and children experiencing DFV well, particularly as the period following separation is dangerous. According to the Australian Domestic and Family Violence Death Review Network (ADFVDRN), actual or intended separation was a characteristic in over half (55.4%) of intimate partner homicides that followed a history of DFV when the homicide offender was male (ADFVDRN, 2018). Almost half (47.7%) of the males who killed a former female partner killed that partner within three months of the relationship ending (ADFVDRN, 2018). Almost a quarter (24%) of the men who killed their current or former female partners were named as respondents in DVPOs protecting the female homicide victim at the time of the death (ADFVDRN, 2018). Family law proceedings had been formally commenced and were on foot at the time of the homicide in 11.4 percent of the cases where a male homicide offender killed a former female intimate partner (ADFVDRN, 2018). Leaving a violent partner does not necessarily mean an end to violence—two out of five women experienced violence while temporarily separated from their violent male former cohabiting partner, and six out of ten women who experienced violence while temporarily separated, reported an increase in violence during the separation (Cox, 2016). One quarter of women who are no longer in a relationship with their violent partner reported that the violence increased after their final separation (Cox, 2016).

According to the Australian Law Reform Commission, the majority of family law cases in federal courts now involve violence, child abuse or other complex factors (ALRC, 2019). It would benefit the safety of women and their children experiencing DFV to address the full range of their legal needs in one place, and limit the time they spend in adversarial contact with perpetrators of DFV. Several recent inquiries have recommended the expansion of specialist family violence courts throughout all states and territories, particularly as they follow a one judge, one family model that allows a single magistrate to exercise multiple jurisdictions where appropriate to service the separated family's full range of legal needs (ALRC, 2019). This would also assist in curtailing systems abuse (see also p. 6) and limit revictimisation, which can occur where a victim/survivor is forced to retell their story to different courts, lawyers and counsellors working across different jurisdictions (ALRC & LRC, 2010).

For these reasons, ANROWS is more persuaded by the ALRC's proposal for the creation of state and territory based family courts, with a view to the eventual abolition of the federal Family Court, than it is by the proposed merger of the Family Court and the Federal Circuit Court (ALRC, 2019). The latter option seems to be a move away from the increased specialisation that an adequate and timely response to DFV in the family law system requires. In a piece in *The Conversation*, Deputy Director of the Indigenous Law Centre at University of NSW, Kyllie Cripps, highlights the importance of specialised courts for Aboriginal people:

There is little point diverting Aboriginal offenders from a specialist family violence court system that is skilled in dealing with the gendered nature of violence and the power and

control dynamics this violence facilitates. These courts are likely to be much more responsive to both victims and offenders. (Cripps, 2016, April 5)

Responding to DFV in family law matters requires the formal, specialised and superior court expertise of the Family Court, or state and territory-based entities like it.

RECOMMENDATION 6: Establish state and territory family courts in all states and territories, to exercise jurisdiction concurrently under the *Family Law Act 1975* (Cth), as well as state and territory child protection and family violence jurisdiction, with view to eventually abolishing federal family courts.

Additional structural concerns

When considering the structure of Australia's updated family law system, applying the principle of fairness (see recommendation 2) requires a simultaneous consideration of tailored approaches for groups whose access to justice is currently curtailed. A thorough consideration of diversity illustrates the need for further specialisation, additional other cross jurisdictional partnerships, and multi-disciplinary collaboration. Some groups the Committee should consider with relation to this include:

1. Aboriginal and Torres Strait Islander women

DFV for Aboriginal and Torres Strait Islander women may be “best understood in intersectional terms, as it exists at the junction of multiple, rather than singular, forms of domination, coercion, and conflict” (Blagg et al., 2018, p. 7). Blagg's research confirmed earlier findings by Nancarrow (2016) that coercive control is not a necessary element for violence against Aboriginal and Torres Strait Islander women, as it does not capture other forms of interpersonal violence, such as couple fighting, that has roots in traditional Aboriginal dispute resolution. When the family law system makes no distinction between coercive control and couple fights, it brings women engaged in incident-based fights into the criminal justice system, and removes victim choice (Nancarrow, 2016). This is especially problematic for Aboriginal and Torres Strait Islander women, as gender-based violence intersects with the legacy and contemporary manifestations of colonialism, including the forced removal of children (Our Watch, ANROWS & VicHealth, 2015). ANROWS research in this area points to a need to enhance trauma-informed practice and innovations in Family Court practices to simplify proceedings and make them more flexible to better serve the needs of Aboriginal and Torres Strait Islander women (Blagg et al., 2018; Langton, Davis & Smith, 2020a).

One-size-fits-all family law system approaches, including the current emphasis on zero tolerance for DFV that encourages mandatory arrest, charge and prosecution (Blagg, Bluett-Boyd & Williams, 2015), are not effective ways to address Aboriginal and Torres Strait Islander DFV. For example, research has shown that DVPOs that exclude men from the family home can be ineffective in the this context, because Aboriginal and Torres Strait Islander men rarely have housing options, rendering

them effectively homeless, meaning they usually return to the family home (Cripps & Habibis, 2019). Making specific changes to the family law system using the insight of these research findings is in line with National Outcome 3 of the [National Plan to Reduce Violence against Women and their Children](#): Indigenous communities are strengthened. Forthcoming ANROWS research on perpetrator interventions (Langton, Davis & Smith, 2020b) will also provide further insight in this area.

2. Culturally and linguistically diverse women, and women with the experience of migration

While some elements of domestic and family violence may cut across communities, culturally and linguistically diverse women, and women with the experience of migration, can experience unique forms of DFV. The ASPIRE project, another piece of ANROWS research, documented some of these experiences in Victoria and Tasmania (Vaughan et al., 2016). The researchers found that definitions of family violence should acknowledge that it may include “multi-perpetrator violence, immigration-related abuse, ostracism from community, and exploitation of interfamilial financial obligations” (Vaughan et al, 2016, p. 6). The researchers also found that fairness for women from culturally and linguistically diverse communities would require greater availability of interpreters (including recognition that interpreters are part of the DFV response system, and thus also require specialised training), and the adaptation of court and legal materials and/or forms to provide clear and accurate information about the rights of immigrant and refugee women (Vaughan et al., 2016).

3. Women with disability

Women with disability can find that gender-based and discrimination based upon ableism intersect and increase their risk of violence (Cox, 2016), particularly when they are substantially dependent upon their caregivers (Barger et al., 2009 in Cox, 2015). Family law services and courts may not support equitable access, which is particularly significant given that the key tactic of abuse for women with disability is limiting access to disability support services or mainstream service providers, along with threats related to these women’s mothering and care-giving roles (Maher et al., 2018). Structural changes like improvements to accessibility, for example wheelchair access, and alternatives to verbally calling matters to assist deaf or hard-of-hearing service users to know when their case is being called, need to accompany changes to the attitudes and stereotypes that impede safe access for women with disability experiencing DFV. Regular disability awareness training would be a great start for all people working within the family law response system.

4. People who identify as LGBTIQI+

Key issues concerning fairness and equity in this area include inequitable and ambiguous legislation; judgemental and prejudiced social and cultural attitudes; inadequate theories of DFV dynamics; heterosexist language; implicit and explicit attitudes of clients, staff and legal authorities; lack of understanding; stigma; risks of outing; constraints seeking justice against fellow community members within a tight-knit community; and re-victimisation (Duke & Davidson, 2009; Simpson & Helfrich,

2007; Simpson & Helfrich, 2014). ANROWS research highlights that fear of heterosexist responses from police and/or services is a consistent concern (Mitra-Kahn, Newbigin & Hardefeldt, 2016). Forthcoming ANROWS research by Bear et al. (2020) will look in more detail at DFV in LGBTQI+ relationships. With the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* passing parliament on 7 December, 2017 gaining Royal Assent the next day, changing legal definitions point to the need for gender neutral language to be updated on family law system forms, among other things. There is a strong need for a systems audit to identify gaps, and ensure that the whole family law system is accessible to people who identify as LGBTQI+, particularly to those experiencing DFV.

5. Women living in rural and remote areas

ANROWS research into the rural and remote DFV experience points out that the people within the family law system to whom women can report DFV, might be known to either the victim/survivor and/or the perpetrator (Wendt et al., 2017). Isolation and a lack of services increases the practical challenges of leaving violent situations for women living in rural and remote areas, (DeKeseredy & Schwartz, 2008 cited in Cox, 2015), which may point to the need for tailored family law approaches that prioritise safety for women living rurally or remotely.

RECOMMENDATION 7: Explore evidence-based tailored approaches for groups whose access to justice is curtailed in the current family law system, including Aboriginal & Torres Strait Islander women, women with disability, culturally and linguistically diverse women & women with the experience of migration, women living in rural and remote areas, and LGBTQI+ people.

Financial costs, including property disputes and child support

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

- h. any improvements to the interaction between the family law system and the child support system;

Financial abuse

Financial costs of family law proceedings can be a significant problem for women experiencing DFV, particularly as financial abuse has been estimated to occur among 80-90 percent of women who seek support for DFV (Cortis & Bullen, 2016). Even when overt financial abuse is absent, DFV has enduring economic effects, due to, for example, difficulties in sustaining education, job-searches, or employment (Cortis & Bullen, 2016). DFV can undermine compliance with welfare and employment services (Sleep, 2019), entrenching economic dependence on the violent partner. DFV can mean women may hold debt or bad credit. Violence can also act as a barrier to women applying for and accessing child support. Service providers identified financial issues as a major factor in a woman's decision to stay in or leave a violent relationship (Cortis & Bullen, 2016).

By exploiting the family law system (see also p. 6), DFV abusers can continue to threaten women's livelihoods without direct contact. As one domestic violence service provider interviewee explained:

...he has denied her access to any financial documents. The court's ordered that he has to provide them to her solicitor, but that was 12 months ago and he still hasn't provided them. So she keeps getting dates to go to court then it's put off. And then in all this time she's got no money at all because he has everything in his name. He's living in the house, driving the car, not paying for the children in any way, so she's had to bear all the financial expense and he's dragging the whole thing out further and further. And also while this is all happening he's merrily disposing of assets as much as he can, so by the time they go to court you know there is less than perhaps she might have been entitled to initially... (Cortis & Bullen, 2016)

The family law system needs to better identify and support women experiencing financial abuse (Cortis & Bullen, 2016).

RECOMMENDATION 8: Improve identification of, and response to, women experiencing financial and systems abuse as part of DFV.

Property disputes and child support

ANROWS research by Cortis & Bullen (2016) found that many women experiencing DFV had difficulty accessing legal representation, as they could not afford private services but had sufficient income that they were also ineligible for Legal Aid. Legal representation, court costs, and lost work days to attend to legal matters, can be particularly high cost for women, and may deter women from seeking a fair share of property, entrenching the economic disadvantage of DFV. Many women may be unable to afford any representation, or access the same quality of representation that men can

afford, and this may compromise the quality of representation received (Braaf & Meyering, 2011 cited in Cortis & Bullen, 2015) resulting in unfair economic outcomes.

There is inadequate availability of free or low cost legal advice on financial and property matters after separation, as low cost alternatives, like Women's Legal Services and Family Violence Prevention Legal Services (the latter targeted to Aboriginal and Torres Strait Islander women) provide little support in property matters (Cortis & Bullen, 2015). Women from migrant and refugee backgrounds can have particular difficulty accessing legal services that assist with migration and visa matters because of their resourcing constraints (Vaughan et al., 2017).

Like the family law system, the child support system has been substantially reviewed across a number of inquiries, most recently with the 2015 parliamentary inquiry into child support entitled [From conflict to cooperation: Inquiry into the Child Support Program](#). In [What would another review of child support achieve? We know the problems, and how to fix them](#), Associate Professor Kristin Natalier (Flinders University) and Kay Cook (RMIT University), outline the issues and background succinctly: "About one-third of child support program cases involve payments of less than A\$500 per year. This amount cannot meaningfully contribute to the costs of children." The authors also point to problems with compliance (high rates of non-payment, partial payment and late payment) and highlight the problematic intersection of child support and social security. For example, discrepancies in how much *should* be paid in child support, versus how much actually *is* paid, that affect the mother's Centrelink payments. Poor understandings of DFV and separation can lead to unfair/incorrect payments and/or debt calculations (Sleep, 2019). There is also a symbolic dimension to child support, where perpetrators of DFV can use child support to express, control and manage relationships with their former partners and children.

RECOMMENDATION 9: Increase support to assist DFV victim/survivors to resolve property and child support arrangements quickly and fairly, so the economic disadvantage of DFV is not entrenched.

In research released last month, *Debts and disappointment: mothers' experiences of the child support system*, the researchers point out that Australia's unpaid child support debt that currently sits at an underestimated \$1.59 billion. This debt is gendered (single mothers make up 80% of child support recipients) and results in children missing out on medical appointments and healthcare (41%), education (66%) and social activities (75%) (Cook et al., 2019). Government payment compliance figures reported that 25 percent of Department of Human Services Child Support Collect parents have a debt, but this figure assumes the majority of cases (54% at the time) who transfer payments privately are 100 percent compliant, which even the government identified as inaccurate during the most recent inquiry by the House of Representatives Standing Committee on Social Policy and Legal Affairs (Commonwealth of Australia, 2015) (Cook et al., 2019).

The research makes some salient points about how to remove this economic burden from mothers, which would be particularly useful when DFV is alleged, because they relate to categories already implicated in system and financial abuse. The researchers' recommendations aim to ensure that women are not being penalised for government inaction, or the child support payer's tax return non-lodgement or inaccurate income estimates. They include compelling both separated parents to submit a tax return annually, and decoupling the family tax benefits women receive from the assumption that child support has being paid (Cook et al., 2019). The research also shows there is an emotional impact of child support debt that sees women express worry (80%), and uncertainty (80%) as well as increasing conflict with their ex-partner (46%) which is particularly problematic in cases where DFV is present (Cook et al., 2019).

Alternatively, government could investigate and trial a limited guarantee child support, that would likely solve many of the problems reported here, particularly for women experiencing DFV. This potential solution was also recommended in *From conflict to cooperation: Inquiry into the Child Support Program* conducted by the House of Representatives Standing Committee on Social Policy and Legal Affairs (Commonwealth of Australia, 2015).

RECOMMENDATION 10: Implement the recommendations from *Debts and disappointment: mothers' experiences of the child support system* to reduce the economic disadvantage of unpaid and incorrectly calculated child support for mothers experiencing DFV.

RECOMMENDATION 11: Investigate and trial a limited guarantee child support system.

Family law support services & family dispute resolution processes

- e. the effectiveness of the delivery of family law support services and family dispute resolution processes;

Family Dispute Resolution (FDR) came about as part of the 2006 changes to the *Family Law Act 1975* (Cth) as a pre-condition to initiating court proceedings in parenting matters. It was an attempt to divert separating and separated parents from the court system and its adversarial processes, after research indicating it could increase acrimony and children's exposure to entrenched conflict. Parents seeking a court listing are required to obtain and present an *s60I* certificate that demonstrates either that mediation was attempted and unsuccessful, or that parties attempted mediation, but a Family Dispute Resolution Practitioner (FDRP) deemed the pursuit to be inappropriate for mediation.

Guided by the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*, the FDRP must consider whether there is DFV history, safety, equal bargaining power, the risk of child abuse,

and both parties' health and wellbeing, in order to determine that the parties are able to negotiate freely in the dispute. DFV is also in the set of exceptions at *s60I(9)* which sets out that a court may hear an application without the filing of a *s60I* certificate if there is history, or future risk, of child abuse or family violence being perpetrated by one of the parties to the proceedings. This means there are two pathways for people experiencing DFV – one where the FDRP is required to consider their DFV history and the risk to children in determining whether FDR is appropriate, and *s60I(9)(b)* which basically states there is no requirement to attend FDR if the court is satisfied that history or risk of DFV exists.

Recent research into *s60I* certificates exposes plenty of opportunity within this system for perpetrators of DFV to engage in financial and systems abuse, for example one FDRP interviewee said:

It's really difficult when you've got somebody who quite obviously does not want to participate in mediation.... They'll take ages to respond to your letters or invitations. When they do respond they'll make an appointment for two months later and then they'll reschedule that appointment for another two months or whatever it is, but you can't issue the certificate because they've got an appointment booked in. So that is a real challenge with those cases (Smyth et al., 2017, p. 23)

In the research, abuse was echoed by women experiencing DFV, for example:

I am not satisfied with how easy it is to get into court for my former partner... and cause discomfort to me including financially. [Former partner] is manipulating. He harms the child...and [the mediation service] believed him rather than listening to me. (Smyth et al., 2017, p. 89)

There are also safety concerns with the current system, for example one party experiencing DFV said:

I told the mediators that I was fearful of my former partner and that was not considered.... There was no consideration of the implications for the child of the care arrangements. I was pressured to take a decision then and there, which was not helpful. (Smyth et al., 2017, p. 88)

The findings in this study were gendered, with fathers tending to raise bias and enforcement of the outcome, and mothers tending to raise issues of family violence (Smyth et al., 2017). The *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* does not legislate what has to happen after the issue of an *s60I* certificate. FDRPs expressed concern about clients who don't have the financial resources to go to court:

One of the key tensions that emerge from the data is that parents who do not appear to have the financial resources to pursue litigation can be caught in a dispute resolution no-man's land. Faced with this dilemma, some FDRPs go to great lengths to provide a service, which in

the strict letter of the legislation may not be appropriate in some instances lest the practitioners also end up in that no-man's land. (Smyth et al., 2017, p. 95)

This research found only half of parents with a certificate later made an application for parenting orders in court; while the other half did not. Of those who did not resolve their situation in court, about two-fifths reported working it out together as a strategy they had attempted, and only 20 percent indicated that they continued with FDR after receiving their s60I certificate (Smyth et al., 2017). This is consistent with recent Australian research (e.g., Kaspiew et al., 2009; Qu et al., 2014 cited in Smyth et al., 2017), which shows that lot of family dispute resolution is occurring where there are allegations of family violence.

The question of when FDR can and should be provided in the context of family violence and other challenging situations, is ongoing and vexed. Without clear legislative guidance, FDRPs are forced to make those decisions for complex needs clients who lack the financial means to pursue a court-based outcome, on a case-by-case or service-by-service basis.

RECOMMENDATION 12: Reform the FDR system so there is a clear pathway for complex needs s60I certificate holders who lack the financial means to pursue a court-based outcome, ensuring appropriate guidance for FDRPs working with these clients toward the resolution of their disputes.

Impact on health, safety and wellbeing of children and families

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

The Australian Bureau of Statistics' 2016 Personal Safety Survey (ABS, 2017 cited in ANROWS, 2018) showed that 65 percent of women who had children in their care when they experienced violence by a current or former partner reported that their children had seen or heard the violence. Other estimates show one in four children have witnessed violence against their mother or stepmother (National Council to Reduce Violence against Women and their Children cited in Taylor et al., 2017). Children are at particular risk of experiencing DFV during and after parental separation (Campo, 2015). Perpetrators of DFV can use tactics involving children to directly or indirectly target women as mothers or carers (Victorian Government, 2018). Threatening to use the family law and child protection system against women is one of a suite of tactics that can have lasting effects on the mother-child relationship (Victorian Government, 2018).

Children who live with such violence are more likely to have a range of health, development and social problems, and are at higher risk of perpetrating or becoming a victim of violence, which perpetrates intergenerational cycles of violence (Kaspiew et al., 2017; Campo, Kaspiew, Moore, & Tayton; Flood &

Fergus; Holt, Buckley, & Whelan; Humphreys, Houghton, & Ellis; Richards; Stith et al., cited in Webster et al., 2018). Children experiencing DFV are diverse, and can face differing risks and implications related to their individual circumstances (Victorian Government, 2018). For example, Aboriginal children experiencing family violence are more likely to be removed from their families (Our Watch, 2014 cited in Victorian Government, 2018). This can intersect with intergenerational trauma stemming from the forced removal of Aboriginal children, and be a barrier to disclosing DFV for Aboriginal women (Australian Institute of Criminology, 2011 cited in Victorian Government, 2018).

Specific impacts on children from family law proceedings can also result from the physical layout of courts and services in the family law system that expose women and children to unwanted contact with the perpetrator of DFV. Mothers in the family law system do not feel their safety, or their children's safety, is prioritised (Kaspiew et al., 2017). Clearer judicial guidance on the importance of children's safety may also to help reduce the disconnection between the child protection system and the court system (Connolly et al., 2017). Advancing the safety of women and children is consistent with the National Risk Assessment Principles that were produced by ANROWS, in particular Principle 1, that "survivors' safety is the core priority of all risk assessment frameworks and tools" (Toivonen & Backhouse, 2018, p. 5).

Research on family violence risks to children emphasises the importance of interagency collaboration in assessing and responding to children impacted by family violence (Fitz-Gibbon et al., 2018; Connolly, Healy & Humphreys, 2017). Those working within the family law system are a key component of this response. We note that a child's risk may be distinct and separate from the risks of the parent and/or mother and that it is essential that any risk assessment and management pay attention to the family structure and histories of family violence. The findings of ANROWS's research on the impact of domestic violence on children has been summarised in [*The impacts of domestic and family violence on children \(2nd ed.\)*](#) (ANROWS, 2018).

RECOMMENDATION 13: Ensure that a child-centric principle is used when reforming the family law system, and that the specific cultural and spiritual needs of Aboriginal and Torres Strait Islander children are separately considered.

Avenues to improve the performance of professionals in family law system

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

In March 2016 the Victorian Royal Commission into Family Violence made 227 recommendations designed to prevent family violence, keep victims/survivors safe and supported, and hold perpetrators

to account. The Victoria Government committed to implementing all 227 recommendations across the next decade, backed up with an investment of more than \$2.7 billion to support cultural and systemic changes needed to achieve these goals. One key change designed to improve the performance of all professionals and services that encounter people experiencing DFV is implementing the Family Violence Multi-Agency Risk Assessment and Management Framework (MARAM). The MARAM Framework has been developed to ensure that all relevant services are contributing effectively to the identification, assessment and management of family violence risk (Victorian Government, 2018).

By establishing the MARAM Framework in law, under a new *Part 11* of the *Family Violence Protection Act 2008* (VIC), organisations that are authorised through regulations, as well as organisations providing funded services relevant to family violence risk assessment and management, must align their policies, procedures, practice guidance and tools to the MARAM Framework. While the MARAM Framework is still being rolled out, with some impact to services that do not have the resources to have a project officer assigned to implementation, early indications suggest that it is worth investigating to see whether mandating federally for a framework within the updated *Family Law Act 1975 (Cth)* would be the best way to achieve a system-wide change to improve the performance of all professionals in the family law system responding to DFV.

RECOMMENDATION 14: Investigate whether a mandatory MARAM Framework approach legislated in *Family Law Act 1975 (Cth)* would work to improve the system-wide performance of professionals involved in family law proceedings and the resolution of disputes.

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