

14 May 2018



# Submission to the Australian Law Reform Commission's Review of the Family Law System – Issues Paper

14 May 2018 (extension approved)

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## Introduction

**safe steps** Family Violence Response Centre (“**safe steps**”) welcomes the opportunity to contribute to the review of the family law system and commends the Attorney-General for directing the Australian Law Reform Commission (ALRC) to undertake this important task. **safe steps** notes the many previous inquiries that have been conducted into the family law system and hopes that the findings in these previous inquiries will be used to inform the current review. **safe steps** has a long-standing interest in improving the family law system, informed by the passionate submissions of our clients and survivor advocates. We have contributed to a number of the previous inquiries in this space, including the following:

- *Family Law Amendment (Family Violence and Other Measures) Bill 2017*
- *Family Law Amendment (Parenting Management Hearings) Bill 2017*
- *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2017*
- *Parliamentary inquiry into a better family law system to support and protect those affected by family violence*
- *Family Law Council: Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems 2015*

We do not wish to discuss in detail the issues we have raised in previous submissions. Instead, we aim in this submission to highlight, via case studies, the priority issues that our clients have raised with us during prior and recent consultations. All client case studies have been de-identified and are provided with the consent of the victim-survivor.

**safe steps** hopes that this inquiry leads to reforms which make our family law system more informed about family violence, more accessible and responsive to family violence victim-survivors, and better able to listen to and represent the perspectives of children.

## About **safe steps**

**safe steps** Family Violence Response Centre is Victoria's 24 hour, 7 day per week statewide first response service for women (including women who identify as female or transfeminine), young people and children experiencing family violence. **safe steps** provides a critical service intervention, including support, accommodation, advocacy and referral throughout Victoria and nationally.

Our work includes referring women who have experienced family violence and are involved in current Magistrates or Family Court proceedings with legal and social support services via the Family Advocacy and Support Service (FASS). We connect women with a specialist **safe steps** social worker who can accompany them and ensure they are safe while at court, and offer emotional support.

**safe steps** is committed to ensuring all women and children are able to live free from abuse - our ultimate goal is the elimination of family violence. We acknowledge that family violence is inherently gendered in nature, with the overwhelming majority of family violence perpetrated by men, against women. As a result, in this submission we refer to the victim-survivor as female and to the perpetrator as male.

Our contributions to policy and legislative reform are evidenced-based, informed by a feminist framework and prioritise the safety and wellbeing of women, young people and children.

## Our approach

In preparing this submission **safe steps** sought advice from our Volunteer Survivor Advocate network and from our 5,000 plus Facebook followers via in person and telephone interviews, and written comment via email. We also consulted with **safe steps**' FASS worker in the Family Court.

**safe steps** also reviewed reports and submissions from previous family law inquiries and consulted with our partners in the family violence and community and legal sectors.

## Recommendations

1. That the Federal Government increase funding to the family courts and to the community legal and legal aid sector.
2. That judicial vacancies in the Family Court and the Federal Circuit Court are filled as a matter of urgency.
3. Any redevelopment of the family law system must be:
  - Forward-looking and focused on finding solutions
  - Trauma-informed
  - Child-centred and ensure that children's voices are heard
  - Culturally-safe and responsive
  - Aware of and responsive to the specific needs of marginalised and vulnerable people.
4. That existing principles in the Act which emphasise preserving the institution of marriage and the family unit are removed.
5. That more information be made available to court users in plain English regarding court processes and services and the availability of specialist family violence services.
6. We support the suggestions made by the Family Law Council of Australia about improving access to information and support in relation to family law services and family violence services, which include:
  - Embedding workers from specialist family violence services and other service sectors into the family law system to support victim-survivors and other family law clients with complex needs; and/or
  - Creating a dedicated family safety service within the family law system to provide independent risk assessment and safety planning, including court reports and referrals to relevant services.
7. That information about intervention orders and family violence clearly identify economic abuse as a form of family violence so that people who are applying for orders unsupported can include this form of abuse in their applications.<sup>1</sup>
8. All information regarding family law system applications and other processes must be translated into languages other than English and be easily accessible; along with a corresponding increase in the availability of other related legal matters, such as immigration processes.
9. Better access to multi-lingual services within the courts, including people who can provide emotional and practical support in the lead up to and during hearings.

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<sup>1</sup> Good Shepherd and Wyndham Legal Service, 2015, *Restoring Financial Safety: Legal Responses to Economic Abuse*, p. 8.

10. We support the recommendations made by ANROWS to improve access to justice for women with disabilities in their report *Women, disability and violence: Barriers to accessing justice*, including:
  - More options to use communication devices to give evidence in court and the ability to have communication partners attend court with them;
  - Allocating more time and support for women with disability to speak out<sup>2</sup>; and
  - A range of opportunities to tell their stories to independent third parties, given that their voices are often mediated through family, institutions or carers who may be implicated in the abuse or have a vested interest in the abuse not being disclosed.
11. **safe steps** endorses the recommendations made by the OPA in its report, *Whatever happened to the village? The removal of children from parents with a disability*, regarding amendments to the Family Law Act and to Family Court processes.
12. We support the recommendation of the SPLA suggesting specialised training for family law professionals in the unique experience of LGBTIQ-identifying individuals who experience family violence.
13. We encourage the ALRC to proactively seek the views of LGBTIQ family law users in the Review.
14. That the operation of private family consultants is more strictly regulated, including creating a nationally-consistent fee schedule for reports.
15. Ban direct cross-examination of victim-survivors by perpetrators by introducing the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017* (Cth) into Parliament as a matter of urgency.
16. The ALRC consider an integrated case management model for determination of complex matters to ensure litigants have better access to non-legal supports.
17. More information made available on the Family Court website about legal processes to support those representing themselves.
18. Expansion of the existing Family Advocacy and Support Service (FASS) and extend its life beyond June 2019. The FASS program could also be better promoted, for example through signage at the Court.
19. That Family Courts explore the provision of more physical security measures to allow safe attendance at Court by victim-survivors, including separate entrances and safe waiting spaces.
20. That child care options provided at the Family Courts be expanded and that sufficient spaces are provided for breastfeeding mothers.
21. Remove the presumption of equal shared parental responsibility in the Family Law Act.

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<sup>2</sup> ANROWS, 2018, *Women, disability and violence: Barriers to accessing justice: Final Report*, p. 49.

22. Insert a rebuttable presumption into the Family Law Act that perpetrators of family violence should be prohibited from spending unsupervised time with children 'unless the Court is satisfied that such an arrangement could be safe and in the child's best interests'.
23. That the definition of family violence in the Family Law Act be amended so that it is consistent with broader definitions in state and territory family violence legislation; for example: the definition in section 5 of the *Family Violence Protection Act 2008* (Vic), which includes controlling and dominating behaviour, economic abuse and exposing children to family violence. The definition should also include a non-exhaustive list of violent behaviours to assist decision-makers, including 'misuse' or 'abuse' of process and making or possessing child-abuse materials.
24. We support the recommendation made in *A better family law system* to amend the Family Law Act to enable:
  - the impact of family violence to be taken into account in the Court's consideration of both parties' contributions; and
  - the impact of family violence to be specifically taken into account in the Court's consideration of a party's future needs.
25. That the ALRC explore new models of managing and resolving family law disputes that include:
  - coordinated, multi-disciplinary responses which address the legal and non-legal needs of victim-survivors (like the Magellan list)
  - an integrated case management system for family law system users
  - inquisitorial and problem-solving approaches.
26. Embed specialist family violence support workers in the courts<sup>3</sup> and allow them to attend hearings and provide support to women although they are not party to proceedings (whether or not women are legally-represented).
27. Establish a peer support program that links victim-survivors who are going through the court system for the first time with women with prior experience of the system.
28. Facilitate a more integrated service response at the courts.
29. Judicial officers should provide more leniency in court procedures to acknowledge the effects of trauma.
30. As recommended in *A better family law system*, the Australian Government progress, through the Council of Australian Governments, the development of a national family violence risk assessment tool. The tool must be nationally consistent, multi-method, multi-informant and culturally sensitive and be adopted to operate across sectors, between jurisdictions and among all professionals working within the family law system.

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<sup>3</sup> See Family Law Council, 2016, *Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Terms 3, 4 & 5*, p. 138

31. As recommended in *A better family law system*, the Australian Government introduce to the Parliament amendments to the *Family Law Act 1975* (Cth) to require a risk assessment for family violence be undertaken upon a matter being filed at a registry of the Family Court of Australia or the Federal Circuit Court of Australia, using the national family violence risk assessment tool. The risk assessment should utilise the national family violence risk assessment tool and be undertaken by an appropriately trained family violence specialist provider.
32. That the ALRC address the risks posed to women and children by incompatible state and federal family violence orders in the context of women being placed into high security emergency accommodation or refuge (when women are still required to maintain regular contact with a perpetrator).
33. That a panel of representatives with lived experience of family violence be established to provide ongoing recommendations for improvement of the courts and the family law system.
34. The Australian Institute of Family Studies be provided with a reference to undertake research into the practices and assessments of family consultants.
35. The Federal Government, in consultation with family violence and family law experts develop an accreditation process and minimum standards for family consultants.
36. The Federal Government establish an oversight mechanism and complaints process to monitor and review the conduct of family consultants.
37. That measures are implemented to enable the enforcement of financial orders by the courts; and/or current recovery processes are reviewed to ensure they are trauma-informed and protect victim-survivors.
38. That an absolute privilege for sensitive records, including sexual assault counselling records, is inserted into either or both the *Family Law Act 1975* (Cth) and the *Evidence Act 1995* (Cth).
39. That legal services be funded to provide legal support to counsellors wishing to object to subpoenas for counselling records; and that resources are made available to help victim-survivors enforce their rights in the family law system.
40. That all Independent Children's Lawyers must be trained in both family violence and working with children, and that they be mandated to speak with the children they are appointed to assist, rather than relying on the views of others.
41. The development of clearer guidelines that aim to afford children greater participation in decision-making that affects them and within the family law system, as long as they are in accordance with the *Convention on the Rights of the Child*.
42. As recommended in *A better family law system*, that the Australian Government establish a young person's advisory panel to assist in the design of child-focused family law services.

43. As recommended in *A better family law system*, that 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. This program would include content on:

- the nature and dynamics of family violence;
- working with vulnerable clients;
- cultural competency;
- trauma informed practice;
- the intersection of family law, child protection and family violence; and
- 'The Safe and Together Model' for understanding the patterns of abuse and impact of family violence on children.

## Overarching issues

“I found the [family law system] to be extremely frightening and damaging, especially for my children... As a result of [the system], which is slow and typically ignores the violence, I have lost my children, my career, my financial security and my health. I spent over \$200k in legal fees and for most of the 5 years I was self represented.” - Leonie

“The system is desensitised to so much that they see they do not see the effects on how the process affects the victims in any capacity and rather supports the children having to be re-exposed to their abuser. As one of the victims I am required to fight my ex husband on a daily basis from his continued control over me and the decisions I make... The lengthy time involved in the process contributes to the anxiety and uncertainty around what you may have to do over a period of time. Each time I am forced to be within close proximity I find myself in a full blown panic attack and frozen. It has continued to negatively impact my health... It has hindered any chance I have had of recovery and will to continue into the future.” - Maria

The family law system is failing victim-survivors of family violence. Although families using the family law system are more likely than others to have a history of family violence – one study found that, of the parents who used court, 85% reported emotional abuse and 54% reported physical violence<sup>4</sup> – the system often fails to identify – or wilfully ignores – family violence; painting women who act protectively towards their children as obstructing their abusive former partner’s rightful to access his children. Family court outcomes often risk children’s safety, leave women financially devastated and fail to hold perpetrators of family violence to account.

As **safe steps** has argued in previous submissions, the adversarial system is ill-equipped to address family law matters involving violence and abuse. The same system governs the determination of criminal matters; however the implications for parties at the conclusion of a case are very different: family court proceedings result in court orders that “establish regimes for contact and interaction between parents and children”<sup>5</sup>, rather than criminal sentences. Although a court setting can potentially be therapeutic for women if it allows them to tell their stories of abuse and receive validation by someone in a position of authority (a judge), the adversarial court environment rarely offers this possibility; instead the common experience of many women is of combative questioning, limited time and opportunity to be heard – or, conversely, being required to repeat their story multiple times to many different people – and a lack of understanding of family violence and trauma on the part of judicial officers and family law professionals. It is arguable that the adversarial system, where the role of the court is primarily that of an ‘impartial referee’ between opposing parties, is ill-suited to determine matters involving intimate human relationships and merely compounds existing trauma.

Added to which, the *Family Law Act 1975* (Cth) (‘the Family Law Act’ or ‘the Act’) does not currently identify the range of violent behaviours present in many abusive intimate partner relationships

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<sup>4</sup> R Kaspiew, R Carson et al, October 2015, *Evaluation of the 2012 family violence amendments: Synthesis report*, Australian Institute of Family Studies, p. 16.

<sup>5</sup> Ibid, p. 2.

and is inconsistent with definitions in state and territory legislation, and the family law system often fails to provide adequate responses to intersectional disadvantage; for example: victim-survivors who have an intellectual disability, women from culturally and linguistically diverse communities (CALD), LGBTIQ women, and Aboriginal and Torres Strait Islander women.

It is clear that the ability of the current system to operate effectively has been impeded by high demand for family law services and an under-funded and under-resourced court system.<sup>6</sup> A magistrate describes how this strain on the courts can act to restrict judicial officers from interacting with parties in a way that is responsive and minimises trauma: “Large court lists limit the time available to consider creative options and to apply a therapeutic approach”<sup>7</sup>. Further, although the law governing resolution of parenting and property disputes is complex and intended to be navigated and applied by lawyers on behalf of their clients, in reality, many victim-survivors are forced to do this for themselves. This can exacerbate trauma and lead to unfavourable outcomes for victim-survivors; and increases delays in the court system.

As we have previously recommended, if family law disputes are going to continue to be played out in the court system, the Federal Government must increase funding to the family courts and to the community legal and legal aid sector.<sup>8</sup> Further, the Government must also prioritise filling judicial vacancies in the Family Court and the Federal Circuit Court, as a lack of judges is putting pressure on interim duty lists and resulting in lengthy delays in matters being heard. This is particularly important when such delays can have dire consequences for the safety of women and children where violence is present. Former Chief Justice of the Family Court of Australia stated that although the Australian Parliament has addressed family violence in parenting proceedings under the Family Law Act, via the enactment of the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth), “without structural support to the courts, legislation alone is not of much assistance”.<sup>9</sup>

In spite of our concerns with the current family law system, in our submission we present recommendations to improve the existing structures and processes as well as explore alternatives that upend the status quo. We realise that significant change, particularly cultural change, can take time, and we recognise that even minor adjustments to the current system in the interim could result in substantially better outcomes for families. **safe steps** also notes that the success of many individual changes we propose is contingent upon the implementation of other larger-scale reforms, such as training of all family law professionals in family violence and trauma-informed practice.

We have used the term ‘victim-survivor’ in this submission to refer to women who have been subject to family violence in the context of an intimate partner relationship. ‘Victim’ recognises the systemic injustices which perpetuate violent behaviours and ‘survivor’ points to the resilience and agency of those who survive family violence, or indeed any other forms of harm. We use the

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<sup>6</sup> The Law Council of Australia, *The Justice Project Progress Report*, 2018, p. 9.

<sup>7</sup> Michael King, *Applying therapeutic jurisprudence from the Bench: Challenges and opportunities*

<sup>8</sup> See safe steps’ recommendations 1&2 in our submission to *Family Law Amendment (Family Violence and Other Measures) Bill 2017*

<sup>9</sup> Diana Bryant AO, former Chief Justice of the Family Court of Australia, *The Family Courts and Family Violence*, Judicial Conference of Australia Colloquium, 9-11 October 2015, p. 1.

term 'perpetrator' to refer to those who use violence against others within the broad definition of the *Family Violence Protection Act 2008* (Vic), and note that the vast majority of perpetrators are men.

## Objectives and Principles

### Question 1 What should be the role and objectives of the modern family law system?

The role of the modern family law system should be assisting families to find workable outcomes in relation to the care and wellbeing of their children and in the division of property in the context of separation. In performing this role, the system should be adequately-equipped to recognise and deal with the entirety of the circumstances, including whether there is a risk of violence to children or adults and whether the characteristics of the parties involved mean that they have specific needs or are disadvantaged in one or multiple ways (intersectionality).

Throughout our consultation with women and the family violence sector, **safe steps** heard that the current system places too much emphasis on fact-finding and what happened in the past. A better system is one which is focussed on the present and looks forward to what is most likely to serve the interests of families into the future.

Further, the family law processes should be as simple and affordable as possible for users of the system.

### Question 2 What principles should guide any redevelopment of the family law system?

Given the current system's failure to deal appropriately with the nuances involved in the complex human relationships it is designed to manage, reform of the family law systems should ideally be underpinned by a greater awareness of vulnerability and an intention to provide a more therapeutic approach to making decisions about people's lives.

As such, **safe steps** agrees with many of the principles proposed in early consultations for the Inquiry. In particular, the system should be:

- Forward-looking and focused on finding solutions
- Trauma-informed
- Child-centred and ensure that children's voices are heard
- Culturally-safe and responsive
- Aware of and responsive to the specific needs of marginalised and vulnerable people.

We would also argue that the existing principles in the Act which emphasise preserving the institution of marriage and the family unit should be removed. These principles tacitly perpetuate the notion that preservation of the family is more important than the safety of women and children and that family violence is something that should be dealt with in the private sphere. The Act should reflect the diversity of family structures in contemporary Australia and remove any judgement about separation and relationship breakdown.

Finally, **safe steps** agrees that guiding principles are important, particularly at this juncture when the system is under review, however we note that the mere presence of such principles does not secure action on behalf of judges. For example, it is clear that courts have a long way to go in exercising their jurisdiction in a way that ensures protection from family violence, despite this having been a principle in the Family Law Act for a number of years. More crucial is training and monitoring to ensure greater application of these principles in decision-making and court processes.

## Access and Engagement

Question 3 In what ways could access to information about family law and family law related services, including family violence services, be improved?

Question 4 How might people with family law related needs be assisted to navigate the family law system?

Access to information about the family law system could be improved via greater resourcing of the legal assistance sector. As there is a large gap between clients who are eligible for legal aid and people who can afford to pay for legal services, many self-represented litigants do not have the same access to information about application and court processes, putting them at a disadvantage.

The feedback **safe steps** has received indicates that many victim-survivors have had issues navigating the family law system, alone or assisted by a legal representative. This uncertainty covers application and filing processes, as well as managing breaches of family court orders, and stems from the complexity of the legal processes<sup>10</sup>. Victim-survivors face additional challenges due to the impact of trauma, the fear of having to confront their abuser in court and of orders being made which give the perpetrator access to the children, jeopardising their physical and emotional safety.

Ideally, a user's engagement with the family law system would be via a central point of access, which would provide information in plain English, guide them through all processes and connect them with legal and non-legal supports where required. This might take the form of an integrated case management model, which we encourage the ALRC to explore further.

**safe steps** also supports the suggestions made by the Family Law Council of Australia about improving access to information and support in relation to family law services and family violence services, which include:

- Embedding workers from specialist family violence services and other service sectors into the family law system to support victim-survivors and other family law clients with complex needs<sup>11</sup>; and/or

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<sup>10</sup> Standing Committee on Social Policy and Legal Affairs, 2017, *A better family law system to support and protect those affected by family violence*, p. 63.

<sup>11</sup> Above n. 3, p 138.

- Creating a dedicated family safety service within the family law system to provide independent risk assessment and safety planning, including court reports and referrals to relevant services.<sup>12</sup>

In its 2015 report about improving legal responses to economic abuse, Good Shepherd recommended that information about intervention orders and family violence clearly identify economic abuse as a form of family violence so that people who are applying for orders unsupported can include this form of abuse in their applications.<sup>13</sup> We also support this change.

#### Question 5 How can the accessibility of the family law system be improved for being from Aboriginal and Torres Strait Islander communities?

Regretfully, we did not have any victim-survivors contribute to our consultation around this Inquiry who identified as Aboriginal or Torres Strait Islander; however, as a statewide service **safe steps** does receive a significant number of calls from Aboriginal clients. We are deeply committed to ensuring Aboriginal and Torres Strait Islander clients receive a culturally safe and respectful experience at all stages of the family violence response and recovery journey, including through the justice system.

#### Question 6 How can the accessibility of the family law system be improved for people from culturally and linguistically diverse communities?

To promote equal access to the family law system, all information regarding application and other processes must be translated into languages other than English and be easily accessible. At present, such information is difficult to find and is not available in a sufficient number of languages. Further, **safe steps** has learned from the Australian Women's Alliance Against Violence Alliance (AWAVA) that where there is information about the family law system in languages other than English, there are often inaccuracies in translations: for example, sexual assault was translated as sexual 'attack'. There must be a significant investment in improving both the quantity and quality of information produced for CALD applicants and a corresponding increase in the availability of other relevant information about related legal matters, such as immigration processes.

There should also be better access to multi-lingual services within the courts, including people who can provide emotional and practical support in the lead up to and during hearings.

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<sup>12</sup> Ibid, p. 121.

<sup>13</sup> Good Shepherd and Wyndham Legal Service, 2015, *Restoring Financial Safety: Legal Responses to Economic Abuse*, p. 8.

## Question 7 How can the accessibility of the family law system be improved for people with disability?

“As there is no protection in the Act for a parent with a disability, the disability of one parent can be the determining factor in the court deciding that the child should live with the other parent.”<sup>14</sup>

A key issue for women with disabilities in the family law system is that they are often seen as unfit parents simply by virtue of the fact that they have a disability.<sup>15</sup> A report published by the Office of the Public Advocate (OPA) recently found that although there have been multiple amendments to the Family Law Act since 1975, “[t]he major area of social change that is not reflected in the Act is the change in attitude towards people with disabilities.”<sup>16</sup>

Women with Disabilities Victoria (WDV) advised **safe steps** that in a survey they conducted in Magistrates’ Courts around Victoria with court staff and women with disabilities, they found that disability access barriers can make women feel less safe at court. These barriers can be attitudinal, systemic, physical or technological in nature, or involve communication (or lack thereof). A recent report published by Australia’s National Research Organisation for Women’s Safety Limited (ANROWS) entitled *Women, disability and violence: Barriers to accessing justice*, notes that, “[p]olice and courts commonly fail to: provide reasonable adjustments, adequately investigate, and recognise the abuse as violence rather than a “service incident”; and commonly apply paternalistic tropes about women with disability<sup>17</sup>”. Many of the issues that are present for women experiencing family violence in the court system are even more problematic for women with disabilities: “The usual stresses and anxieties related to attending and giving evidence in court about experiences of violence, are multiplied for women with disability”<sup>18</sup>.

WDV stated that family court processes are unlikely to be accessible for women with disabilities unless they receive “enhanced court services”. Some of the suggestions provided by ANROWS to improve access to justice for women with disabilities, which **safe steps** supports, include:

- More options to use communication devices to give evidence in court and the ability to have communication partners attend court with them;
- According more time and support for women with disability to speak out<sup>19</sup>; and
- A range of opportunities to tell their stories to independent third parties, given that their voices are often mediated through family, institutions or carers who may be implicated in the abuse or have a vested interest in the abuse not being disclosed.

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<sup>14</sup> Office of the Public Advocate, 2013, *Whatever happened to the village: the removal of children from parents with a disability*, p. 7.

<sup>15</sup> Advice safe steps received from Women with Disabilities Victoria; *ibid* p. 7

<sup>16</sup> *Ibid*, p. 4

<sup>17</sup> Above n. 2, p. 31

<sup>18</sup> Above n. 2, p. 52.

<sup>19</sup> *Ibid*, p. 49.

**safe steps** endorses the recommendations made by the OPA in its report, *Whatever happened to the village? The removal of children from parents with a disability*, regarding amendments to the Family Law Act and to Family Court processes,<sup>20</sup> such as:

- That a rebuttable section is included in the Family Law Act that disability is not, per se, a barrier to parenting.
- That the Family Law Act is amended to state that the disability of one or both of the parents cannot be grounds for determining the best interests of the child with regards to residence, contact and parental responsibility.

Question 8 How can the accessibility of the family law system be improved for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people?

“The Australian family law system remains mired in a two-parent model of legal parentage, a paradigm that does not always reflect the reality and diversity of same-sex families.”<sup>21</sup>

**safe steps** strongly supports a more inclusive family law system which sees parenting relationships as equal regardless of sexual orientation. In our discussions with other family violence specialist organisations including AWAVA, it is clear that the culture in the Courts at present is one of disregarding, or not assessing at the same level of harm or seriousness, violence perpetrated by a woman within the context of a lesbian or bisexual relationship. This echoes findings from a New Zealand study which interviewed lesbian survivors of family violence, with most relying on friendship and family networks for support rather than mainstream agencies because they believed those agencies would not take them seriously, or accept them<sup>22</sup>. It is clear there is much more which can and should be done within mainstream agencies, including the Courts, to familiarise themselves with the unique experience of LGBTIQ-identifying individuals who experience family violence and to better respond to their needs. We note the recommendation from the SPLA around specialised training for family law professionals and support this recommendation.

We note in the Issues Paper that “(t)here is limited information available on the issues that people from LGBTIQ groups face in accessing the family law system”. Indeed information about the experience of family violence within the LGBTIQ community is lacking overall – as noted by Monash University’s Gender and Family Violence Unit, “the Australian Bureau of Statistics Personal Safety Survey did not and still does not collect data on LGBTIQ identity”<sup>23</sup>. This makes it

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<sup>20</sup> Above n. 14, p. 5.

<sup>21</sup> Adiva Sifris, May 2014, *Families, policy and the law: Selected essays on contemporary issues for Australia*, Chapter 10: Gay and lesbian parenting: The legislative response: <https://aifs.gov.au/publications/families-policy-and-law/10-gay-and-lesbian-parenting-legislative-response>

<sup>22</sup> Mcleod, S, 2001, *Exploring the 'Second Closet': A discursive exploration into the silencing and acknowledgement of family violence within the bounds of lesbian relationships*. Thesis submitted for the degree of Master of Public Health, University of Otago, Dunedin.

<sup>23</sup> Monash University, 2017, *Research Brief: Family Violence and the LGBTIQ Community*, Gender and Family Violence Monash Arts Focus Program: <https://arts.monash.edu/gender-and-family-violence/wp-content/uploads/sites/11/2017/11/RBFVandLGBTIQcommunities.pdf>

very difficult for mainstream services to map the full scale of the issue. Whilst this is beyond the scope of the current ALRC Review, we would welcome a recommendation that family violence data collection features LGBTIQ identity as a matter of course. We hope that this ALRC Review proactively seeks the views of the LGBTIQ community and provides a positive opportunity for them to reflect on their experiences in a way which is meaningful, and acted upon.

An additional issue is that family law inconsistencies across the states mean that children being raised by same-sex parents are being denied legal recognition: "This means that children being raised by same-sex parents through foster care arrangements, through step-parent arrangements are being denied the legal protections of having two parents."<sup>24</sup> We note that the Issues Paper touches upon this concern at point 89, and look forward to seeing the Review fully address these inconsistencies.

### Question 10 What changes could be made to the family law system, including to the provision of legal services and private reports, to reduce the cost to clients of resolving family disputes?

"[The father] was fully funded by legal aid while I who only worked part time had to pay out of pocket."- Anna

A number of previous reports have indicated that the current provision of Legal Aid and community legal lawyers for family law matters is failing to meet demand for services. There is a significant gap in service provision for people who do not qualify for Legal Aid but are unable to afford the high cost of engaging a private lawyer. The Law Council of Australia highlighted these issues in a recent report:

"Decades of inadequate government funding have led to a situation in which 14 per cent of the population live under the poverty line, yet legal aid representation is only available for eight per cent of Australians... People who are cash poor but have some assets can expect not to receive help – including many older Australians, rural Australians, and mothers seeking to leave violent relationships."<sup>25</sup>

These issues are also discussed in detail by the Standing Committee on Policy and Legal Affairs (SPLA) in *A better family law system to support and protect those affected by family violence (A better family law system)* and by the Productivity Commission in its recent report, *Access to Justice Arrangements*.<sup>26</sup> As stated above and in previous submissions, **safe steps** supports an increased investment in legal assistance services.

An increased investment in legal assistance services would reduce the overall costs of the family law system by reducing the number of self-represented litigants, who have a significant impact on the timeliness and administration of justice. This would then have a flow-on effect for parties.

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<sup>24</sup> Clara Tran, #TalkAboutIt: Five LGBTI issues you may not know about': <http://www.abc.net.au/news/2015-07-03/lgbti-challenges-in-2015/6586454>; above n. 21.

<sup>25</sup> Above n. 6, p. 9

<sup>26</sup> Above n. 10, pp. 126-127; Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report*, No. 72, 2014, Vol. 2, pp. 1021-1022.

Further, improving delays and processes in the court system more generally should also reduce legal costs to clients.

**safe steps** heard from a number of women about the exorbitant expense of engaging private family consultants. This was also raised in discussions with our partners in the family violence sector and has been noted previously in family law inquiries. If the current approach to resolving family law disputes continues, **safe steps** supports much stricter regulation of private consultants, including a nationally-consistent fee schedule for reports.

Question 11 What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?

Question 12 What other changes are needed to support people who do not have legal representation to resolve their family law problems?

We have addressed in previous submissions the challenges presented by the system for self-represented litigants, and the reasons that a large proportion of women who have experienced family violence are self-represented. The difficulties that these women face are compounded if they have a disability, are from culturally and linguistically diverse communities or are Aboriginal/Torres Strait Islander. Many women end up settling out of court, even if it means a less than favourable outcome, because it is preferable than having to face their abuser in court; particularly as perpetrators often use the court setting as a forum for continuing abuse and control.

There are a number of changes to the current system which would improve the system for unrepresented litigants who have experienced family violence:

- Introduction of the *Family Law Amendment (Family Violence and Cross-examination of the Parties) Bill 2017* into Parliament, to ensure direct cross-examination of victim-survivors by self-represented perpetrators is no longer allowed in court;
- An integrated case management model for determination of complex matters would ensure litigants had better access to non-legal supports; and
- More information made available on the Family Court website about legal processes to support those representing themselves.

**safe steps** notes that the Family Court website includes a factsheet designed to assist people who are representing themselves, and that the National Domestic and Family Violence Bench Book contains guidance for judicial officers when dealing with self-represented litigants, noting that the overriding task is to ensure procedural fairness to all parties<sup>27</sup>. We also note a previous initiative of the Family Court to improve information and services available to litigants in person, in particular the recommendations regarding changes to court processes to assist these litigants.<sup>28</sup> **safe steps** commends these efforts to support unrepresented litigants but our position remains that the focus should be on reducing the number of people representing

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<sup>27</sup> 'Self-represented litigants', National Domestic and Family Violence Bench Book: <http://dfvbenchbook.aija.org.au/court-and-case-management/self-represented-litigants/>

<sup>28</sup> Family Court of Australia, *Self Represented Litigants – A Challenge: Project Report December 2000–December 2002*

themselves in Family Court proceedings via increased funding to legal assistance services and by expanding the eligibility criteria so that more people can access affordable legal advice and representation.

We also recommend support services being integrated into the courts. For example, the Family Advocacy and Support Service (FASS), which allows people who have experienced or are alleged to have used family violence to get legal help from a duty lawyer and further assistance from a social support worker. This program, established by legal aid commissions in every state with funding from the Australian Government, is due to run until 30 June 2019. We recommend expanding and extending this service.

### Question 13 What improvements could be made to the physical design of the family courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children or themselves?

This is an area of focus which was strongly considered within the Victorian Royal Commission into Family Violence.

Having only one security entrance/exit in and out of the Court is frequently cited as an area of concern by victim-survivors. We are aware of many stories of clients being attacked on site, or stalked as they depart Court by either the perpetrator or a member of his support network; this can sometimes lead to the perpetrator learning the location of a confidential safe house or accommodation location where the woman is staying, which causes significant distress and disruption to both the woman and to the service supporting her. The Heidelberg Family Violence Court Division in Victoria offers an option for a separate, secure entrance.

**safe steps** is pleased to be one of the first organisations engaged to provide remote witness facilities on behalf of the Melbourne Magistrates' Court. Women who participate in this program give evidence at a location hosted by **safe steps** rather than having to attend Court in person. The feedback we have received from women using this program has been overwhelmingly positive and has really spoken to the stress and fear which can be avoided by not requiring victim-survivors to give evidence with the perpetrator in the same room.

Accepting that it will often be necessary for the victim-survivor to attend Court, the provision of a safe space in which she can wait and not be in the presence of the perpetrator was highlighted as critical by many women.

Lack of access to affordable child care is an enormous barrier for mothers attending Court. This leads to children being brought to Court. The Court is not a welcoming or supportive space for children; often mothers will also not realise how long they will need to be at Court and may not realise they need to bring sufficient snacks, nappies and toys/entertainment for a full day. We note that the Melbourne branch of the Family Court offers childcare facilities only for families attending court-ordered mediation on Level 5. Ideally we would like to see a childcare facility introduced which caters to any family attending the Family Court. Submissions we received in collating this response also emphasised the importance of providing sufficient spaces for breast-feeding mothers.

Our team member working on the FASS program at the Melbourne Family Court noted that better signage would make it easier for women attending Court to find them. Many people attending Court believe that the information and referral desk for the FASS program is actually the general information desk.

## Legal principles in relation to parenting and property

Question 14 What changes to the provisions in Part VII of the Family Law Act could be made to produce the best outcomes for children?

“Most of us want our child/children to have a healthy relationship with their father. Unfortunately this is not always possible when dealing with violent men. I think the courts need to take a long hard look at the results of placing children with dangerous men just for the sake of having a relationship with their biological father... My child is a thriving happy engaged and emotionally intelligent compassionate person, despite not having seen his father since 2012. This story could have been quite different.” - Anna

**safe steps** supports the removal of the presumption of equal shared parental responsibility in the Act. We received consistent feedback during our consultation with women that its operation is causing detrimental and unsafe outcomes for women and children. As noted in *A better family law system*, the presumption is particularly problematic because “the distinction between ‘responsibility’ and ‘time’ is not well understood, influencing both the culture within the judiciary and the assumptions of separating parents when agreeing to consent orders.”<sup>29</sup> Although the presumption does not apply in cases of family violence or child abuse and is rebuttable where it is not in the best interests of the child, a 2009 evaluation by the Australian Institute of Family Studies (AIFS) found that in over 75 per cent of cases in which both family violence and child abuse had been alleged orders were nonetheless made for equal shared parental responsibility, whether made by a judge or agreed to by the parties through consent orders.<sup>30</sup> This is supported by what we have heard from women. Many victim-survivors told us that they could not rebut the presumption of equal shared responsibility in the Family Court. They were either unable to convince the Court that they and their children had experienced violence – despite providing evidence to support it – or they were advised by their lawyers not to mention family violence as it would have affected the success of their case and led to less favourable parenting orders.

“I...don’t understand how almost everything I said in respect to the violence, financial contributions and care of the children, backed by irrefutable rock solid evidence, in the form of reports, safety plans, medical assessments, financial statements was either minimised, trivialised or outright dismissed...It just seems to be that everything is “equalised” - Leonie

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<sup>29</sup> Above n. 10, p. 27.

<sup>30</sup> Ibid, p. 191.

“Throughout this court process at the Federal circuit court in Dandenong, I was advised to not speak of the family violence. I had to ‘play a game’. This process felt as though it had little to do with the truth.” - Anna

Although the Act intends decision-makers to give greater weight to the need to protect children from being subjected to, or exposed to, abuse, neglect or family violence when determining what is in their best interests, the actual operation of the law has favoured the principle that it is beneficial for children to have a ‘meaningful’ relationship with both parents, even when there is evidence that the abuse is still present. This is putting children at risk. A 2017 report released by ANROWS stated that “maintaining relationships between children and abusive fathers is likely to be harmful unless the abusive behaviour ends”<sup>31</sup>.

One woman explained the impact that equal shared responsibility has had on her life and her children’s lives:

“Co-parenting with an abuser robs me of my ability to plan, to spend quality time with my son because it is continually interrupted by his father, to earn a living as I am constantly changing or cancelling work assignments... I am still living by the whims and demands of a controlling abuser, through the use of my vulnerable, defenceless children... This is a critical issue that must be addressed. There is nothing the family law system can do about the past but the “system” needs to recognise what they are imposing on women and children for the future.”

The current decision-making framework affects the whole operation of the family law system. In many women’s experience, family report writers pre-empt the presumption of equal shared parental responsibility in their reports, meaning that they present a more favourable picture of perpetrators, often overlooking and minimising evidence of abusive behaviours.

As such, **safe steps** supports the recommendation made by Women’s Legal Services Australia (WLSA) that the language of equal shared parental responsibility in the Act be removed to “shift culture and practice towards a greater focus of children’s needs and their safety”<sup>32</sup>. Further, we agree with recommendations made by other organisations in *A better family law system* that a rebuttable presumption should be inserted into the Family Law Act that perpetrators of family violence should be prohibited from spending unsupervised time with children ‘unless the Court is satisfied that such an arrangement could be safe and in the child’s best interests’.<sup>33</sup>

## Question 15 What changes could be made to the definition of family violence, or other provisions regarding family violence, in the Family Law Act to better support decision making about the safety of children and their families?

In our discussions with women and our FASS worker at the court, we heard that if women do raise family violence at trial, they are often accused of making it up. This leads many women in

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<sup>31</sup> ANROWS, 2017, *Domestic and family violence and parenting: Mixed method insights into impact and support needs: Final report*, p. 13.

<sup>32</sup> Above n. 10, p. 195.

<sup>33</sup> Above n. 10, p. 196.

the system to stay silent about the violence, particularly when it is non-physical in nature, such as emotional, psychological and financial abuse. For example, Leonie said that she was “ripped apart” by her former partner’s lawyer during cross-examination, who, in respect to the psychological abuse in the relationship, stated that “it never happened”, and brought up her mother’s schizophrenia to try and discredit her. The flow-on effects of this are that parenting orders made by the courts endanger the children – who are often forced to spend time with an abuser – and perpetrators are not being held to account.

A crucial part of addressing this problem is to expand the definition of family violence in the Act to support better identification of and responses to family violence and safety concerns for women and children. **safe steps** recommends that the definition in the Family Law Act be amended so that it is consistent with broader definitions in state and territory family violence legislation; for example: the definition in section 5 of the *Family Violence Protection Act 2008* (Vic), which includes controlling and dominating behaviour, economic abuse and exposing children to family violence. The Victorian legislation also includes a non-exhaustive list of violent behaviours to assist decision-makers. To this we would add that the Family Law Act should include in its definition ‘misuse’ or ‘abuse’ of process, to cover the phenomenon of perpetrators using the family law system as a means of continuing control and abuse. We discuss this issue further below.

During our consultation with the family violence sector, PartnerSpeak emphasised that making or possessing child-abuse materials must also be considered a form of family violence and **safe steps** agrees that this should be covered by the definition in the Act.

### Question 17 What changes could be made to the provisions in the Family Law Act governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?

“In the end I settled by agreeing to give my former partner the lion’s share of assets that he had not contributed towards. In addition I agreed to accepting all the liabilities, such as loans, debts etc. My abuser came to the relationship with debt, I had the assets and a career. Post separation, 23 years later, with my high income earning years behind me, my career gone, carrying trauma and overwhelmingly left to carry the financial responsibility for children, I have less assets. I have debt and I am self employed with no security. To maintain the roof over my head I had to give my former partner all my superannuation. How can this be fair?” – Leonie

The family law system should assist women recover financially from family violence. Currently, however, many victim-survivors end up settling out of court and receive unfavourable financial outcomes. This occurs because the system is either unaffordable or because family violence is invisible: it either isn’t recognised as such or women are discouraged from raising it because it will only ‘complicate’ matters.

As noted by Women's Legal Service Victoria (WLSV) in their *Small Claims, Large Battles: Achieving economic equality in the family law system*<sup>34</sup> report, women who have few assets, no assets, or have joint debts arising from their past relationship do not receive sufficient money from property settlement to pay for private legal representation, and yet, "because of their financial vulnerability, they are the most in need of urgent access to a fair property settlement following separation"<sup>35</sup>.

A further issue is that family violence is largely irrelevant in property case law: judges are only bound to consider it (based on a 1997 judgment) if "there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage or... to have made his or her contributions significantly more arduous than they ought to have been"<sup>36</sup>.

Feedback from women indicates that many encounter problems obtaining financial disclosure from uncooperative partners. This can mean that their true financial circumstances are hidden and women end up with an unfair outcome. Natalie described how her former partner operated a lucrative retail business but as he earned his money in cash and it was tied up in various trust funds, he was able to hide his actual financial situation from the court. As this significantly reduced the pool of money being divided by the court, Natalie received a far lesser share than she was entitled to in the final orders.

Legal practitioners attempting to support women who had experienced family violence and economic abuse attested to similar tactics being used by perpetrators in a recent report by Good Shepherd, explaining that abusers used the property settlement process to "continue to control their partners and former partners, including intentionally delaying settlement and offering unreasonable settlement amounts"<sup>37</sup>.

Amending the Family Law Act to include a broader range of non-physical violence, including economic abuse and misuse of process, as well as training of judicial officers in family violence dynamics would improve the way judicial officers assess and resolve property matters involving the presence of family violence. Further, we support the recommendation made in *A better family law system* to amend the Family Law Act to enable:

- the impact of family violence to be taken into account in the Court's consideration of both parties' contributions; and
- the impact of family violence to be specifically taken into account in the Court's consideration of a party's future needs.

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<sup>35</sup> Women's Legal Services Victoria, March 2018, *Small Claims, Large Battles: Achieving economic equality in the family law system*

<sup>36</sup> *Kennon and Kennon* [1997] FamCA 27

<sup>37</sup> Above n 1, p. 39.

## Resolution and adjudication processes

Question 20 What changes to court processes could be made to facilitate the timely and cost-effective resolution of family law disputes?

Former Chief Justice of the Family Court of Australia, Diana Bryant AO, has noted that family law disputes involving family violence are inherently complex and involve contested facts. It is therefore challenging for courts to resolve these matters quickly while providing parties with “the kind of hearing which would enable those facts to be tested and findings made”<sup>38</sup>. Added to the inherent complexity of many family law disputes, the reasons for lengthy delays and drawn-out proceedings (which cause users significant expense) include complex decision-making considerations in the Act, the time-consuming nature of court processes required under the adversarial legal system, perpetrators intentionally “flooding” the court with affidavits or withholding information to drag out proceedings, a lack of judicial officers to hear matters, inadequate funding of legal assistance services leading to a large number of self-represented litigants (who slow the system down), and a lack of family violence literacy causing poor outcomes for families, whose affairs then require further intervention by the courts.

As identified in the Issues Paper, we have heard from women that such lengthy delays create safety risks, particularly for children; can exacerbate conflict; and can result in victim-survivors consenting to outcomes which do not secure their protection.<sup>39</sup>

Improving the timeliness of the family law system is unlikely to be successful until systemic changes have been addressed. We do not feel it is useful at this point to discuss changing individual court processes, and note that resolving family law disputes in a timely and cost-effective manner would be more achievable under an inquisitorial system that did not place undue emphasis on fact-finding and the past. We discuss this further below.

Question 23 How can parties who have experienced family violence or abuse be better supported at court?

“The trauma caused via the court process is almost as debilitating as the [domestic violence] itself, especially to the children involved” - Rosie

“Throughout this court process at the Federal Circuit Court in Dandenong, I was advised to not speak of the family violence. I had to ‘play a game’. This process felt as though it had little to do with the truth... As a woman it is impossible in the current system to speak the truth safely.”- Anna

### A new approach

**safe steps** would argue that the best way to support victim-survivors at court is to overhaul the current model of resolving parenting and property disputes. Family violence is “core business” in the Family Courts: over half of the matters dealt with by the courts involve allegations of family

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<sup>38</sup> Above n. 9, p. 8.

<sup>39</sup> ALRC, *Review of the Family Law System - Issues Paper*, p. 53.

violence<sup>40</sup>, and most matters involving family violence will not go to mediation and will require court determination.<sup>41</sup> Given this, and the problems outlined above with the existing family law system's response to family violence, particularly in relation to the safety of women and children, it is imperative that the system be substantially reformed. As noted by the Law Council of Australia, "family violence is a leading cause of death and disability for women. A poor response to family violence by the justice system increases the risk of homicide".<sup>42</sup>

We know what the problems are for victim-survivors in the family law system. They have been elucidated in many reports over a number of years and are referenced in the Issues Paper. **safe steps** has heard the same issues being raised over and over again by our clients.

We do not propose a specific alternative to the adversarial model at this point but are of the view that, given the prevalence of family violence in family law matters and the inherent complexity involved in determining matters involving children and human relationships, a specialised response such as a separate family violence court list may not be the answer<sup>43</sup>; more appropriate would be a system-wide shift. Broadly speaking, an improved system for victim-survivors of family violence could include:

- a coordinated, multi-disciplinary response that addresses the legal and non-legal needs of victim-survivors (like the Magellan list)
- an integrated case management system for family law system users
- the incorporation of inquisitorial and problem-solving approaches.

As stated previously, the success of any new approaches must be underpinned by amendments to the definition of family violence in the Family Law Act, removal of the presumption of equal shared parental responsibility and comprehensive training of family law professionals and judicial officers.

In addition, **safe steps** notes that any new model should:

- be co-designed by family violence specialists and system users;
- be informed by evaluations of other similar models domestically and internationally;
- include adequate protections for parties in matters involving family violence and child abuse;
- mandate that its decision-makers are comprehensively trained in family violence, cultural competency, disability awareness, child abuse and trauma informed practice and receive ongoing training in these areas; and
- be independently reviewed, evaluated and refined on a regular basis.

While **safe steps** supports exploring options for inquisitorial models of resolving family law disputes, particularly where family violence is involved, we reiterate our reservations about the

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<sup>40</sup> Above n. 10, p.2

<sup>41</sup> Diana Bryant, 2015, p 8.

<sup>42</sup> The Law Council of Australia, *People Who Experience Family Violence: Consultation Paper August 2017*, p. 4: <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/People%20Who%20Experience%20Family%20Violence.pdf>

<sup>43</sup> Having said that, we note that it may be beneficial to create a specialist court hearing process for Aboriginal and Torres Strait Islander people.

recently proposed parenting management hearings model.<sup>44</sup> In particular, given the complexity of matters involving family violence, we believe that parties should be legally represented to ensure they are advised of their legal options and the consequences of taking particular actions, to protect against re-traumatisation and achieve a fair hearing. Further, as noted by WLSA, “[w]omen who have experienced violence face enormous difficulty in advocating for themselves or their children, especially if they are in the same room or in the vicinity of the perpetrator of violence”<sup>45</sup>. However, we support further exploration of similar inquisitorial models by the ALRC as part of the Review, as it is a step in the right direction.

We would also be interested to consider the evaluation outcomes of the legally-assisted family dispute resolution (FDR) pilots that were mentioned in the Issues Paper to consider whether legally-assisted FDR could provide victim-survivors with a more appropriate means of resolving disputes.

**safe steps** is looking forward to considering and providing comment on the ALRC’s proposals for reform in its Discussion Paper later in the year.

### Possible changes to the current system

“The effects and trauma caused from a year of returning to court every three months is exponential.” - Anna

Due to long-term exposure to violence and abuse, many victim-survivors have mental health issues or even – as recently highlighted in a Brain Injury Australia report – mild to severe acquired brain injury as a result of multiple head traumas<sup>46</sup> and “by the time they engage with the legal system they may lack confidence, and require practical and emotional support”.<sup>47</sup> We have received this feedback from our FASS worker and from women directly. They highlighted the difficulties in relying upon friends and family members to provide emotional support during family law proceedings: many have been isolated for some time as a result of the violence and may feel uncomfortable telling people close to them about what has been going on. Or, if they are comfortable disclosing their story to friends and family, the length and ongoing nature of family law proceedings can act as a barrier to requesting support: Leonie emphasised how bad she felt repeatedly asking her friend to support her in court as it was a significant inconvenience for her friend, who needed to arrange time off work or childcare to attend.

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<sup>44</sup> See **safe steps’** submission to *Family Law Amendment (Parenting Management Hearings) Bill 2017*

<sup>45</sup> WLSA, Submission to FL Amendment Other Measures, p. 10

<sup>46</sup> A recent report by Brain Injury Australia (BIA) found that 40% of all victim-survivors attending Victorian hospitals over a ten-year period sustained a brain injury. BIA noted, however, that “hospital attendances are the tip of the iceberg” (p. viii) and state that mild traumatic brain injury is seldom diagnosed, even in hospital, and that it is likely that a significant proportion of family violence victim-survivors who do not attend hospital may have sustained brain injuries (between 30 per cent and 74 per cent) (p. 29). The effects of acquired brain injury can include cognitive problems with memory and concentration and difficulties with formulating plans and making decisions, (p. 5) and the report notes that these circumstances are often “unrecognised by bureaucratic systems” (p.27). Women with such injuries are likely to be disadvantaged in the adversarial system: Brain Injury Australia, 2018, *The Prevalence of Acquired Brain Injury Among Victims and Perpetrators of Family Violence*.

<sup>47</sup> Above n. 42, p. 3.

Aside from emotional support, many victim-survivors of family violence require practical assistance with housing, financial advice, counselling, drug and alcohol support.

As noted previously, **safe steps'** preference is for an overhaul of the status quo; however, we have included below some suggestions for improving the current system for victim-survivors:

- Expansion of the FASS program
- Embed specialist family violence support workers in the courts<sup>48</sup> and allow them to attend hearings and provide support to women although they are not party to proceedings (whether or not women are legally-represented)
- Establish a peer support program that links victim-survivors who are going through the court system for the first time with women with prior experience of the system
- Facilitate a more integrated service response at the courts
- Judicial officers should provide more leniency in court procedures to acknowledge the effects of trauma
- Ban direct cross-examination of victim-survivors by perpetrators by introducing the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017* (Cth) into Parliament as a matter of urgency.

### Risk Assessment

As identified in previous reports, a crucial element of system reform is the early assessment of family violence risk.<sup>49</sup> In particular, risk assessment should be performed prior to interim hearings. Court orders from interim hearings often last 12 months or more (due to delays in the court system) and have a significant impact on a family's life, yet are often informed by minimal evidence at a very brief hearings. Parenting orders that fail to acknowledge the risk of family violence often end up having adverse consequences for children. For example, the court failed to stop Natalie's ex-partner from having unsupervised access to their son after a no-contact order in place for some months ended, despite the presence of emotional and psychological abuse and the fact that he had failed to attend a men's behaviour change program. Her son ended up refusing contact with his father. Natalie further stated that her son was prevented from receiving support for the effects of the abuse during and after separation because her former partner refused to consent to him receiving therapy.

The Centre for Innovative Justice reported that courts often facilitate increased contact with children where men previously had minimal parental involvement, and "[w]ith unsupervised access over their children, many perpetrators [can] not cope with the resulting parenting demands, this in turn contribut[es] to an escalation in risk."<sup>50</sup>

Risk assessment must be specialised and ongoing – recognising that risk is not static – and must not be performed by family consultants or Independent Children's Lawyers as they are not

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<sup>48</sup> See above n. 3, p. 138.

<sup>49</sup> See for example, Recommendation 2 & 3, above n. 10.

<sup>50</sup> Centre for Innovative Justice, November 2016, *Pathways towards accountability: mapping the journeys of perpetrators of family violence: Report to Department of Premier and Cabinet*, p. 43.

qualified to perform such assessments. As such, we support the recommendations proposed in *A better family law system*:

- That the Australian Government progresses, through the Council of Australian Governments, the development of a national family violence risk assessment tool. The tool must be nationally consistent, multi-method, multi-informant and culturally sensitive and be adopted to operate across sectors, between jurisdictions and among all professionals working within the family law system.
- That the Australian Government introduces to the Parliament amendments to the *Family Law Act 1975* (Cth) to require a risk assessment for family violence be undertaken upon a matter being filed at a registry of the Family Court of Australia or the Federal Circuit Court of Australia, using the national family violence risk assessment tool. The risk assessment should utilise the national family violence risk assessment tool and be undertaken by an appropriately trained family violence specialist provider.

We also note recommendation 67 of the Royal Commission in relation to The Magistrates' Court registry adopting a practice of providing risk assessments made by applicant and respondent support workers to magistrates as a matter of course and submit that such a practice could also be implemented by Family Courts in the intervening period before a national risk assessment tool is introduced, as well as to assess risk when an applicant first makes contact with the courts.

Further, we reiterate our previous recommendation that children should be screened separately for family violence in parenting disputes.<sup>51</sup>

### Interaction of Family Court orders with state and territory court orders

In addition, **safe steps** notes the issues we raised previously regarding the incompatibility of Family Courts Orders and intervention orders, which are enforced at a state and territory level, and the particular impact this can have on women when they are placed into high security emergency accommodation or refuge. Currently, women are still required to maintain regular contact with a perpetrator in accordance with Family Court parenting orders despite having to leave their house due to safety concerns. Complying with Family Court contact orders under these circumstances poses significant risks: the likelihood of violence is escalated at the point of contact and the woman may have to breach refuge rules by seeing the perpetrator (most refuges prohibit contact with the perpetrator of violence as a blanket rule), risking homelessness or a return to violence.<sup>52</sup>

To improve inconsistencies between state and federal laws, **safe steps** supported changes to the law proposed in the recent *Family Law Amendment (Family Violence and Other Measures) Bill 2017*. However, we would recommend that the ALRC review the above issue in more detail as we do not believe it is covered by the recent proposed amendments.

### Advisory panel

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<sup>51</sup> See **safe steps**' submission to *A better family law system to support and protect those affected by family violence*, p. 13.

<sup>52</sup> *Ibid*, p. 10.

We reiterate our previous recommendation to the *A better family law system* inquiry that there should be a panel of representatives with lived experience of family violence to provide ongoing recommendations for improvement of the Courts and the family law system. **safe steps** notes that this would mirror bodies such as the Victims of Crime Consultative Committee in Victoria.<sup>53</sup>

### Family consultants

“The court psychologist would not allow me to have a support person in the room with me. I went in and it immediately felt like I was being cross-examined. The report that came back from this person was damning of me yet referred to the father as ‘child focused’. I am told that most women receive damning reports from this court psychologists, In fact my lawyer suggested that mine was one of the better reports.

I was briefed by my lawyer that I must not say anything to undermine the perpetrators ability to parent nor his controlling violent behaviour. If I did speak the truth it would be used against me. It would be suggested that I’m just making it up and that it is me that is the problem and influencing the child to not want to see his father.” - Anna

“The process of ‘assessment’ was not transparent, there was no oversight, no appeal, no opportunity to correct incorrect reporting and despite all the red flags identified by the report writers my abuser still got the children!” - Leonie

According to the women we consulted with, one of the most problematic aspects of the current family law system are the practices of family consultants and the influence that they have upon judicial decision-making. As touched upon above, we heard that family consultants often “equalise” or minimise family violence and abuse in their reports to present circumstances in a way that aligns with the current presumptions in the Act regarding the importance of children having a meaningful relationship with both parents. We also heard from women and partner organisations that there exists an internal court culture which supports the use of court report writers even in the face of significant conflict of interest issues. Further, many women described the prohibitive costs associated with family consultant reports and widespread practices, particularly by private consultants, which included ignoring intervention orders, accusing women of coaching their children and exhibiting threatening behaviour towards children who they were assessing. They also noted that many of the consultants have a lack of accreditation and training in family violence. This was noted by the Family Law Council in its 2016 report: “[w]hile ongoing professional development is provided to family report writers by the Child Dispute Services section of the family courts, there is presently no requirement that report writers have family violence training.”<sup>54</sup> These issues were recently documented by the SPLA in *A better family law system*.

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<sup>53</sup> Victims of Crime Consultative Committee: <https://www.victimsofcrime.vic.gov.au/home/victims-of-crime-consultative-committee>

<sup>54</sup> Above n. 3, p. 31.

If they continue to be necessary in a redeveloped family law system, there must be changes to the practices, accreditation and training of family consultants and the culture surrounding their use. As such, we support WLSA's recommendations in relation to family consultants:

- The Australian Institute of Family Studies be provided with a reference to undertake research into the practices and assessments of family consultants.
- The Federal Government, in consultation with family violence and family law experts develop an accreditation process and minimum standards for family consultants.
- The Federal Government establish an oversight mechanism and complaints process to monitor and review the conduct of family consultants.

### Enforcement of financial orders

A further issue for women who have experienced family violence is that the family law system does not enforce financial orders with respect to parenting, such as health costs, school fees and child support. One woman **safe steps** spoke to advised that her former partner was in breach of his financial orders for a number of years but when she attempted to recover money via a recovery order, she was told that she would be required to provide financial evidence as part of the process, meaning that her ex-partner would be able to view her bank account balances. This distressed her so much that she decided not to go ahead with the recovery order.

**safe steps** would recommend the development of enforcement measures for such orders or reviewing current recovery processes to ensure they are trauma-informed and protect victim-survivors.

### Question 25 How should the family law system address misuse of process as a form of abuse in family law matters?

*"Separated families revealed that around a quarter of men involved had been through a MBCP, with most partners knowing little about the man's participation. Women reported that perpetrators used this participation, however, as 'evidence' of being a 'good father', which courts tended to find persuasive."*

Submissions to the Royal Commission, such as that above, recognised that perpetrators of violence often use family court proceedings to maintain previous patterns of coercion and control.<sup>55</sup> This issue has been raised in previous inquiries and was attested to by women that we consulted with in preparing this submission.

As noted above, we believe that including misuse of process as a form of family violence in the Act would go some way in mitigating this problem. Earlier identification of family violence risk in family law matters should also ensure that a perpetrator attempting to obstruct or misuse proceedings is more quickly recognised by the system. Further, the shift to an inquisitorial model would potentially remove some of the legal processes that lend themselves to misuse by perpetrators.

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<sup>55</sup> Royal Commission into Family Violence, March 2016, Summary and Recommendations, p. 32

**safe steps** commends the Federal Government's recent proposal to insert section 45A into the Act to "better protect victims of family violence from perpetrators who attempt to use the family law system as a tool of continued victimisation<sup>56</sup>", by giving clearer powers to family law courts to dismiss cases that are instigated by perpetrators and clearly have no merit. However, we reiterate our view that this amendment might have unintended consequences for victim-survivors unless the family law system is better trained to recognise the effects of trauma.<sup>57</sup>

### Subpoenaing of sensitive records

"The first violation that distressed me was despite only being in a relationship with the perpetrator for under two years, all of my doctors and psychologist records were subpoenaed to the courts and available for the perpetrator to access. These records dated back twenty years. I was extremely disturbed by this." - Anna

One form of misuse of the system by perpetrators is the practice of issuing subpoenas to obtain access to sensitive material such as a victim-survivor's therapeutic counselling records or sexual assault service records. **safe steps** consulted with Liberty Victoria on this issue, who noted that the Commonwealth is the only jurisdiction in Australia that does not currently have a sexual assault counselling privilege.

**safe steps** raised this issue in its submission to the *A better family law system*. We are subject to approximately five subpoenas a month for client files, and although we have so far been successful in objecting to these, the process is distressing for our clients. Objecting to the requests also expends significant resources.

The success of such requests results in breaches of confidence between counsellors and victim-survivors, damage to the therapeutic relationship, and exposes victim-survivors to the risk of further psychological harm. It may also have the knock-on effect of discouraging victim-survivors from seeking counselling services for fear of exposure. Even if access to the sensitive records is restricted to a perpetrator's lawyer, there is still a risk that if the perpetrator later becomes self-represented, he would be entitled to access the records, unless the Court orders otherwise.

We recommend that an absolute privilege for sensitive records, including sexual assault counselling records, to be inserted into either or both the *Family Law Act 1975* (Cth) and the *Evidence Act 1995* (Cth). Further, we support Liberty Victoria's recommendation that legal services be funded to provide legal support to counsellors wishing to object to subpoenas for counselling records; and that resources are made available to help victim-survivors enforce their rights in the family law system.

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<sup>56</sup> Explanatory Memorandum, *Family Law Amendment (Family Violence and Other Measures) Bill 2017* (Cth), p. 3

<sup>57</sup> **safe steps'** submission to *Family Law Amendment (Family Violence and Other Measures) Bill 2017* (Cth), p. 9

## Children's experiences and perspectives

Question 34 How can children's experiences of participation in court processes be improved?

Question 36 What mechanisms are best adapted to ensure children's views are heard in court proceedings?

As we discuss below, **safe steps** is of the view that the current mechanisms designed to engage children in the family law system are inadequate. We recognise that there are inherent difficulties in simply asking children what they believe to be in their best interests, particularly if it might involve ceasing to have an ongoing relationship with one of their parents. Women we spoke to told of their children struggling to articulate the abuse they had suffered until they had spent some time apart from their father, the perpetrator. Other women told us about how the behaviour and attitudes of their children towards them began to mirror the abuse being perpetrated by their ex-partners as a result of emotional abuse and manipulation by fathers post separation. These complexities make seeking children's views about parenting arrangements fraught with difficulty; and all this is compounded by a family law system that does not adequately recognise family violence and the abuse that many perpetrators subject their children to during and after separation.

We hope that broader changes and, in particular, training of judicial officers and other family law professionals, will result in a system which supports and understands the nature and dynamics of family violence, is better equipped to consult children about their needs and consequently to determine what is in their best interests.

### Independent Children's Lawyers and Family Consultants

Although the stated purpose of Independent Children's Lawyers (ICLs) is to represent a child's best interests and ensure their views are put before the court, we heard from many women that Independent Children's Lawyers (ICLs) often never met or spoke to their children, were untrained in the dynamics of family violence, and relied upon information provided by Family Consultants or barristers. One woman told us that the abuse in her relationship was identified simply as "bad communication" by the Independent Children's Lawyer. We were also informed that the quality of ICLs was inconsistent. As such, we do not support the further use of ICLs in court proceedings unless they are trained in family violence and working with children – and mandated to actually speak to the children they are supposed to be assisting. An ICL's understanding of a child's best interests should not be limited to what they are told by Family Consultants or lawyers, otherwise their independence comes into question and their role becomes somewhat redundant.

Further, as discussed above, there are arguably significant issues with Family Consultants representing children's views in their reports. The women we spoke to regarding their children's experiences with Family Consultants raised questions about their family violence training and ability to engage with children who had suffered or were subject to ongoing abuse by perpetrators. One victim-survivor we spoke to during the preparation of our submission to the *A Better Family Law System* inquiry, Harriet, stated that the first psychologist appointed claimed that her pre-school-aged daughter had been "coached" in her response to questions because Harriet

had tried to prepare her for the process by telling her what she could expect on the day. Much later, however, a second psychologist identified significant psychological abuse being perpetrated toward the child by the father. At best, it appears that some consultants have the requisite training but, even then, what they write in their reports frequently does not reflect the entirety of what they observe during sessions with family members. We heard from women that report findings are often skewed towards supporting the presumption of equal shared parental responsibility and associated guidance in the Act.

### Therapeutic approaches

It is crucial that, where possible, children's voices are heard in matters involving family violence, as very often children will have been exposed to or subject to the abuse as well – although not all will be able to recognise or articulate what is happening.

Therapeutic justice approaches to engaging children are worth exploring. As an example, one woman told us of a meeting her child had with a judicial officer in the Magistrates' Court, which she described as "amazing", as the magistrate sat opposite her son at a table, rather than at the bench, listened to his story, and "heard his voice". However, **safe steps** acknowledges that the system should not rely upon the ability of individual judicial officers to ensure that children's perspectives are heard, and that there cannot be a 'one-size-fits-all' approach to dealing with children.

In addition to comprehensive training of judicial officers and other family law professionals, we would welcome clearer guidelines for decision-makers or other proposals that aim to afford children greater participation in the family law system, so long as they are in accordance with the *Convention on the Rights of the Child*.

### Question 40 How can efforts to improve children's experiences in the family law system best learn from children and young people who have experience of its processes?

**safe steps** endorses the recommendation made by the SPLA that the Australian Government establish a young person advisory panel to assist in the design of child-focused family law services that build on an understanding of children's and young people's views and experiences of the family law system's services.<sup>58</sup>

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<sup>58</sup> Above n. 10, p. 309.

## Professional skills and wellbeing

Question 41 What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

Question 42 What core competencies should be expected of judicial officers who exercise family law jurisdiction? What measures are needed to ensure that judicial officers have and maintain these competencies?

Former Chief Justice Diana Bryant noted that Family Court judges are constantly dealing with the most difficult cases: they no longer have a cohort of less complex matters to deal with as the majority of these will be resolved via mediation outside the court system, or will settle before getting to trial.<sup>59</sup> Whether or not family law disputes continue to be resolved in the current adversarial court setting, it is clear that judicial officers, and all other family law system professionals, including lawyers, registrars, family report writers, Independent Children's Lawyers, interpreters and other court staff, are comprehensively trained in the following areas to better equip them to manage complex family law matters:

- the nature and dynamics of family violence and child sexual abuse, including perpetrators misuse of the family law system
- the capacity to identify family violence risk
- cultural awareness, including understanding the perspective and specific needs of the Aboriginal and Torres Strait Islander people, those from culturally and linguistically diverse backgrounds, parents and children with disability, and LGBTIQ clients and families; and
- trauma-informed practice.

The current lack or inconsistency in understanding of the above areas is in large part responsible for restricting the system from being able to provide parties with favourable outcomes (particularly if they are vulnerable or marginalised), and endangers women and children, prevents perpetrators from being held accountable and perpetuates damaging stereotypes about women. Given the nature of the adversarial legal system and the professional culture surrounding it, the benefits of such training may take time to be felt in the system.

**safe steps** sees the Family Courts' Family Violence Best Practice Principles, the Family Violence Bench Book<sup>60</sup> and the Avert Family Violence training package<sup>61</sup> as important steps in educating family law professionals; however training must be mandatory, ongoing, comprehensive and include more than completion of some online modules. It should also raise awareness about certain police practices (such as issuing dual protection orders), which lead to victim-survivors being wrongly identified and prosecuted as "primary aggressors" in relationships. The aim of this

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<sup>59</sup> Former Chief Justice Diana Bryant AO, Family Court of Australia, 22 September 2015, *Launch – Stepping Stones: Legal Barriers to Economic Equality after Family Violence*:

<http://www.womenslegal.org.au/files/file/Chief%20Justice%20SPEECH.pdf>

<sup>60</sup> Domestic and family Violence Bench Book: <http://dfvbenchbook.aija.org.au/>

<sup>61</sup> Avert Family Violence: <https://www.avertfamilyviolence.com.au/>

training would be to produce a family law workforce which has a more nuanced understanding of family violence that recognises emotional, psychological, economic abuse, as well as manipulation of the family law system itself by perpetrators.

As noted in our recent submission to the *Family Law Amendment (Family Violence and Other Measures) Bill 2017*, we support the implementation of Recommendation 28 of the *A better family law system* report.

#### Question 44 What approaches are needed to promote the wellbeing of family law system professionals and judicial officers?

“We make orders that have enormous consequences. We make orders that tell people where they can and can't live, how often or if they will see their children at all. And they are pretty intrusive orders into people's lives.. [I]t's an onerous responsibility”<sup>62</sup> – Former Chief Justice of the Family Court, Diana Bryant AO

**safe steps** recognises the difficulty faced by judges and other professionals involved in family law – particularly given the stress on the current system – and the need to promote their wellbeing. As noted by one magistrate, providing a healthy and supportive working environment is necessary to protect both family law professionals and the families they deal with: stress, burn-out or vicarious trauma can “impact on their temperament and inhibit their ability to take a therapeutic approach”<sup>63</sup>. Further, it is important that the family law system continues to attract people to the work by offering a healthy and supportive work environment that supports people’s wellbeing.

It is hoped that reforms to the system will eradicate some of the issues currently contributing to stress on the system and on professionals working in family law, such as: the backlog of cases, the number of complex matters being determined by the courts (and the tendency for matters to become more complex with delays in their resolution) and the complexity of the Family Law Act. **safe steps** believes that these changes, along with the training discussed above, will result in better decision-making and more positive outcomes for families, which in turn will reduce existing levels of anxiety and distress amongst parties and create less contested, adversarial working environment.

## Conclusion

As is evident throughout this submission, victim-survivors of family violence have found themselves badly affected by the many shortcomings and failures of the current family law system. At a time when they are already experiencing trauma, to compound that trauma with a system which is not aware of, or responsive to their needs is highly distressing, and points to the desperate need for reform. In providing their feedback to this Inquiry, they are determined that

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<sup>62</sup> Damian Carrick, ‘Retiring Chief Justice reflects on thirteen years in the Family Court’, Law Report, ABC Radio National, 19 September 2017: <http://www.abc.net.au/radionational/programs/lawreport/2017-09-19/8956300#transcript>

<sup>63</sup> Above n. 7

sharing their stories will lead to better outcomes for the women and children who come after them.

We see the Australian Law Reform Commission's review as a once-in-a-generation opportunity to provide a forum to bring together the many findings of previous reviews, and to consolidate an approach which leads to sweeping and dramatic reforms to the family law system in this country. We would welcome the opportunity to speak further to any of the submissions raised in this Issues Paper, and look forward with anticipation to the release of the Discussion Paper as the next stage of this Inquiry.