

Submission to Joint Select Committee on

Australia's Family Law System.

Rape & Domestic Violence Services Australia

23 December 2019

P 02 8585 0333 **F** 02 9555 5911
PO Box 555 Drummoyne NSW 2047

Funded by NSW Health, the Commonwealth Bank,
and the Australian Government Department of
Social Services.

ABN 58 023 656 939

Counselling Services

24/7 NSW Rape Crisis 1800 424 017
CBA Domestic &
Family Violence Line 1800 222 387
Sexual Assault
Counselling Australia 1800 211 028

rape-dvservices.org.au

Table of Contents

Summary of recommendations	4
1. Background	7
2. Language and Terminology	8
3. Introduction.....	9
4. Family Violence Statistics in the Family Law System	9
5. Information Sharing between the federal and state/territory jurisdictions	10
Information Sharing between jurisdictions.....	10
Information Sharing Framework as part of the National Domestic Violence Order Scheme.....	12
6. Proposed Merger and further reforms to the family law system.....	13
Proposed Merger of the Family Court of Australia and the Federal Circuit Court of Australia – Loss of specialisation	13
Triage and Risk Assessment	14
A specialist family violence pathway	15
Post-order support for families	16
The Court Environment must be safe and accessible for those using the family law system.....	17
Family Law legislation and forms should be simplified	18
Prioritising the safety of carers	21
Prioritising safety over maintaining relationships	22
7. Delivery of family law support services and family dispute resolution processes ...	23
Increased funding for family law services	23
Families Hubs concept proposed during the ALRC’s family law review	25
8. The impacts of family law proceedings on those involved	26
Family Law outcomes must be in line with United Nations Conventions.....	26
Complex Trauma in the Courtroom	27
Education regarding family violence as it relates to family law	28
Recognising diverse experiences of family violence	30
The need for ongoing Family Violence Awareness Training for those working in the family law system	30
Understanding sexual violence in the context of family violence	34
Understanding family violence	35
The concept of Vicarious Trauma (‘VT’).....	35
A work, health and safety issue.....	37

The need for a proactive approach	38
Best Practice Vicarious Trauma Management Program	39
Judicial Officers exercising family law jurisdiction	40
Professional wellbeing training for those working in government funded family relationship services and family law legal assistance services	40
9. Further matters that must be considered by the Joint Select Committee	40
 Addressing any unintended consequences in the future if changes to family law legislation were made	40
 Community education about the family law system.....	41
 Stronger protections for sensitive records in family law proceedings.....	41
 Limited forensic relevance.....	43
 A qualified privilege	44
Appendix A.....	46

Summary of recommendations

Recommendation 1: That the Australian Government, in conjunction with each State/Territory Government develop and implement a national information sharing framework in line with Recommendation 2 of the ALRC report.

Recommendation 2: That the Australian Government consider expanding the National Domestic Violence Order Scheme to include Family Court Orders as well as Court Orders that are issued in relation to child protection.

Recommendation 3: That Women's Legal Service Australia's five step plan, Safety First in family law be implemented to strengthen the family law system's response to family violence through a specialist family violence pathway and/or Specialist Family Violence Court.

Recommendation 4: That there is consideration given to the implementation of a post-order case management support service for families. The design of this service should occur in consultation with specialist family violence services, with all staff working within the service to have specialist domestic and/or family violence training.

Recommendation 5: That the Australian Government ensure all premises and/or facilities are safe and accessible for those using the family law system.

Recommendation 6: That the Australian Government undertake a comprehensive review of family law legislation and the current forms used in the system, with a view to simplifying the legislation and making forms more user-friendly and accessible.

Recommendation 7: That the presumption of 'equal shared parental responsibility' be removed from the *Family Law Act 1975* (Cth).

Recommendation 8: That the common law principles set out in *Rice v Asplund* be enshrined in family law legislation.

Recommendation 9: That any improved resources available to separating parents be formulated in consultation with specialist family violence services.

Recommendation 10: That any reforms to family law legislation should include that when determining parenting arrangements, there must be enhanced focus on the safety of carers, particularly in the context of family violence.

Recommendation 11: That the Australian Government allocate additional funding for a specialised family violence pathway for legal aid grants, particularly for family law and care and protection matters.

Recommendation 12: That the Australian Government allocate additional funding to existing family law services, including legal assistance, trauma counselling and case management services.

Recommendation 13: That family law outcomes must be made in line with United Nations Conventions, and this is particularly important when determining parenting arrangements within the context of family violence.

Recommendation 14: That those who have experienced domestic and/or family violence have access to specialised, free and timely legal advice and representation to ensure safe and just family law outcomes.

Recommendation 15: That the Australian Government commit to funding a community legal education campaign, resources and materials regarding family violence in the context of family law proceedings. This education should be framed to support people experiencing family violence.

Recommendation 16: That the Joint Select Committee recommend that further research to examine the strengths and limitations of the definition of family violence in relation to experiences of diverse groups be commissioned.

Recommendation 17: That all family law professionals, judicial officers and those working in the family law system are at risk of vicarious trauma, and strategies should be put in place to manage its impacts.

Recommendation 18: That any training packages prepared and provided to family law professionals, judicial officers and those working in the family law system include training, information and resources as to the understanding of sexual violence within the context of family violence.

Recommendation 19: That any training packages prepared and provided to family law professionals, judicial officers and those working in the family law system include training, information and resources as to the understanding of domestic and/or family violence.

Recommendation 20: That the concept of vicarious trauma should be preferred over other concepts such as burnout, compassion fatigue or secondary traumatic stress when considering the professional wellbeing of family law professionals, judicial officers and those working in the family law system.

Recommendation 21: That vicarious trauma should be considered a work, health and safety issue to emphasize that organisations have a duty to implement risk management strategies.

Recommendation 22: That there must be a proactive approach to vicarious trauma management for family law professionals, judicial officers and those working in the family law system.

Recommendation 23: That trauma specialists should be engaged to develop a program designed to manage vicarious trauma for family law professionals, judicial officers and those working in the family law system which incorporates education, risk reduction, monitoring, early intervention and offsetting symptoms.

Recommendation 24: That government funded family relationship services and family law legal assistance services be provided with additional funding to support establishment costs in relation to professional wellbeing training programs.

Recommendation 25: That there be a further mechanism for ongoing monitoring and evaluation of any changes to law and legal processes, with an opportunity to examine the effectiveness of any such changes, including seeking to address any unintended consequences.

Recommendation 26: That in conjunction with any legislative reforms, there should be broad community education as to the family law system, as well as a community awareness campaign as to family violence in the context of family law proceedings.

Recommendation 27: That there is consideration of the need for greater protections for the use of confidential counselling records in family law proceedings, subject to the paramount consideration of the best interests of the child.

Recommendation 28: That a qualified privilege for confidential counselling communications be inserted into family law legislation that would require a party to seek leave in order to compel, adduce or produce evidence of a confidential counselling record in family law proceedings.

Recommendation 29: That when determining whether to grant leave, the Court be required to satisfy itself that the evidence is necessary in order to determine the best interests of the child, and that there is no alternative source of evidence available that would be less intrusive to the person who has been impacted by sexual, domestic and/or family violence.

Recommendation 30: That the Australian Government should establish and fund a legal service to provide free advice and representation to individuals and counselling services wishing to object to the production of confidential counselling records.

1. Background

- 1.1 Rape & Domestic Violence Services Australia welcome the opportunity to contribute to the Joint Select Committee's ('**the Joint Select Committee**') inquiry of Australia's Family Law System ('**this inquiry**').
- 1.2 Rape & Domestic Violence Services Australia is a non-government organisation that provides a range of trauma specialised counselling services for those who have experienced sexual, domestic and/or family violence and their supporters.¹
- 1.3 Our services include the NSW Rape Crisis counselling service for people in NSW whose lives have been impacted by sexual violence; Sexual Assault Counselling Australia for people accessing the Redress Scheme resulting from the Royal Commission into Institutional Responses to Child Sexual Abuse; and the Domestic and Family Violence Counselling Service for Commonwealth Bank of Australia customers and staff who are seeking to escape domestic and/or family violence.
- 1.4 In the 2018/19 financial year, Rape & Domestic Violence Services Australia provided 34,877 occasions of service to 14,649 clients nationally, with 90% of callers identifying themselves as female, and 92% identifying themselves as someone who had experienced sexual, domestic and/or family violence.
- 1.5 In addition, Rape & Domestic Violence Services Australia also provides consultation and training services to other organisations and individuals who may come into contact with people whose lives have been impacted by sexual, domestic and/or family violence. Consultation and training sessions may cover topics such as managing vicarious trauma, responding with compassion, and understanding complex trauma.
- 1.6 When referring to our recommendations throughout this submission, we refer to the recommendations made in our submission dated 29 November 2018 to the *Australian Law Reform Commission's review of the family law system*.
- 1.7 In making this submission, Rape & Domestic Violence Services Australia do not propose to address each term of reference as set out by the Joint Select Committee.
- 1.8 Rape & Domestic Violence Services Australia also confirm that we have already provided a short preliminary submission dated 3 October 2019 to the Joint Select

¹ Generally, Rape & Domestic Violence Services Australia prefer the term *people who have experienced sexual assault and/or domestic and family violence* to describe individuals who have suffered this type of violence, rather than the terms survivors or victims. This is in acknowledgement that, although experiences of sexual assault and/or domestic and family violence are very significant in a person's life, they nevertheless do not define that person. However, in this submission, Rape & Domestic Violence Services Australia will sometimes use the term victims as this accords with the language used in the legislation.

Committee as to the need for all Committee Members participating in this inquiry to undertake family violence awareness training.²

2. Language and Terminology

- 2.1 In this submission, Rape & Domestic Violence Services Australia use the term *people who have experienced sexual assault/violence, domestic and/or family violence* to describe individuals who have suffered this type of violence, rather than the terms survivors or victims. This language acknowledges that, although experiences of violence are often very significant in a person's life, they nevertheless do not define that person. Moreover, the process of recovery from trauma is complex, multifaceted and non-linear and will often involve experiences of survival in combination with experiences of victimisation.
- 2.2 We acknowledge that the *Family Law Act 1975* (Cth) uses the term *family violence*³ as a descriptor to capture domestic and/or family violence. Rape & Domestic Violence Services Australia therefore use this term throughout this submission.
- 2.3 Rape & Domestic Violence Services Australia also use the term *sexual violence* as a broad descriptor for any unwanted acts of a sexual nature perpetrated by one or more persons against another. This term is designed to emphasise the violent nature of all sexual offences and is not limited to those offences that involve physical force and/or injury.
- 2.4 Rape & Domestic Violence Services Australia use gendered language when discussing sexual, domestic and/or family violence. This reflects the fact that sexual, domestic and/or family violence is predominantly perpetrated by men against women. However, we acknowledge that gendered language can exclude the experiences of some people impacted by sexual, domestic and/or family violence. We acknowledge that:
- 2.4.1 Women can also be perpetrators of sexual, domestic and/or family violence.
- 2.4.2 Sexual violence occurs within LGBTIQ+ relationships at a similar rate to sexual violence within heterosexual relationships.⁴
- 2.4.3 Sexual violence is perpetrated against transgender and gender-diverse people at a higher rate than against cis gender people.⁵

² Rape & Domestic Violence Services Australia's preliminary submission dated 3 October 2019 is annexed at Appendix A. This preliminary submission is available as No. 3 on the Joint Select Committee's website.

³ *Family Law Act 1975* (Cth), s 4AB.

⁴ B. Fileborn 'Accounting for space, place and identity: GLBTIQ young adults' experiences and understandings of unwanted sexual attention in clubs and pubs' (2013) 22(1) *Critical Criminology*, 81.

⁵ K. O'Halloran, 'Family Violence in an LGBTIQ context' (2015) 2 *Royal Commission In Brief*, <<https://www.dvrcv.org.au/sites/default/files/Family-violence-in-an-LGBTIQ-context-Kate-OHalloran.pdf>>

3. Introduction

- 3.1 Rape & Domestic Violence Services Australia state that the safety of those who experience sexual, domestic and/or family violence and their children who are likely to have also been exposed to these types of violence must be prioritised within the family law system. This safety should be an absolute priority at every stage of the family law process.
- 3.2 Our organisation commend the Australian Law Reform Commission in their final report on the *'Family Law for the Future – An inquiry into the family law system'*⁶ ('the ALRC review' or 'the ALRC report') as to their focus on the safety of those experiencing violence and their experiences in the family law system. We urge the Joint Select Committee to carefully consider the recommendations of this report to inform final recommendations made within this current inquiry.
- 3.3 The Joint Select Committee must consider that responding to family violence forms part of the core business of the family law system, and that advocating for the advancement of the safety and wellbeing of children and their carers must be paramount in guiding the modern family law system.
- 3.4 Our submission is informed by the experiences of our clients, and as such, we consider the systemic barriers faced by carers and their children who have experienced sexual, domestic and/or family violence when they have accessed the family law system.
- 3.5 It is too often the case in family law proceedings that the issue of carer's safety is portrayed as ancillary to the best interests of the child. However, Rape & Domestic Violence Services Australia understand the safety and wellbeing of carers as inextricably intertwined with the safety and wellbeing of their children. This is because parental violence can have devastating consequences for the safety and wellbeing of children, even where violence is not targeted at those children.
- 3.6 Rape & Domestic Violence Services Australia propose that structural changes to the family law system – including enhanced risk-assessment and specialist family violence training for all family law professionals – are more likely to result in the desired cultural shift.

4. Family Violence Statistics in the Family Law System

- 4.1 Rape & Domestic Violence Services Australia acknowledge that accurate statistics measuring the prevalence of family violence in Australia is difficult, as there can be reporting barriers and difficulty in accessing reporting services.⁷ The

⁶ Australian Law Reform Commission, *Family Law for the Future – An inquiry into the Family Law System*, ALRC Report 135 (March 2019).

⁷ Dr Rae Kaspiew et al. (January 2016). *Domestic and family violence and parenting: Mixed methods insights into impact and support needs: State of Knowledge Paper* (ANROWS, Issue 01), 5.

measuring of family violence within the context of family law proceedings is even harder to accurately assess.⁸

- 4.2 The World Health Organization (2017) estimated globally that *“about 1 in 3 women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence in their lifetime.”*⁹
- 4.3 In Australia, the Australian Bureau of Statistics 2016 Personal Safety Survey indicated that 17% of women and 6% of men had experienced violence by a partner since the age of 15 years.¹⁰
- 4.4 Based on the statistics above, it would be inaccurate to say that there is no prevalence of family violence in the family law system.

5. Information Sharing between the federal and state/territory jurisdictions

- 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

Information Sharing between jurisdictions

- 5.1 Firstly, Rape & Domestic Violence Services Australia strongly assert that there must be consideration by the Joint Select Committee that in circumstances of sexual, domestic and/or family violence, there is not always concurrent state/territory proceedings as to child protection concerns and/or sexual, domestic and/or family violence. However, this does not mean that these are not valid concerns in the context of family law proceedings.
- 5.2 As stated in the ALRC report, the focus should be *“on families, not the system.”*¹¹ We assert that it is fundamentally flawed to say that simply because there are no active proceedings before the relevant state/territory child protection Court or relevant Court as to sexual, domestic and/or family violence that these issues will not be relevant in Family Court proceedings. It is also well documented that

⁸ *Ibid*, 6.

⁹ World Health Organization, *Violence against Women: Key Facts*, (29 November 2017), <<https://www.who.int/news-room/fact-sheets/detail/violence-against-women>>

¹⁰ Australian Bureau of Statistics, *4906.0 – Personal Safety, Australia, 2016* (8 November 2017), <<https://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0>>

¹¹ Australian Law Reform Commission, *Family Law for the Future – An inquiry into the Family Law System*, ALRC Report 135 (March 2019), 33.

sexual, domestic and/or family violence is underreported to Police.¹² Family law proceedings if they proceed to a litigated final hearing must be considered on the evidence before the Court, and not solely on whether there has been an intervention, such as a domestic violence protection order.

- 5.3 Further, when parties have Court proceedings in various jurisdictions simultaneously, this can create unnecessary burdens and stressors for those agitating Family Court Orders for the safety of their children. This might occur where there are ongoing child protection proceedings and/or proceedings regarding sexual, domestic and/or family violence in state/territory Courts as well as concurrent family law proceedings. This can also place Magistrates and/or Judges in each of the jurisdictions in a hamstrung position where they are unable to make a necessary determination as they await other determinations in other jurisdictions to be made.
- 5.4 This barrier to effective service delivery in terms of a lack of collaboration is highlighted by Australia's National Research Organisation for Women's Safety ('ANROWS'). ANROWS states that *"in particular, the disconnection between the child protection and justice systems mean that many children continue to be vulnerable to abuse after their parents separate."*¹³
- 5.5 Kaspiew (2017) conducted a number of de-identified interviews with mothers going through the family law system. The below quote in particular highlights the difficulties where there is a disconnect between the systems:
- "And the last time we went to Family Court, on the very same day they had somebody from [child protection department] saying that if I hand over [child to ex-partner] when I think she's at risk, then she could be removed from me. And on the same day, the, um, the magistrate, it was a circuit court. And he said that if I withhold [child], then he could send me to jail. (Karla)."*¹⁴
- 5.6 Our organisation often have clients who are experiencing the above scenario where one jurisdiction, for example, the child protection system says that if a carer provides their children to their ex-partner then they are placing them at risk and could face the relevant child protection agency removing them from their care; however, another jurisdiction such as the Family Court have made orders where that carer must facilitate their children spending time with the other parent.
- 5.7 Unfortunately, in many family law proceedings where family violence is a live issue, legal professionals as well as judicial officers are quick to instead refer to the parties' relationship with each other as *"high conflict."* The use of this term is

¹² Dr Christine Coumarelos, 'Quantifying the legal and broader life impacts of domestic and family violence,' (2019) *Justice Issues, Law and Justice Foundation of New South Wales*, Paper 32, 5.

¹³ Australia's National Research Organisation for Women's Safety (ANROWS), *'The impacts of domestic and family violence on children - Research Summary,'* (2nd ed) (2018), 2.

¹⁴ Dr Rae Kaspiew et al. (2017) cited in Australia's National Research Organisation for Women's Safety (ANROWS), *'The impacts of domestic and family violence on children - Research Summary,'* (2nd ed) (2018), 2.

potentially dangerous when the causes of said conflict may in fact be sexual, domestic and/or family violence that compromises the safety of children as well as their carers.

- 5.8 Rape & Domestic Violence Services Australia support the implementation of a national information sharing framework as per Recommendation 2 of the ALRC report, particularly a framework with a *“focus on agency”*¹⁵ and the safety of those who have experienced sexual, domestic and/or family violence, including children. It would seem that this is a vital starting point in the sharing of information for the *“safety, welfare and wellbeing of families and children between the family law, family violence and child protection systems.”*¹⁶ Although, we caveat this by saying a framework should only be implemented where there is clarity as to the purpose of an information sharing framework and who is to be involved.¹⁷
- 5.9 Women’s Legal Service Australia (‘WLSA’) provided extensive commentary as to the potential advantages and risks regarding an information sharing framework in their submission to the ALRC review, and we endorse their submission on this issue.¹⁸ Our main concern regarding a national information sharing framework is the risk of the information being wrongly shared, particularly with a perpetrator. We would not want further harm, and in turn the creation of further barriers to those who have experienced sexual, domestic and/or family violence caused. Therefore, if a national information sharing framework is to be implemented, and it is our understanding that the Council of Attorney Generals - Family Violence Group¹⁹ may be developing this framework, then there must be consideration of any unintended consequences and processes put in place to mitigate these consequences. We would not want the safety of children and/or their carers further compromised.

Recommendation 1: That the Australian Government, in conjunction with each State/Territory Government develop and implement a national information sharing framework in line with Recommendation 2 of the ALRC report.

Information Sharing Framework as part of the National Domestic Violence Order Scheme

- 5.10 Rape & Domestic Violence Services Australia believe that consideration ought to be given to the expansion of the scope of the National Domestic Violence Order

¹⁵ Australian Law Reform Commission, *Family Law for the Future – An inquiry into the Family Law System*, ALRC Report 135 (March 2019), 146.

¹⁶ *Ibid*, 146.

¹⁷ Women’s Legal Service Australia, *Submission to the Australian Law Reform Commission’s Review of the Family Law System – Response to Discussion Paper*, (27 November 2018), No. 366. Accessed at: <https://www.alrc.gov.au/wp-content/uploads/2019/08/family-law-366-womens-legal-services-australia-0.pdf>, 88.

¹⁸ *Ibid*.

¹⁹ Australian Law Reform Commission, *Family Law for the Future – An inquiry into the Family Law System*, ALRC Report 135 (March 2019), 146.

Scheme. This Scheme was introduced in November 2017 to provide for all family violence orders to have automatic national recognition. This automatic recognition occurs for all family violence orders issued in Australian states and/or territories.

- 5.11 Monash Gender and Family Violence Prevention Centre (2018) indicated in their submission to the ALRC review that:

“Our research on family violence risk indicates that family court orders and/or proceedings are a family violence risk factor. The sharing of information about family court orders and/or proceedings will enhance risk assessment and risk management.”²⁰

- 5.12 The National Domestic Violence Order Scheme should be expanded to include Family Court Orders as well as Court Orders that are issued in relation to child protection. Many stakeholders supported this during the ALRC review, with the ALRC recommending this approach in their final report.²¹

Recommendation 2: That the Australian Government consider expanding the National Domestic Violence Order Scheme to include Family Court Orders as well as Court Orders that are issued in relation to child protection.

6. Proposed Merger and further reforms to the family law system

- 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 of the Family Court of Australia and the Federal Circuit Court of Australia – Loss of specialisation

- 6.1 Rape & Domestic Violence Services Australia state from the outset that we are not supportive of the proposed merger of the Family Court and the Federal Circuit Court of Australia. We confirm our organisation is a co-signatory to the Open Letter compiled by WLSA dated 11 November 2019 provided to the Attorney-General, the Honourable Christian Porter MP on this issue.²² We also intend to make a submission to the Commonwealth Senate Legal and Constitutional Affairs Committee’s review of the *Federal Circuit and Family Court of Australia Bill 2019 & Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019* in early 2020.

²⁰ Monash Gender and Family Violence Prevention Centre, *Submission to the Australian Law Reform Commission’s review of the family law system*, (13 November 2018), No. 411 cited in Australian Law Reform Commission, *Family Law for the Future – An inquiry into the Family Law System*, ALRC Report 135 (March 2019), 154.

²¹ Australian Law Reform Commission, *Family Law for the Future – An inquiry into the Family Law System*, ALRC Report 135 (March 2019), 152.

²² Women’s Legal Service Australia, *Open Letter – Concerns about proposed Family Court Merger*, <<http://www.wlsa.org.au/submissions/open-letter-concerns-about-proposed-family-court-merger>>

- 6.2 Our organisation reiterates the sentiments of this Open Letter that any reforms to the family law system, including to its current structure should be to strengthen the system in prioritising the safety of children and those who have experienced sexual, domestic and/or family violence.
- 6.3 Rape & Domestic Violence Services Australia, together with a number of other organisations has long advocated for the need for a specialist approach to matters involving sexual, domestic and/or family violence in the family law system.
- 6.4 Rape & Domestic Violence Services Australia endorse WLSA's five step plan, Safety First in family law. These steps include:
- 6.4.1 Step 1 – Strengthen family violence response in the family law system;
 - 6.4.2 Step 2 – Provide effective legal help for the most disadvantaged;
 - 6.4.3 Step 3 – Ensure family law professionals have real understanding of family violence;
 - 6.4.4 Step 4 – Increase access to safe dispute resolution models; and
 - 6.4.5 Step 5 – Overcome the gaps between the family law, family violence and child protection systems.²³
- 6.5 We state that this plan should be implemented, as these principles should guide the creation of a family law system that keeps women and children safe and supports them to recover both financially and emotionally from the trauma of family violence.

Triage and Risk Assessment

- 6.6 Rape & Domestic Violence Services Australia is also supportive of the implementation of effective case management practices, particularly in providing triage and risk assessment. It is our understanding that a number of stakeholders were supportive of the triage-related proposals put forward during the consultations that informed the final ALRC report.²⁴ Victoria Legal Aid highlighting that:

“current absence of a dedicated case management role within the court contributes to delays in proceedings, poor documentation, a lack of coordinated response for children and families, and other roles in the system

²³ Women's Legal Service Australia, *Safety First in Family Law*, (2019), <http://www.wlsa.org.au/campaigns/safety_first_in_family_law>

²⁴ Australian Law Reform Commission, *Family Law for the Future – An inquiry into the Family Law System*, ALRC Report 135 (March 2019), 322.

*taking on case management functions without the appropriate training or resources.*²⁵

- 6.7 Our organisation support WLSA's recommendations in their submission to the ALRC review that early risk assessment must be embedded into any triage process. We also further recommend that:
- 6.7.1 Staff conducting the triage process must receive comprehensive and ongoing training in relation to family violence, trauma-informed practice and cultural competency.
 - 6.7.2 Risk management must be a *"dynamic, active and collaborative process."* The ANROWS National Risk Assessment Principles for Domestic and Family Violence states, *"As risk can change quickly and unpredictably, it must be continuously assessed, monitored and reviewed. ... [R]isk assessment is conducted continuously so that risk management and safety strategies can be adjusted over time as necessary to respond to changing experiences and contexts of violence."*²⁶

A specialist family violence pathway

- 6.8 Within the implementation of WLSA's five step plan, the response to family violence in the family law system must be strengthened by creating a specialist family violence pathway and/or Specialist Family Violence Court.
- 6.9 Rape & Domestic Violence Services Australia believe it is critical that every matter involving allegations of family violence is afforded a specialist approach, which takes into account the particular circumstances of each case and acknowledges the dynamic character of risk.
- 6.10 However, our organisation caution that a specialist family violence pathway within the family law system must be more than the establishment of a specialist family violence list for identified high risk cases. We understand that this was a proposal during consultations prior to the final ALRC report being released in March 2019. While, the implementation of effective case management for family law matters where family violence is a live issue is promising, we reiterate our concerns as to the establishment of a specialist family violence list for 'high risk' cases here:
- 6.10.1 As noted above, risk in relation to family violence is dynamic and can change *"quickly and unpredictably."*²⁷ As such, it may not be possible to accurately identify high-risk cases during the initial triage process.

²⁵ Victoria Legal Aid, *Submission to the Australian Law Reform Commission's review of the family law system*, (November 2018), No. 375 cited in Australian Law Reform Commission, *Family Law for the Future – An inquiry into the Family Law System*, ALRC Report 135 (March 2019), 322.

²⁶ Corina Backhouse and Cherie Toivonen, (2018). *National Risk Assessment Principles for Domestic and Family Violence: Companion Resource* (ANROWS Insights 07/2018), 24.

²⁷ *Ibid.*

Moreover, it is unclear whether cases could be moved in or out of the specialist list at a later date, in response to changing risk levels. There is a significant risk that cases which were initially triaged as low risk and hence excluded from the specialist list, may subsequently escalate in risk but be denied those additional protections afforded to cases in the specialist list.

- 6.10.2 Matters that are identified as lower risk may still demand high-level specialist knowledge. For example, non-physical forms of abuse such as emotional, psychological and financial abuse may be assessed as having a lower level of urgency and risk. However, responding appropriately to these types of more subtle or insidious forms of abuse may in fact demand a more sophisticated understanding of family violence than physical violence. Separating high risk cases into a specialist list may have the unintended effect of created a hierarchy between physical and non-physical forms of family violence.
- 6.10.3 It is unclear how a triage system would operate in relation to matters which are eligible for multiple specialist lists, for example matters involving parties who are Aboriginal or Torres Strait Islander and involve allegations of high risk family violence. Where the appropriate tools for responding to each type of case are segregated into specialist lists, there is a risk that matters involving intersectional issues will not be handled appropriately.
- 6.10.4 There is a risk that parties may be discouraged from disclosing the full extent of their experience of family violence in order to avoid being placed into a specialist list.
- 6.10.5 Given the overwhelming prevalence of family violence matters, it may be necessary to draw an arbitrary line between high and low risk cases in order to limit the number of cases entering the specialist list. This may create access to justice issues, where eligibility for a specialist approach is determined by resource limitations rather than evidence-based risk assessment principles.

Recommendation 3: That Women’s Legal Service Australia’s five step plan, Safety First in family law be implemented to strengthen the family law system’s response to family violence through a specialist family violence pathway and/or Specialist Family Violence Court.

Post-order support for families

- 6.11 Our organisation acknowledges that Recommendation 39 in the ALRC report provides that the *Family Law Act 1975* (Cth) be amended to include that where final orders are made in parenting proceedings, the Court should consider making an order that the parties see a Family Consultant to receive post-order

case management.²⁸ Even the former Chief Justice of the Family Court of Australia, The Honourable Diana Bryant AO QC noted *“that the provision of post-order support services, particularly in cases where the proceedings have been acrimonious, is lacking and has been for many years.”*²⁹

- 6.12 Rape & Domestic Violence Services Australia are supportive of this approach and believe there is a strong need for the development of a post-order parenting support case management service.
- 6.13 We state that a post-order support/case management service should be implemented, and this reform could occur immediately within the family law system, with additional funding and resources provided to Family Consultants if they are to undertake this work.
- 6.14 However, it is essential that all parts of this service are designed in collaboration with specialist family violence services, with all staff working within the service having comprehensive and ongoing specialist training in relation to family violence.

Recommendation 4: That there is consideration given to the implementation of a post-order case management support service for families. The design of this service should occur in consultation with specialist family violence services, with all staff working within the service to have specialist domestic and/or family violence training.

The Court Environment must be safe and accessible for those using the family law system

- 6.15 Rape & Domestic Violence Services Australia note that there were proposals during consultations of the ALRC review that the Government ensure all premises used for family law proceedings are safe for attendees. However, we note that there were no recommendations specifically on this issue in the final ALRC report.
- 6.16 Our organisation states that it should go without saying that the Australian Government should ensure all premises and/or facilities used for family law proceedings are safe and accessible for those using the family law system.
- 6.17 We support the recommendations as to facilities made by WLSA in their submission to the ALRC review, which include:
- 6.17.1 Providing safe rooms and meeting rooms in all Family Court premises, and in some Family Court premises an increase of these types of facilities;
 - 6.17.2 Safety planning in terms of entering and leaving buildings;

²⁸ Australian Law Reform Commission, *Family Law for the Future – An inquiry into the Family Law System*, ALRC Report 135 (March 2019), 343.

²⁹ *Ibid*, 345.

6.17.3 Ensuring cultural safety in consultation with Aboriginal and Torres Strait Islander communities; and

6.17.4 Ensuring accessibility for people with disability in consultation with court users with disabilities and their advocates.³⁰

Recommendation 5: That the Australian Government ensure all premises and/or facilities are safe and accessible for those using the family law system.

Family Law legislation and forms should be simplified

6.18 Rape & Domestic Violence Services Australia welcome the recommendations in the ALRC report on simplifying family law legislation. We agree that the legislation must be comprehensively redrafted.³¹ The *Family Law Act 1975* (Cth) has been the subject of so many amendments over time that it is now an extremely complex body of laws that can be difficult to navigate by those practising in the family law system, and especially for self-represented parties.

6.19 Our organisation recommends in the first instance that any family law forms must be accessible, safe and appropriate for those using the family law system, but especially for those who have experienced family violence. Some examples of how this should be achieved include:

6.19.1 Forms should allow users to make freeform comments, to encourage the proper and safe disclosure of family violence.

6.19.2 Collaborative form functions should be used with caution in matters involving allegations of family violence. In these circumstances, there is a risk that perpetrators may exploit collaborative functions as a tool of power and control. In addition, there is a risk that collaborative functions may inappropriately expose sensitive information to the perpetrator.

6.19.3 Paper forms should be made accessible to parties experiencing family violence. Evidence shows that perpetrators of family violence regularly use technology to control, intimidate, stalk and harass victims. This form of family violence commonly extends to “preventing, restricting or monitoring victims’ use of technology.”³² As such, people experiencing family violence may face particular difficulties accessing online court forms.

³⁰ Women’s Legal Service Australia, *Submission to the Australian Law Reform Commission’s Review of the Family Law System – Response to Discussion Paper*, (27 November 2018), No. 366. Accessed at: https://www.alrc.gov.au/wp-content/uploads/2019/08/family-law_366_womens_legal_services_australia_0.pdf, 62.

³¹ Australian Law Reform Commission, *Family Law for the Future – An inquiry into the Family Law System*, ALRC Report 135 (March 2019), Recommendation 55.

³² State of Victoria. (2014-16) *Royal Commission into Family Violence: Report and recommendations*, Summary and Recommendations, 29.

6.20 We state that it is incumbent on the Joint Select Committee to consider amendments/changes to the legislation carefully in an effort to reform the entire family law system and should look to the ALRC report as a starting point on the consideration of these reforms. However, the Joint Select Committee must accept that changes have to be made to the currently complex and convoluted legislation that governs the family law system. Although, recognition has to be had that simplifying this legislation is only one piece of the puzzle in reforming the family law system.

Recommendation 6: That the Australian Government undertake a comprehensive review of family law legislation and the current forms used in the system, with a view to simplifying the legislation and making forms more user-friendly and accessible.

Removal of the presumption of the equal shared parental responsibility ('ESPR')

6.21 Rape & Domestic Violence Services Australia supported a number of key stakeholders including WLSA in their submissions to the ALRC review, that the most important legislative change in the *Family Law Act 1975* (Cth) is the removal of the presumption of equal shared parental responsibility ('ESPR').

6.22 The presumption as it currently operates creates many misunderstandings, including that parents are entitled to equal time in parenting arrangements if they have ESPR. This perception can have dangerous implications for matters involving family violence, serving as a tool for abusive parents to negotiate contact with their children in unsafe circumstances.

6.23 We note that the presumption is not intended to apply in circumstances of family violence. However, despite the legislative exclusion, the presumption may still impact matters involving family violence where they are negotiated outside of Court "in the shadow of the law," or more accurately, in the shadow of the misunderstanding of the law.³³

6.24 Within the context of legislative simplification and clarity, Rape & Domestic Violence Services Australia support at the very least the replacement of the term 'parental responsibility' with 'decision-making responsibility'.

6.25 Further, our organisation is supportive of the proposals that were made by the ALRC during consultations recommending "*making it clear that in determining what arrangements best promote the child's safety and best interests, decision makers must consider what arrangements would be best for each child in their particular circumstances.*"³⁴ In adopting this approach, it would be "*less complex*

³³ Crowe, J., Field, R., Toohey, L. et al, 'Bargaining in the Shadow of the Folk Law: Expanding the Concept of the Shadow of the Law in Family Dispute Resolution', 40(3) *The Sydney Law Review*, 319.

³⁴ Australian Law Reform Commission, 'Review of family law system,' (Discussion Paper 86 DP86), October 2018), Proposal 3.7.

*and prescriptive about the steps to be taken in determining what is most likely to be consistent with the safety and best interests of the child.*³⁵

- 6.26 Given the above, Rape & Domestic Violence Services Australia recommend that the Joint Select Committee consider the need to remove any presumption on the decision-making responsibility of parents.

Recommendation 7: That the presumption of 'equal shared parental responsibility' be removed from the *Family Law Act 1975* (Cth).

Enshrining the common law principles of *Rice v Asplund* in family law legislation

- 6.27 Rape & Domestic Violence Services Australia acknowledge that the common law principles set out in the case of *Rice v Asplund*³⁶ are used where there is a proposal to change existing parenting orders. Parents seeking to change final orders are required to demonstrate a significant change in circumstances that would warrant a change being necessary to the existing orders.

- 6.28 We again reiterate as stated in our submission to the ALRC report,³⁷ that it is appropriate to limit the circumstances in which parties may apply for new orders in order to prevent perpetrators of family violence from misusing this legal process as a form of abuse. However, on the other hand, it is important that people experiencing family violence are able to seek revised orders where the risk of further violence has escalated or changed in nature, or where the full extent of the family violence was not taken into account when the previous orders were made. Therefore, we assert that given the use and application of *Rice v Asplund* has been used over many years that the common law principles should be enshrined in family law legislation.

Recommendation 8: That the common law principles set out in *Rice v Asplund* be enshrined in family law legislation.

Improved resources available to separating parents

- 6.29 Rape & Domestic Violence Service Australia were also supportive of the proposals put forward by the ALRC during consultations³⁸ that the Attorney-General's Department commission a multi-disciplinary body to produce improved guidance material for families formulating care arrangements without professional help. This material should be developed in consultation with family violence professionals, and include information about risk factors, the impact of family violence on children and adults, and safety planning.

³⁵ *Ibid*, 48.

³⁶ (1979) FLC 90-725.

³⁷ Rape & Domestic Violence Services Australia, *Submission to the Australian Law Reform Commission's Review of the Family Law System – Response to Discussion Paper*, (29 November 2018), No. 287, Accessed at: <https://www.alrc.gov.au/wp-content/uploads/2019/08/family-law-287-rape-domestic-violence-services-australia.pdf>.

³⁸ *Ibid*.

6.30 Although, within the formulation of this material, the information must ultimately emphasise the need for people experiencing family violence to seek professional support. It should be highlighted that without the support of family violence professionals, there is a risk that power imbalances may be perpetuated during negotiations and any resulting parenting arrangements will be unsafe.

Recommendation 9: That any improved resources available to separating parents be formulated in consultation with specialist family violence services.

Prioritising the safety of carers

6.31 Rape & Domestic Violence Services Australia state that there must be enhanced focus on safety within decision making about parenting arrangements, not only for children but also for their carers.

6.32 It is imperative that safety is interpreted broadly to include emotional, psychological and cultural safety, alongside protection from physical harm. A parenting arrangement is not safe unless both the child and their carers are protected from exposure to physical and non-physical forms of abuse, neglect or family violence. We recommend that this interpretation be set out in legislation.

6.33 We urge the Joint Select Committee to keep in mind when making any recommendations from this inquiry that there must be an understanding that the safety and wellbeing of carers is inextricably intertwined with the safety and wellbeing of their children.

Recommendation 10: That any reforms to family law legislation should include that when determining parenting arrangements, there must be enhanced focus on the safety of carers, particularly in the context of family violence.

6.34 Rape & Domestic Violence Services Australia is supportive of Recommendation 5 in the ALRC report³⁹ in the consideration of amending Section 60CC of the *Family Law Act 1975* (Cth). Recommendation 5 reflects when determining parenting arrangements that promote a child's best interests, there is inclusion of a simplified list of factors, which includes '*what arrangements best promote the safety of the child and the child's carers, including safety from family violence, abuse, or other harm.*'⁴⁰

6.35 Although, we reiterate concerns from our submission to the ALRC review on this issue below that:

6.35.1 Failure to specify that *any exposure* of children or their carers to family violence should be considered unsafe and therefore unacceptable. Instead, it leaves discretion to the decision-maker to determine what

³⁹ Australian Law Reform Commission, *Family Law for the Future – An inquiry into the Family Law System*, ALRC Report 135 (March 2019), Recommendation 5.

⁴⁰ *Ibid.*

level of exposure to family violence they consider unsafe. For example, without clarification, a decision-maker may determine that a particular arrangement is safe despite the fact that it exposes a carer to non-physical forms of abuse.

6.35.2 Secondly, it does not provide any definitive guidance to decision-makers on the need to prioritise safety over any other consideration. Instead, the decision-maker is afforded discretion to weigh this factor against other considerations. We note that the child's safety is prioritised in the paramountcy principle. However, there is a risk the carer's safety may be subsumed by other considerations.

Prioritising safety over maintaining relationships

6.36 Evidence shows that maintaining a relationship with an abusive parent is likely to be harmful for the child, exposure to family violence is a key predictor of poor outcomes for children.⁴¹ Moreover, research demonstrates that fathers who perpetrate parental violence commonly exhibit poor parental characteristics, for example behaving in authoritarian, neglectful or manipulative ways towards their children.⁴²

6.37 The current position under Section 60CC of the *Family Law Act 1975* (Cth) in terms of maintaining relationships is the consideration of the "primary considerations" being:

*"the benefit to the child of having a meaningful relationship with both of the child's parents," and "the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence."*⁴³

6.38 The recommendation from the ALRC report was to incorporate within a simplified list of factors, the consideration of *"the benefit to the child of being able to maintain relationships with each parent and other people who are significant to the child, where it is safe to do so."*⁴⁴

6.39 Rape & Domestic Violence Services Australia are concerned about the recommendation from the ALRC report as:

6.39.1 Decision-makers may interpret safety narrowly as meaning protection from physical violence. This is concerning given that maintaining a

⁴¹ EM Cummings and PT Davies, *The Guilford Series on Social and Emotional Development. Marital Conflict and Children: An Emotional Security Perspective* (Guilford Press, 2010).

⁴² Dr Rae Kaspiew et al. (January 2016). *Domestic and family violence and parenting: Mixed methods insights into impact and support needs: State of Knowledge Paper* (ANROWS, Issue 01), 20-22.

⁴³ *Family Law Act 1975* (Cth), s 60CC(2).

⁴⁴ Australian Law Reform Commission, *Family Law for the Future – An inquiry into the Family Law System*, ALRC Report 135 (March 2019), Recommendation 5.

relationship which exposes a child to non-physical forms of violence may be equally harmful to the child.

6.39.2 Decision-makers may prioritise the child maintaining a relationship, even where this will expose their carer to family violence. Rape & Domestic Violence Services Australia believe that, for example, parenting plans must be safe for both children and any carers as a baseline requirement.

7. Delivery of family law support services and family dispute resolution processes

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

Increased funding for family law services

7.1 The limited availability of legal advice and representation are perennial concerns⁴⁵ for the family law system and affect the full spectrum of family law participants. Those who have experienced family violence often face financial barriers to accessing legal support as a result of perpetrators' tactics of financial abuse and/or impacts of trauma that may reduce their earning capacity. As a result, those who have been impacted by family violence often find themselves in the "missing middle" between those who are eligible for Legal Aid and those who can afford to pay a private lawyer.⁴⁶ As the Victorian Royal Commission into Family Violence stated in their final report:

Limited [legal] services are particularly concerning in the context of family violence, when the parties may have unequal access to resources and legal processes can be used by the perpetrator to continue dominating the victim. Victims may also endure significant financial hardship to engage legal representation, including depleting their savings, incurring debt and selling or mortgaging property and assets. Yet these assets and resources may be a protective factor, and their depletion may inhibit a victim's autonomy and increase their vulnerability to further violence.⁴⁷

7.2 Further, those who access the family law system without legal representation, are likely to be disadvantaged as a result. We acknowledge that self-representation has the potential to disadvantage any litigant. A 2003 Family Court report on self-represented litigants stated that Judges and Registrars reported that lack of

⁴⁵ State of Victoria. (2014-16) *Royal Commission into Family Violence: Report and recommendations*. Vol III, Parl Paper No 132, Ch 16, 169.

⁴⁶ Women's Legal Services Australia cited in House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry of a better family law system to support and protect those affected by family violence final report*, December 2017, paragraph 4.160.

⁴⁷ State of Victoria. (2014-16). *Royal Commission into Family Violence: Report and recommendations*, Vol III, Parl Paper No 132, Ch 16, 169.

representation disadvantaged self-represented litigants in 59% of cases.⁴⁸ However, this risk is amplified for those who have experienced violence because:

- 7.2.1 The impacts of trauma may inhibit their ability to advocate effectively for themselves and their children. The specific impacts of complex trauma are explored in further detail below.
 - 7.2.2 Matters involving family violence are often highly complex and require self-represented litigants to compile extensive documentary evidence. In a 2016 report, the Family Law Council found that cases involving unrepresented litigants were *“significantly less likely to contain the kind of evidence needed to determine matters involving child safety concerns – such as evidence of child protection notifications and family violence protection orders – than cases where the parties are represented or partially-unrepresented.”*⁴⁹
 - 7.2.3 Perpetrators may continue to perpetrate violence throughout family law proceedings, often misusing legal processes in order to exert ongoing power and control.
 - 7.2.4 Those who have experienced sexual, domestic and/or family violence may feel unable to directly cross-examine their alleged perpetrator, meaning that the perpetrator’s evidence goes untested.
- 7.3 In each of our submissions to the ALRC review, Rape & Domestic Violence Services Australia has outlined the critical importance of access to legal support and representation for people experiencing family violence. In essence, where a person can access the family law system without legal representation there is a significant risk that power imbalances will be perpetuated, and that any resulting parenting arrangements may not adequately take into account safety concerns.
 - 7.4 However, ultimately, those who have experienced violence will be disadvantaged unless they have access to specialised, free and timely legal support and representation.
 - 7.5 Rape & Domestic Violence Services Australia recommend that any education campaign and information package must be accompanied by increased funding for legal assistance for people who have been impacted by family violence.
 - 7.6 However, we state that education and resources must not be considered a substitute for specialised legal support for people who have been impacted by

⁴⁸ Family Court of Australia 2003, *Self-represented litigants – a challenge: Project report December 2000-December 2002*, Family Court of Australia. The report drew on a questionnaire of judges and registrars.

⁴⁹ Family Law Council Final Report 2016, p. 22, referring to R Hunter, A Genovese, A Chranowski & C Morris, *The changing face of litigation: Unrepresented Litigants in the Family Court of Australia*, Law and Justice Foundation of NSW, August 2002, and Family Law Council, *Litigants in Person: A Report to the Attorney-General*, 2000, which noted this issue.

family violence. This is discussed further under *'Education regarding family violence as it relates to family law'* below.

- 7.7 In this respect, we support the recommendation made by AWAVA to the ALRC review for a separate and additional specialised family violence pathway for legal aid grants, particularly for family law and care and protection matters.⁵⁰
- 7.8 We also support the recommendation made by the Law Council of Australia that the Australian government must invest *"at a minimum, \$390 million per annum"* in Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services, and Family Violence Prevention Legal Services in order to address critical civil and criminal legal assistance service gaps. As the Law Council of Australia notes, *"Legal assistance services are critically underfunded"* and *"this funding gap is often felt acutely by women without financial means, who often need assistance with family law, family violence and related civil law matters."*⁵¹
- 7.9 We confirm that the above recommendations were also recommendations made in the final ALRC report at Recommendations 57 and 58.⁵²

Recommendation 11: That the Australian Government allocate additional funding for a specialised family violence pathway for legal aid grants, particularly for family law and care and protection matters.

Families Hubs concept proposed during the ALRC's family law review

- 7.10 Rape & Domestic Violence Services Australia are supportive of the objectives in the establishment of Families Hubs as proposed by the ALRC.⁵³ However, our organisation queried whether this proposal represented a cost-effective response to the issues experienced by people accessing the family law system. This query was supported by the ALRC in their report as they did not make any specific proposal and/or recommendation as to the establishment of Families Hubs.⁵⁴
- 7.11 Rape & Domestic Violence Services Australia submit that an equivalent investment into existing family law services, with an increased focus on case management, is likely to result in better outcomes for people accessing the family law system. This is because the expenditures involved in establishing an entirely new system of Families Hubs will involve significant duplication with existing service expenditure. We note that the Victorian Labor Government recently allocated \$448.1 million over four years to establish and operate its Orange Door

⁵⁰ Australian Women Against Violence Alliance (AWAVA), *Submission to the Australian Law Reform Commission's Review of the Family Law System – Response to Discussion Paper*, (16 November 2018), No. 379, Accessed at: <https://www.alrc.gov.au/wp-content/uploads/2019/08/family-law-379-australian-women-against-violence-alliance-awava.pdf>.

⁵¹ Law Council of Australia (2018) *The Justice Project Final Report. Recommendations and Group Priorities*, p. 4, rec. 2.1.

⁵² Australian Law Reform Commission, *Family Law for the Future – An inquiry into the Family Law System*, ALRC Report 135 (March 2019), Recommendations 57 and 58.

⁵³ *Ibid*, Proposal 4.1.

⁵⁴ *Ibid*, 63.

Support and Safety Hubs.⁵⁵ The cost of establishing Families Hubs is likely to involve a similarly large expenditure, magnified across every Australian state and territory. A significant proportion of these funds will be allocated to establishment costs, associated with building new physical facilities, administrative processes, and building community recognition and trust. In contrast, if funding were invested into existing services, it could be injected directly into service provision that better responds to client needs.

7.12 Our organisation submits that with greater investment, existing family law services would be capable of providing enhanced case management that would fulfil the same objectives set out for the Families Hubs, namely to:

7.12.1 Identify the person's safety, support and advice needs and those of their children;

7.12.2 Assist clients to develop plans to address their safety, support and advice needs and those of their children;

7.12.3 Connect clients with relevant services; and

7.12.4 Coordinate the client's engagement with multiple services.

7.13 Rape & Domestic Violence Services Australia urge that increased funding be allocated to existing family law services, including legal assistance, trauma counselling, and case management services. This must include specialist women's services and specialist Aboriginal and Torres Strait Islander community controlled organisations.

Recommendation 12: That the Australian Government allocate additional funding to existing family law services, including legal assistance, trauma counselling and case management services.

8. The impacts of family law proceedings on those involved

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

Family Law outcomes must be in line with United Nations Conventions

8.1 The *United Nations Convention on the Rights of the Child* sets out in Article 19 that:

⁵⁵ Victorian Government, *The Orange Door Support and Safety Hubs: Frequently Asked Questions* (2018), https://www.vic.gov.au/system/user_files/Documents/fv/The%20Orange%20Door%20FAQs.pdf.

“Governments should ensure that children are properly cared for and protect them from violence, abuse and neglect by their parents, or anyone else who looks after them.”⁵⁶

- 8.2 Rape & Domestic Violence Services Australia assert that any decision made within the family law system must be in keeping with United Nations Conventions. This is particularly the case when making parenting arrangements within the context of family violence, as any decisions made about children should support their human rights.

Recommendation 13: That family law outcomes must be made in line with United Nations Conventions, and this is particularly important when determining parenting arrangements within the context of family violence.

Complex Trauma in the Courtroom

- 8.3 In order to understand how those who have experienced family violence may be disadvantaged when accessing the family law system without legal support, it is necessary to consider how the impacts of trauma and complex trauma may play out within the Courtroom.

- 8.4 Trauma may result from experiencing sexual, domestic and/or family violence as an adult, and complex trauma is often the result of a lifetime of experiencing violence often beginning with sexual abuse in childhood. The impacts of trauma and complex trauma can be categorised into four clusters of symptoms: re-experiencing or intrusions, avoidance, arousal and cognitive changes. Each cluster of symptoms presents specific barriers for those who are forced to self-represent:

8.4.1 **Re-experiencing symptoms or intrusions** include flashbacks, intrusive thoughts and recurrent nightmares. These symptoms may cause individuals to experience re-traumatisation or high levels of distress when forced to recount their experiences of violence to the Court or to confront their abuser through cross-examination.

8.4.2 **Avoidance symptoms** include the avoidance of people, places, activities, thoughts or feelings associated with the experience of traumatisation. These symptoms may influence individuals to withhold details about their experiences of violence or to consent to unsafe parenting arrangements in order to avoid further confrontation with their perpetrator. As a result, court outcomes may not adequately take into account safety concerns.

8.4.3 **Arousal symptoms** include difficulties sleeping, symptoms of heightened anxiety and/or anger, difficulties concentrating, hypervigilance and exaggerated sympathetic nervous system responses.

⁵⁶ *United Nations on the Convention on the Rights of the Child*, Adopted by the General Assembly Resolution 44/25 on 20 November 1989, Article 19.

These symptoms may impact an individual's capacity to present their account to the Judge in a coherent, persuasive format.

8.4.4 **Cognitive alterations** include negative beliefs about the self and distorted cognitions about the causes or consequences of the traumatic events. These symptoms may cause individuals to feel insecure about their own parenting capacity, to doubt their own recall of events, or to inappropriately justify or excuse the perpetrator's abusive behaviours. Where a person expresses these distorted cognitions to the Judge, this may lead to unsafe and/or unjust arrangements.

8.5 It is critical that Judges receive extensive and ongoing training in relation to complex trauma so they may recognise and respond appropriately when these presentations arise.

8.6 However, the most critical factor to ensure that those who have experienced family violence have access to safe and just family law outcomes is access to specialised, free and timely legal advice and representation.

Recommendation 14: That those who have experienced domestic and/or family violence have access to specialised, free and timely legal advice and representation to ensure safe and just family law outcomes.

Education regarding family violence as it relates to family law

8.7 Community education as to family violence as it relates to family law proceedings may improve the safety and wellbeing of people impacted by violence, both within and outside of the family law system.

8.8 Rape & Domestic Violence Services Australia recommend that an education campaign and information package should each include information about:

8.8.1 The meaning of family violence, including the definition within the *Family Law Act 1975* (Cth) and illustrative examples of physical and non-physical forms of violence;

8.8.2 Risk factors, including the escalated risks during the period of separation;

8.8.3 The impact of family violence on children and adults;

8.8.4 Support services available to people impacted by family violence, including legal and non-legal services;

8.8.5 The relevance of family violence to decision-making in relation to both parenting arrangements and property division; and

8.8.6 Protections available for people impacted by family violence when accessing the family law system.

8.9 Education on these topics may support people experiencing family violence to:

- 8.9.1 **Seek information, advice and support when contemplating or experiencing separation.** It is important that parties are equipped to identify their safety, support and advice needs and those of their children.
- 8.9.2 **Disclose family violence when accessing the family law system.** A 2015 Australian Institute of Family Studies ('AIFS') report found that many people experiencing family violence did not disclose this information during family law proceedings.⁵⁷ One common reason for non-disclosure is a lack of trust in the capacity of the legal system to respond appropriately.⁵⁸ For example, research by AIFS found that less than one third (32 per cent) of separated parents perceived the family law system as addressing family violence issues.⁵⁹ As such, education may support people to disclose family violence by increasing their confidence that disclosure will lead to enhanced protections and safer outcomes.
- 8.9.3 **Access protections within the family law system.** Evidence shows that existing protections for people experiencing family violence are under-used. For example, a 2018 AIFS report found that despite safeguards being available in matters involving family violence and direct cross-examination, these safeguards were not put in place in the majority of cases. It is important that parties are aware of any protections available to them, such that they are able to advocate effectively for their safety and wellbeing throughout the family law process. This is especially relevant where parties are self-represented.
- 8.9.4 **Negotiate safe post-separation arrangements outside of Court.** As proposed by Mnookin and Kornhauser, out of Court negotiations in separation matters occur in "the shadow of the law," with legal entitlements often functioning as bargaining chips for each party.⁶⁰ Thus, it is imperative that people experiencing family violence understand their legal entitlements, including their right to have family violence taken into account in both parenting and property matters. Where parties understand their rights in relation to family violence, they will be less likely to consent to unsafe and/or unjust outcomes.

Recommendation 15: That the Australian Government commit to funding a community legal education campaign, resources and materials regarding family violence in the

⁵⁷ Of parents who had experienced family violence and resolved their matter through family dispute resolution, only one third disclosed the violence to a professional during negotiations. Of parents who proceeded through court, around two thirds disclosed family violence. See Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 94-95.

⁵⁸ Women's Legal Service Australia, 'Response to Family Law Amendment (Family violence and Cross-Examination of Parties) Bill 2018,' Submission 22, 6.

⁵⁹ Dr Rae Kaspiew et al, *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)* (Australian Institute of Family Studies, 2015) 117.

⁶⁰ Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) *Yale Law Journal* 950.

context of family law proceedings. This education should be framed to support people experiencing family violence.

Recognising diverse experiences of family violence

- 8.10 Rape & Domestic Violence Services Australia strongly support Recommendations 49 – 54 made in the ALRC report⁶¹ in terms of building accountability and transparency within the family law system. This is especially important within the context of recognising the diverse experiences of those experiencing family violence.
- 8.11 Our organisation believes that further research must be commissioned to examine the strengths and limitations of the definition of family violence in relation to the experiences of diverse groups.
- 8.12 Rape & Domestic Violence Services Australia specifically recommend, as we recommended in our submission to the ALRC review that:
- 8.12.1 Conduct extensive consultation with Aboriginal and Torres Strait Islander peoples in considering the removal of coercion, control and/or fear as limiting elements in the definition of family violence;
 - 8.12.2 Commission research in relation to the experiences of people with disability; and
 - 8.12.3 Commission research in relation to the experiences of older people.
- 8.13 Rape & Domestic Violence Services Australia submit that it is imperative this research prioritises the voices of those who may be even further disadvantaged within the family law system; and that this research especially prioritises the voices of Aboriginal and Torres Strait Islander peoples, in order to capture their unique experiences of family violence which sit *“at the cross-roads of gendered and racialised oppression.”*⁶²

Recommendation 16: That the Joint Select Committee recommend that further research to examine the strengths and limitations of the definition of family violence in relation to experiences of diverse groups be commissioned.

The need for ongoing Family Violence Awareness Training for those working in the family law system

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

⁶¹ Australian Law Reform Commission, *Family Law for the Future – An inquiry into the Family Law System*, ALRC Report 135 (March 2019), Recommendations 49-54.

⁶² Heather Nancarrow, *Legal Responses to Intimate Partner Violence: Gendered Aspirations and Racialised Realities* (Griffith University, 2016), 46.

- 8.14 The attitude, knowledge and skills of family law professionals, judicial officers and those working in the family law system are vital to ensuring the safety and protection of women and children accessing this system. In their Final Report, the Victorian Royal Commission stated that judicial officers' skills and approach in matters involving family violence are "critical" to "the outcome of a hearing, the victim's safety, and a perpetrator's level of accountability."⁶³
- 8.15 The importance of education about family violence for family law professionals and judicial officers has been a consistent theme emerging from recent inquiries including:
- 8.15.1 The 2019 Australian Law Reform Commission's Family Law for the Future – An inquiry into the family law system.⁶⁴
 - 8.15.2 The 2017 Commonwealth House of Representatives' inquiry into a better family law system to support and protect those affected by family violence⁶⁵ – Recommendation 27 and 28.
 - 8.15.3 The 2016 Victorian Royal Commission into Family Violence Report⁶⁶ – Recommendations 215 and 216.
 - 8.15.4 The 2016 Family Law Council Final Report on Families with Complex Needs and the Intersection of Family Law and Child Protection⁶⁷ – Recommendations 11 and 12.
 - 8.15.5 The 2015 Federal Senate Finance and Public Administration References Committee inquiry report titled Domestic violence in Australia⁶⁸ – Recommendations 9.71 and 9.72.

⁶³ State of Victoria. (2014-16). *Royal Commission into Family Violence: Report and recommendations*. Vol III, Parl Paper No 132, Ch 40, 210.

⁶⁴ Australian Law Reform Commission. *Family Law for the Future – An Inquiry into the family law system*, (March 2019). Accessed at: https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf

⁶⁵ Commonwealth, House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into a better family law system to support and protect those affected by family violence*, (December 2017). Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Report

⁶⁶ State of Victoria. (2014-16). *Royal Commission into Family Violence: Report and recommendations*. Accessed at: <http://www.rcfv.com.au/Report-Recommendations>

⁶⁷ Family Law Council, Commonwealth Attorney-General's Department, *Reports on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, (June 2016). Accessed at: <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF>

⁶⁸ Senate Finance and Public Administration References Committee, Parliament of Australia, *Domestic Violence in Australia*, (August 2015). Accessed at: https://www.aph.gov.au/parliamentary_business/committees/senate/finance_and_public_administration/domestic_violence/report

- 8.15.6 The 2009 report of Professor Richard Chisholm titled *Family Courts Violence Review* report⁶⁹ – Recommendations 4.3, 4.4 and 4.6.
- 8.16 Rape & Domestic Violence Services Australia, together with WLSA endorsed the 2017 Commonwealth House of Representatives Committee’s recommendations in the ALRC review and again endorse that:
- 8.16.1 The Australian Government develops a national and comprehensive professional development program for judicial officers from the family courts and from states and territory courts that preside over matters involving family violence (Recommendation 27); and
- 8.16.2 The Australian Government develops a national, ongoing, comprehensive, and mandatory family violence training program for family law professionals, including court staff, family consultants, Independent Children’s Lawyers, and family dispute resolution practitioners (Recommendation 28).⁷⁰
- 8.17 Rape & Domestic Violence Services Australia submit that any training package for family law professionals, judicial officers and those working in the family law system should include components on:
- 8.17.1 The dynamics, complexities and impacts of sexual, domestic and/or family violence;
- 8.17.2 Identifying family violence risk factors and responding appropriately;
- 8.17.3 The intersection of family law and child protection;
- 8.17.4 Trauma informed practice;
- 8.17.5 Cultural competency in relation to working with Aboriginal and Torres Strait Islander people;
- 8.17.6 Cultural competency in relation to working with people from a culturally and linguistically diverse (CALD) background;
- 8.17.7 Working with lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) families;
- 8.17.8 Working with older people;

⁶⁹ Professor Richard Chisholm, *Family Courts Violence Review*, (27 November 2009). Accessed at: <https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Documents/Family%20Courts%20Violence%20Review.pdf>

⁷⁰ Commonwealth, House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into a better family law system to support and protect those affected by family violence*, (December 2017). Accessed at: https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Report

- 8.17.9 Working with people with a disability; and
 - 8.17.10 Working with other people made vulnerable by their circumstances.
- 8.18 In line with WLSA's submission to the ALRC review, we submit that in order to have any real impact, training must be:
- 8.18.1 Adequately funded;
 - 8.18.2 Comprehensive and ongoing;
 - 8.18.3 Accredited and overseen by an independent body;
 - 8.18.4 Delivered by specialist training providers; and
 - 8.18.5 Developed in consultation with relevant community groups and service providers, including Aboriginal and Torres Strait Islander communities, those from culturally and linguistically diverse communities and those with disability.
- 8.19 We urge the Joint Select Committee to recognise that family law professionals, judicial officers and those working in the family law system are at risk of vicarious trauma ('VT'). It is critical that strategies are put in place to manage VT effectively, not only to ensure the wellbeing of professionals but also to ensure the family law system functions effectively for clients.
- 8.20 Rape & Domestic Violence Services Australia has significant experience and expertise in responding to and developing strategies to manage VT. Through the NSW Rape Crisis counselling service, we regularly provide VT support to professionals assisting someone who has experienced sexual, domestic and/or family violence.
- 8.21 Further, on the basis of extensive research and clinical expertise, Rape & Domestic Violence Services Australia has developed a best practice Vicarious Trauma Management Program. This program includes a comprehensive suite of strategies aimed at both an individual and organisational level. The Rape & Domestic Violence Services Australia VT Management Program has been implemented internally for over ten years. It has also been implemented externally through training and consultation undertaken with other organisations and individuals working with people who have experienced, or are at risk of, trauma. In 2007, the Rape & Domestic Violence Services Australia VT Management Program won the WorkCover NSW Safety Work Award for its approach.

Recommendation 17: That all family law professionals, judicial officers and those working in the family law system are at risk of vicarious trauma, and strategies should be put in place to manage its impacts.

Understanding sexual violence in the context of family violence

- 8.22 We were also supportive of WLSA’s recommendation in the ALRC review for a separate, additional core competency that recognises the need for all family law professionals to have an ‘understanding of sexual violence’.⁷¹
- 8.23 Research indicates that intimate partner sexual violence is *“the strongest indicator of escalating frequency and severity of violence, more so than stalking, strangulation and abuse during pregnancy.”*⁷² One study found that of women who had experienced physical abuse, those who had also experienced forced sexual activity or rape were seven times more likely than other women to be murdered.⁷³
- 8.24 However, intimate partner sexual violence (‘IPSV’) is reported at lower rates than other risk factors associated with family violence. The Victorian Royal Commission into Family Violence found that *“sexual violence is an area that has the potential to fall through the gaps in the system, as family violence services often do not ask about sexual assault, as it is viewed as a separate form of violence.”*⁷⁴
- 8.25 Thus, as the ANROWS National Risk Assessment Principles for Domestic and Family Violence (‘DFV’) states:

*“Training on IPSV for all workers conducting DFV risk assessment is essential and should include: detail on the myths and dynamics of sexual violence within relationships; guidance on “how to ask” sensitively and building trust; the specific impacts and health consequences of IPSV; and how best to manage victim-survivors’ safety, cultural considerations, legal options and evidence requirements.... asking victim-survivors of DFV about IPSV separately, distinct from physical abuse, will assist in better self-identification and identification by practitioners, and appropriate service responses and referrals.”*⁷⁵

Recommendation 18: That any training packages prepared and provided to family law professionals, judicial officers and those working in the family law system include training, information and resources as to the understanding of sexual violence within the context of family violence.

⁷¹ Women’s Legal Service Australia, *Submission to the Australian Law Reform Commission’s Review of the Family Law System – Response to Discussion Paper*, (27 November 2018), No. 366. Accessed at: https://www.alrc.gov.au/wp-content/uploads/2019/08/family-law_366_womens_legal_services_australia_0.pdf.

⁷² Corina Backhouse and Cherie Toivonen, (2018). *National Risk Assessment Principles for Domestic and Family Violence: Companion Resource* (ANROWS Insights 07/2018), 28.

⁷³ *Ibid.*

⁷⁴ Law Council of Australia (2018) The Justice Project. Final Report Part 1. People who Experience Family Violence, drawing on the Victorian Royal Commission, Summary and Recommendations, 24.

⁷⁵ Corina Backhouse and Cherie Toivonen, (2018). *National Risk Assessment Principles for Domestic and Family Violence: Companion Resource* (ANROWS Insights 07/2018), 28.

Understanding family violence

- 8.26 Rape & Domestic Violence Services Australia urge that training programs in relation to family violence are developed in consultation with specialist family violence service providers and people who have experienced family violence.
- 8.27 At a minimum, training on family violence must cover:
- 8.27.1 Early and ongoing risk assessment and screening.
 - 8.27.2 The forms, dynamics and nuances of family violence including:
 - o skills for identifying primary and secondary aggressors;
 - o offender behaviour and grooming strategies; and
 - o the risks of importing family violence typologies into the law, as discussed in detail by Rathus in her article, 'Shifting Language and Meanings between Social Science and the Law: Defining Family Violence'.⁷⁶
 - 8.27.3 Safety planning, including guidance for how to develop safe parenting plans in circumstances of violence.
 - 8.27.4 The impact of family violence on children and parents, including complex trauma presentations.
 - 8.27.5 The financial impacts of family violence.
 - 8.27.6 A gendered analysis of family violence.
 - 8.27.7 The specific experiences of diverse groups of people in relation to family violence, including Aboriginal and Torres Strait Islander families, LGBTIQ communities, culturally and linguistically diverse communities, people with disability and older people.

Recommendation 19: That any training packages prepared and provided to family law professionals, judicial officers and those working in the family law system include training, information and resources as to the understanding of domestic and/or family violence.

The concept of Vicarious Trauma ('VT')

Doing this work means bearing witness to atrocity, holding the pain of others and being an unwilling participant in traumatic re-enactments.

Saakvitne and Pearlman, 1996⁷⁷

⁷⁶ Zoe Ratus, 'Shifting Language and Meanings between Social Science and the Law: Defining Family Violence' 36(2) *UNSW Law Journal* 359.

⁷⁷ Saakvitne, K. W., and Pearlman, L. A. (1996). *Transforming the Pain: A Workbook on Vicarious Traumatization*. New York: W. W. Norton & Company.

- 8.28 Vicarious Trauma ('VT') is a term used to describe the negative psychological impacts experienced by people not directly affected by traumatic events but nevertheless exposed to them in some way. Rape & Domestic Violence Services Australia's understanding of VT is influenced by the work of Charles Figley,⁷⁸ Laurie Pearlman⁷⁹ and Zoe Morrison,⁸⁰ among others.
- 8.29 VT is characterised by two clusters of psychological symptoms: secondary traumatic stress symptoms and cognitive change symptoms:⁸¹
- 8.29.1 **Secondary traumatic stress symptoms** are similar to those of Post Traumatic Stress Disorder (PTSD). They can include intrusive symptoms (e.g. recurrent dreams, images, flashbacks, intense distress at re-experiencing), avoidance symptoms (e.g. avoiding places, people, activities, feelings or thoughts that remind the person of trauma), and arousal symptoms (e.g. sweating, sleep disturbances, irritability, hyper vigilance or reckless behaviour).⁸²
- 8.29.2 **Cognitive Change Symptoms** are disruptions to important beliefs that individuals hold about themselves, other people, and the world. This may include changes to an individual's frame of reference (e.g. spirituality or worldview), self capacities (e.g. maintain a consistent and coherent sense of self) and psychological needs (e.g. beliefs about safety, esteem, intimacy, trust and control). For example, repeated exposure to traumatic material can lead a person to develop schemas that the world is unsafe, and that people are often cruel to others.
- 8.30 In the 2010 report *Family Violence – A National Legal Response*, the ALRC and NSW Law Reform Commission referred to the impact on professionals working in the area of family law as 'burnout'.⁸³ The concept of burnout refers to emotional exhaustion related to workload rather than specifically to working with trauma. For example, burnout may develop as a result of high workload, conflict between individuals and an organisation's goals, limited control over the quality of service

⁷⁸ See for example, Figley, C. R. (1995). Compassion fatigue as secondary traumatic stress disorder: An overview. In C.R. Figley (Ed.). *Compassion fatigue: Coping with secondary traumatic stress disorder in those who treat the traumatized*, (pp. 1-20). New York, NY: Brunner/Mazel.

⁷⁹ See for example, Pearlman, L. A. (1995). Self-care for trauma therapists: Ameliorating vicarious traumatization. In B. H. Stamm (Ed.), *Secondary traumatic stress: Self-care issues for clinicians, researcher, and educators* (2nd ed., pp. 51-64), Lutherville, MD: Sidran Press.

⁸⁰ See Morrison, Z. (2007). Feeling heavy: Vicarious trauma and other issues facing those who work in the sexual assault field. *Australian Centre for the Study of Sexual Assault Wrap*, 4. Melbourne: Australian Institute of Family Studies.

⁸¹ Jenkins, S. R., and Baird, S. (2002). Secondary Traumatic Stress and Vicarious Trauma: A Validation Study. 15(5) *Journal of Traumatic Stress* 423; Morrison, Z. (2007). Feeling heavy: Vicarious trauma and other issues facing those who work in the sexual assault field. *Australian Centre for the Study of Sexual Assault Wrap*, 4. Melbourne: Australian Institute of Family Studies.

⁸² Figley, C. R. (Ed.) (2002). *Treating Compassion Fatigue*. Philadelphia: Brunner/Rutledge; Coles, J., Astbury, J., Dartnall, E. & Limjerwala, A. (2014). A qualitative exploration of researcher trauma and researcher's responses to investigating sexual violence. *Violence Against Women*, 20(1), 95-117. doi:10.1177/1077801213520578.

⁸³ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 1488. The term 'burnout' is also used in another source referenced in the Issues Paper: Lisa Morgillo. (2015) *Do Not Make Their Trauma Your Trauma: Coping With Burnout as a Family Law Attorney*. 53(3) *Family Court Review* 456.

provided etc. While burnout may occur more frequently in those who respond to traumatised populations, it does not capture the specific impacts experienced as a result of working with traumatic material.

- 8.31 The terms compassion fatigue and secondary traumatic stress attempt to describe the experiences of working with clients who have experienced trauma; however, they do not fully capture the cognitive changes that can occur as a result of trauma work. In the early 1990's, Karen Saakvitne and Lorraine Pearlman suggested that impacts from working with people who have experienced trauma can also include cognitive changes such as altered beliefs about the world, others and the self.⁸⁴ The concept of vicarious trauma was developed to capture both clusters of symptoms: of secondary traumatic stress and changes to cognitive schemas.
- 8.32 In order to promote the wellbeing of family law professionals, judicial officers and those working in the family law system, it is important to address both secondary traumatic stress and cognitive change symptoms.

Recommendation 20: That the concept of vicarious trauma should be preferred over other concepts such as burnout, compassion fatigue or secondary traumatic stress when considering the professional wellbeing of family law professionals, judicial officers and those working in the family law system.

A work, health and safety issue

- 8.33 Rape & Domestic Violence Services Australia hold the view that the only reliable predictor of whether or not a person will experience vicarious trauma is their exposure to traumatic material.⁸⁵ Given that family law work inevitably involves significant contact with traumatic material, VT represents a work, health and safety risk for all working in the family law system.
- 8.34 This conceptualisation of VT as a work, health and safety issue has two important implications. First, it becomes clear that managing VT is an organisational responsibility. Second, this conceptualisation emphasises that VT is a legitimate response to the nature of the work rather than a result of any personal inadequacy or weakness.

⁸⁴ Saakvitne, K. W., and Pearlman, L. A. (1996). *Transforming the Pain: A Workbook on Vicarious Traumatization*. New York: W. W. Norton & Company.

⁸⁵ Some literature suggests that individual differences can predict whether a person will experience VT symptoms, such as a person's previous trauma history, age, gender, social support, education, and coping styles. However, there is a significant body of research which shows that exposure to traumatic material is the only variable that reliably and significantly predicts VT. See, for example: Kassam-Adams, N. (1995). The risks of treating sexual trauma: Stress and secondary trauma in psychotherapists. In B. H. Stamm (Ed.), *Secondary traumatic stress: Self-care issues for clinicians, researchers, and educators* (2nd ed., pp. 37-48); Lutherville, MD: The Sidran Press; Salston, M. D., & Figley, C. R. (2003). Secondary traumatic stress effects of working with survivors of criminal victimisation. *Journal of Traumatic Stress, 16*(2), 167-174; Schauben, L. J., & Frazier, P. A. (1995). Vicarious trauma: The effects on female counsellors of working with sexual abuse survivors. *Psychology of Women Quarterly, 19*, 49-64.

Recommendation 21: That vicarious trauma should be considered a work, health and safety issue to emphasize that organisations have a duty to implement risk management strategies.

The need for a proactive approach

- 8.35 Although the risks of VT cannot be altogether eliminated, research suggests that VT effects can be ameliorated if proactively addressed at an organisational level.⁸⁶
- 8.36 Implementing a VT management program will inevitably involve up-front expenditures. However, the experience of Rape & Domestic Violence Services Australia demonstrates that a proactive approach has the potential to reduce both human and financial costs significantly.
- 8.37 Where VT is not managed proactively, there are likely to be serious and long-term impacts on:
- 8.37.1 Employees' physical and mental wellbeing;
 - 8.37.2 Employee work performance;
 - 8.37.3 Collegial relationships;
 - 8.37.4 Workplace culture;
 - 8.37.5 Staff attrition rates;
 - 8.37.6 Unplanned absences from the workplace; and
 - 8.37.7 Worker compensation claims.
- 8.38 An internal analysis of Rape & Domestic Violence Services Australia's VT Management Program shows that a proactive approach may significantly alleviate these impacts. After ten years of implementation, the percentage of sick leave entitlements taken by Rape & Domestic Violence Services Australia staff had dropped by 50 per cent. The number of workers compensation claims had also reduced from approximately one claim per year to none over a period of ten years.
- 8.39 Rape & Domestic Violence Services Australia estimate that our organisation has saved approximately \$250,000 per year through the implementation of our VT Management Program. These savings were achieved as a result of lowered insurance premiums, fewer insurance claims, and reduced costs associated with sick leave, staff attrition and responding to maximal VT impacts.

⁸⁶ Cerney, M. S. (1995). Treating the "heroic treaters". In Figley, C. R. (Ed.), *Compassion Fatigue*, (pp. 131-148). New York: Brunner/Mazel; Sansbury, B. S., Graves, K., & Scott, W. (2015). Managing traumatic stress responses among clinicians: Individual and organizational tools for self-care. *Trauma, 17*(2), 114-122. doi:10.1177/1460408614551978; Sexton, L. (1999). Vicarious traumatisation of counsellors and effects on their workplace. *British Journal of Guidance and Counselling, 27*(3), 393-403.

Recommendation 22: That there must be a proactive approach to vicarious trauma management for family law professionals, judicial officers and those working in the family law system.

Best Practice Vicarious Trauma Management Program

8.40 The best practice Rape & Domestic Violence Services Australia VT Management Program includes five components: education, risk reduction, monitoring, early intervention, and offsetting symptoms.

8.40.1 **Education** includes strategies to ensure that workers are aware of the risk of vicarious trauma and have the knowledge and skills necessary to identify it early in themselves and in their subordinate staff. Education is critical to establishing a culture in which staff feel as though they can discuss VT without fear that it will impact their performance appraisal.

8.40.2 **Risk reduction** includes strategies to ensure that vicarious trauma symptoms do not escalate to become maximal impact symptoms. This may include strategies to encourage ongoing communication with peers through opportunities to debrief, varying workers' caseloads and facilitating trauma-free areas and activities.

8.40.3 **Monitoring** involves regular monitoring strategies designed to provide a reflection of the severity and type of vicarious trauma symptoms present for individual workers and the collective workforce. This may be achieved through psychometric testing, monitoring associated factors such as unplanned absence and retention rates, and comprehensive supervision practices.

8.40.4 **Early intervention** includes the use of strategies to intervene in vicarious traumatisation immediately upon the discovery of symptoms. This may include making on-call counselling support available for professional who notice VT impacts.

8.40.5 **Offsetting symptoms** involves longer term proactive strategies that seek to offset the particular symptoms that each individual is most likely to experience. This may involve developing individual self-care plans with staff and providing financial support for activities that may offset vicarious trauma symptoms.

Recommendation 23: That trauma specialists should be engaged to develop a program designed to manage vicarious trauma for family law professionals, judicial officers and those working in the family law system which incorporates education, risk reduction, monitoring, early intervention and offsetting symptoms.

Judicial Officers exercising family law jurisdiction

- 8.41 Rape & Domestic Violence Services Australia state that all future appointments of Judicial Officers exercising family law jurisdiction should include consideration of the person's knowledge, experience and aptitude in relation to family violence.
- 8.42 The importance of judicial education on family violence has been a consistent theme emerging from recent inquiries, including the Victorian Royal Commission into Family Violence. In their Final Report, the Victorian Royal Commission stated that judicial officers' skills and approach are "critical" to "the outcome of a hearing, the victim's safety, and a perpetrator's level of accountability."⁸⁷ Further, as Women's Legal Service Victoria stated in their submission to the Victorian Royal Commission, "Magistrate interaction with victims can have a real impact on whether victims feel empowered or disempowered in the court process."⁸⁸

Professional wellbeing training for those working in government funded family relationship services and family law legal assistance services

- 8.43 Rape & Domestic Violence Services Australia would welcome the Australian Government requiring, as a condition of its funding agreements, that all government funded family relationships services and family law legal assistance services develop and implement wellbeing programs for their staff.
- 8.44 We recommend that services be provided with additional funding to support establishment costs in relation to a wellbeing program. Although, wellbeing programs will likely reduce financial costs to organisations over time, services should be supported with initial costs related to developing the program, training staff, employing supervisors etc.
- 8.45 In addition, Rape & Domestic Violence Services Australia recommend that wellbeing programs be accredited and overseen by an independent body.

Recommendation 24: That government funded family relationship services and family law legal assistance services be provided with additional funding to support establishment costs in relation to professional wellbeing training programs.

9. Further matters that must be considered by the Joint Select Committee

k. Any related matters

Addressing any unintended consequences in the future if changes to family law legislation were made

- 9.1 Rape & Domestic Violence Services Australia recommends that if any changes are made to the existing legislation then there should be a mechanism for ongoing

⁸⁷ State of Victoria (2014-16) *Royal Commission into Family Violence: Report and recommendations*, Vol VI, Parl Paper No 132, Ch 40, 210.

⁸⁸ *Ibid*, 182.

monitoring and evaluation of these changes. The process for ongoing monitoring should include an opportunity to examine the effectiveness of any change to the legislation and ensure that no unintended consequences have arisen.

Recommendation 25: That there be a further mechanism for ongoing monitoring and evaluation of any changes to law and legal processes, with an opportunity to examine the effectiveness of any such changes, including seeking to address any unintended consequences.

Community education about the family law system

- 9.2 Broad community education as to the family law system and family violence within the context of the family law system is critical to both improving outcomes in the Family Court for those who have experienced family violence, as well as preventing its occurrence in our community.
- 9.3 Rape & Domestic Violence Services Australia believe that community education is vital if legislative reform is to shift community standards as to family violence in the context of family law, as well as the family law system generally.

Recommendation 26: That in conjunction with any legislative reforms, there should be broad community education as to the family law system, as well as a community awareness campaign as to family violence in the context of family law proceedings.

Stronger protections for sensitive records in family law proceedings

- 9.4 Rape & Domestic Violence Services Australia has serious concerns about the absence of protections for confidential counselling records in the family law system.
- 9.5 Currently, the *Family Law Act 1975* (Cth) protects the confidentiality of records created by accredited Family Dispute Resolution Practitioners ('FDRP') or accredited Family Counsellors ('FC') as well as records created as a result of a referral to an associated professional by an accredited FDRP or accredited FC. However, there are no specific protections for other service providers and record holders, such as counselling organisations like Rape & Domestic Violence Services Australia.
- 9.6 This means that parties regularly issue subpoenas for the production of confidential counselling records that contain sensitive information about the client's experiences of sexual, domestic and/or family violence.
- 9.7 Where counselling records are produced against the client's wishes, this may have negative impacts not only on the subject of those records, but also on other people who have experienced sexual, domestic and/or family violence, and support services more broadly. For example:

- 9.7.1 The client may feel violated or traumatised and experience heightened trauma impacts including feelings of shame, guilt, fear or disconnection from community;
 - 9.7.2 There may be damage to the relationship of trust and confidence between the counsellor and client and consequently, to therapeutic outcomes;
 - 9.7.3 There may be a risk of further harm to the client, where an offender uses sensitive information in order to disadvantage, intimidate, humiliate or stigmatise them or obtains other sensitive information that may enable ongoing abuse;
 - 9.7.4 Information obtained from the notes may be used to damage a child's relationship with one or both parents;
 - 9.7.5 Where there are current police investigations, production may prejudice future criminal proceedings and circumvent protections provided by Sexual Assault Communications Privilege as it operates in state/territory jurisdictions;
 - 9.7.6 Other people who have experienced sexual, domestic and/or family violence may be less willing to report to service providers and access counselling services; and
 - 9.7.7 Counselling services may be incentivised to adopt practices designed to protect their client's notes, such as minimal record keeping or making dummy files, even though these practices inhibit the counselling relationship and reduce the accountability of counsellors.
- 9.8 The potential impact on reporting rates is supported by findings in a 2005 report by the Australian Institute of Criminology ('AIC') that:
- "key concerns influencing the decision whether or not to report an assault to the police are confidentiality, fear of the assault becoming public knowledge, and the possibility of a defence lawyer being able to access details of medical and sexual histories."*⁸⁹
- 9.9 As such, Rape & Domestic Violence Services Australia submit that the Joint Select Committee should consider the need for greater protections for the use of confidential counselling records in family law proceedings, subject to the paramount consideration of the best interests of the child.

⁸⁹ Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [15.78], referring to D Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (2005) Australian Institute of Criminology, Canberra, 36.

Recommendation 27: That there is consideration of the need for greater protections for the use of confidential counselling records in family law proceedings, subject to the paramount consideration of the best interests of the child.

Limited forensic relevance

9.10 Rape & Domestic Violence Services Australia acknowledge there may be certain circumstances where it is necessary to adduce confidential counselling records in order to uphold the best interests of the child.

9.11 However, we submit that in the vast majority of circumstances, counselling records will have limited relevance to family law matters. This is because the purpose of counselling records is therapeutic, not investigative or forensic. They record the counsellor's observations and opinions about the emotional and psychological responses of the client, rather than any forensic assessment of the facts of the matter.

9.12 In the 2005 review of the *Evidence Act 1995* (Cth), the Commissions' found that:

"Disclosures made in a counselling context may well be misleading for a credit purpose due to the nature of the counselling relationship, the nature of the particular offence, and to the variances in the way that counsellors take notes.

Counsellors' notes are generally made for the purpose of providing therapy to the client, and not as a record of the assault. As part of the counselling process, a victim of a sexual assault is likely to discuss feelings of his or her own shame and guilt and may disclose prior assaults or be unclear about the events surrounding the assault.

This Inquiry has heard that, depending on the policies of the counselling service and the individual counsellor's preference, notes may be taken as a stream of consciousness or they may have the views of the counsellor interspersed with those of the client. The actual 'evidence' or facts of the case may be quite different to what is represented in the notes. In most counselling practices, a client does not have an opportunity to check the notes that are taken, and so will not be able to correct the counsellor if an inaccurate version of his or her comments are recorded. Their forensic value cannot be equated to a police statement or other account."⁹⁰

9.13 The following Rape & Domestic Violence Services Australia practices further demonstrate the potential for counselling records to be misused or misinterpreted in family law proceedings:

9.13.1 Rape & Domestic Services Violence Australia counsellors often record the nature of any sexual, domestic and/or family violence in the client's file using a single dot-point summary. This approach is designed to

⁹⁰ Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [15.75].

facilitate easy handover within our team-based phone counselling practice. However, this practice may disadvantage a client where the Court assumes the file note represents a complete record of all allegations made by the client.

9.13.2 Rape & Domestic Violence Services Australia counsellors regularly record client's cognitive alterations which may include negative beliefs about the self and/or positive reflections of the alleged perpetrator. The purpose is to record the impacts of trauma experienced by the client in order to facilitate effective therapeutic intervention. For example, a counsellor may record that a client has said she is a 'hopeless parent' and has 'failed her children' in order to signal the need for psycho-education around the causes and consequences of family violence. However, this practice may serve to disadvantage a client where the Court misinterprets these notes as a forensic assessment by the counsellor.

9.13.3 Rape & Domestic Violence Services Australia counsellors may sometimes discourage clients from revisiting trauma material and instead focus on strategies designed to establish safety or enhance day-to-day functioning. This approach accords with our stage-based model of trauma recovery. However, as a result, Rape & Domestic Violence Services Australia counselling notes often contain little detail about the client's allegations of violence. This absence of detail may be used to discredit the client by suggesting the allegations were invented retrospectively.

9.14 These examples demonstrate the discord between effective therapeutic practice and the use of counselling records in family law proceedings.

9.15 Even where counselling file notes do contain information that may be relevant to the Court's task to determine the best interests of the child, there is often alternative evidence that is more appropriate for legal purposes. In many Australian states and/or territories, counsellors are covered by mandatory reporting legislation that requires counsellors to report information where a child is being exposed to family violence. Often, it may be more appropriate to seek information from child protection agencies given these agencies have investigative powers and operate with a forensic purpose.

A qualified privilege

9.16 In recognition of the public interest in preserving the confidentiality of counselling relationships, every state and territory in Australia has enacted legislation since the mid 1990s designed to limit the disclosure of communications made in the course of a confidential relationship between a victim of sexual assault and a counsellor. However, the Commonwealth remains the only jurisdiction that does not have a sexual assault counselling privilege.

- 9.17 Rape & Domestic Violence Services Australia recommend that a qualified privilege for confidential counselling communications be inserted into Commonwealth legislation that covers family law proceedings. This may be either in the *Family Law Act 1975* (Cth) or the *Evidence Act 1995* (Cth). The Joint Select Committee should consider extending the privilege to both sexual, domestic and/or family violence.
- 9.18 A qualified privilege would strike an appropriate balance between the need to uphold the best interests of the child and the public interest in preserving the confidentiality of counselling records.
- 9.19 By creating a requirement that a party seek leave in order to compel, adduce or produce evidence of confidential counselling records, the privilege would reverse the onus from parties who have experienced violence or counselling professionals, to the party seeking access to the records. However, parties should still retain the right to object to production even where leave is granted to issue the subpoena.
- 9.20 In determining whether to grant parties leave, the Court should be required to satisfy itself that the evidence is necessary in order to determine the best interests of the child and that there is no alternative source of evidence available that would be less intrusive to the person who has been impacted by sexual, domestic and/or family violence.
- 9.21 In order for the qualified privilege to be effective, it is critical that individuals and counselling services wishing to object to the production of confidential counselling records have access to legal support. As such, we submit the Australian Government should establish and fund a legal service to provide free advice and representation to individuals and counselling services wishing to object to the production of confidential counselling records. This service could operate in a similar way to the Sexual Assault Communications Privilege Service at Legal Aid NSW.

Recommendation 28: That a qualified privilege for confidential counselling communications be inserted into family law legislation that would require a party to seek leave in order to compel, adduce or produce evidence of a confidential counselling record in family law proceedings.

Recommendation 29: That when determining whether to grant leave, the Court be required to satisfy itself that the evidence is necessary in order to determine the best interests of the child, and that there is no alternative source of evidence available that would be less intrusive to the person who has been impacted by sexual, domestic and/or family violence.

Recommendation 30: That the Australian Government should establish and fund a legal service to provide free advice and representation to individuals and counselling services wishing to object to the production of confidential counselling records.

Appendix A

Letter dated 3 October 2019 to be included here – to be inserted into final PDF when can be combined.