



**Law Council**  
OF AUSTRALIA

# **Developing the next National Plan to Reduce Violence against Women and their Children**

**Department of Social Services**

**13 August 2021**

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# Table of Contents

<b>About the Law Council of Australia</b> .....	<b>3</b>
<b>Acknowledgement</b> .....	<b>4</b>
Law Council Constituent Bodies.....	4
<b>Introduction</b> .....	<b>5</b>
<b>Background to consultation</b> .....	<b>6</b>
<b>Discussion and recommendations</b> .....	<b>7</b>
Gender equality and cultural attitudes .....	7
Primary prevention and collaborative practice.....	8
Language and accountability .....	9
Law reform .....	9
Definition of family, domestic and sexual violence.....	9
Coercive control.....	12
Parenting arrangements .....	14
Family violence education and training.....	14
Education and training for legal professionals.....	14
Education and training for the community .....	16
Funding and resourcing the family law system .....	16
The Family Courts .....	17
Legal assistance providers .....	20
Jurisdictional divides and information sharing.....	22
Availability of supports .....	26
Specific needs and diverse experiences of women .....	26
First Nations women and their children .....	27
Women with disability .....	33
Women from Culturally and Linguistically Diverse Backgrounds .....	34
Family violence and temporary migration.....	35
LGBTQI+ communities .....	38
Perpetrator interventions .....	39
Performance, monitoring and reporting .....	41

## About the Law Council of Australia

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

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

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

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

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

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

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

# Acknowledgement

The Law Council of Australia acknowledges that this submission has been primarily prepared by its Family Law Section.

The Family Law Section is the largest of the Law Council's specialist Sections. Since its inception in 1985, the Family Law Section has developed a strong reputation as a source for innovative, constructive and informed advice in all areas of family law reform and policy development. With a national membership of more than 2,400 it is committed to furthering the interests and objectives of family law for the benefit of the community.

The current members of the Family Law Section Executive are:

- Di Simpson (Chair)
- Jason Walker (Deputy Chair)
- Nicola Watts (Treasurer)
- Paul Doolan (Immediate Past Chair)
- Jamie Burreket
- Alison Burt
- Jasmine Evans
- Greg Howe
- Michael Kearney SC
- Trevor McKenna
- Aditi Srinivas
- Sydney William QC

## **Law Council Constituent Bodies**

The Law Council is grateful to the following Constituent Bodies for their assistance with the preparation of this submission:

- Queensland Law Society;
- Law Society of New South Wales; and
- Law Society of South Australia.

## Introduction

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to provide a submission to the Department of Social Services (**DSS**) regarding its [public consultation](#) for developing the next *National Plan to Reduce Violence against Women and their Children* (**National Plan**).
2. As rightly acknowledged in Australia's existing [National Plan to Reduce Violence against Women and their Children 201-2022](#) (**Existing Plan**), family (and, typically, gendered) violence affects not only the victim, but also the children who are exposed to the violence, their families and the community more broadly.<sup>1</sup>
3. The Law Council strongly supports the objectives of the Existing Plan, as well as the four Action Plans through which it has been implemented to date. Violence against women and their children in Australia should be considered a national emergency which requires decisive and immediate action. Over 2 million Australians have experienced physical or sexual violence from a current or previous partner<sup>2</sup> and on average, one woman is murdered by her current or former partner every week.<sup>3</sup>
4. Recognising this emergency, the National Plan must prioritise timely action and proper implementation, including resourcing, monitoring and oversight. Importantly, effective implementation must involve substantial and sustained resourcing across multiple sectors, including legal, health and social. The 'key priorities and focus areas' for the National Plan as drafted in the consultation guide produced by the DSS will require a significant injection of sustained and consistent funding from government. This will ensure that long-term programs can be implemented and the immediate needs of women and children at risk of, and experiencing, family and sexual violence, can be met.
5. It is acknowledged that the Australian community has experienced a positive shift in attitude regarding violence against women and their children since the Existing Plan commenced in 2010.<sup>4</sup> Australians 'are more likely to understand that violence against women involves more than just physical violence in 2017 than they were in 2013 and 2009' and 'are less likely to hold attitudes supportive of violence against women'.<sup>5</sup> In preparing the National Plan, it will be crucial for the DSS to utilise the knowledge acquired through implementation of the Existing Plan and the ongoing consultation to improve existing initiatives, address issues and lessons learnt, and work towards providing an effective policy platform that is built upon primary prevention.
6. Coordination with the DSS' ongoing work on implementing the successor plan to the *National Framework for Protecting Australia's Children 2009-2020* (**Children Protection Framework**) will also be crucial given the considerable overlap between the proposed vision, goal and strategic priorities for that Framework and the National

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<sup>1</sup> Council of Australian Governments, *National Plan to Reduce Violence against Women and their Children 2010-2022* <[https://www.dss.gov.au/sites/default/files/documents/08\\_2014/national\\_plan1.pdf](https://www.dss.gov.au/sites/default/files/documents/08_2014/national_plan1.pdf)> ('Existing Plan') 1.

<sup>2</sup> Australian Institute of Health and Welfare, *Family, Domestic and sexual violence in Australia: continuing the national story 2019* (Report, 5 June 2019) <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-australia-2019/contents/summary>> ('AIHW 2019 Report').

<sup>3</sup> Our Watch, *Quick facts* <<https://www.ourwatch.org.au/quick-facts/>>.

<sup>4</sup> ANROWS, *Australians' attitudes to violence against women and gender equality. Findings from the 2017 National Community Attitudes towards Violence against Women Survey (NCAS)* (Summary, 2018)

<[https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2019/12/300419\\_NCAS\\_Summary\\_Report.pdf](https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2019/12/300419_NCAS_Summary_Report.pdf)> 4.

<sup>5</sup> Ibid.

Plan currently under consideration.<sup>6</sup> The DSS is asked to refer to relevant input it receives in response to the Consultation Paper for the Children Protection Framework when preparing the National Plan, including the Law Council's submission to that Consultation Paper and, particularly, the sections addressing the protection of children from violence.<sup>7</sup>

7. This submission has been broadly framed to respond to the questions posed by the DSS in its online questionnaire, with reference to the consultation guide. The Law Council looks forward to the opportunity to further contribute to the subsequent development of the more detailed aspects of the draft National Plan.

## Background to consultation

8. The Law Council notes that the Existing Plan is the vehicle through which the DSS, alongside the Office for Women, currently draws upon programs, grants and research to advance gender equality and improve the status and wellbeing of women in Australia.<sup>8</sup> The Plan has been implemented through four successive 'Action Plans', with the current [Fourth Action Plan 2019-2022 \(fourth Action Plan\)](#) endorsed by the Council of Australian Governments (**COAG**) in August 2019.
9. Significantly, the announcement of consultations for the National Plan closely followed the 1 April 2021 release of the report by the House of Representatives Standing Committee on Social Policy and Legal Affairs (**SPLA Committee**) on its inquiry into family, domestic and sexual violence (**the Parliamentary Inquiry, and the SPLA Report**). The Law Council welcomed several aspects of the SPLA Report, including:
  - the proposal for a uniform national definition of family, domestic and sexual violence (**FDSV**)<sup>9</sup>;
  - the proposal that Federal, state and territory governments develop shared principles to guide any future offences targeting coercive and controlling behaviour;
  - the suite of recommendations calling for additional funding to legal assistance services to assist victims of FDSV, and engage more social workers experienced in family violence, child protection and family law matters; and
  - the recommendation that there be a commitment to increasing the overall baseline funding for specialist family and domestic violence service providers.<sup>10</sup>
10. The Law Council also noted its disappointment that the SPLA Report did not consider or call for additional funding for the courts to adequately address family violence in the justice system.<sup>11</sup>

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<sup>6</sup> See, Department of Social Services, *Consultation Paper: Implementing the Successor Plan to the National Framework for Protecting Australia's Children 2009-2020* (June 2021) <dss-engage-discussion-paper-3-june.pdf>.

<sup>7</sup> See, Law Council of Australia, 'Submission to the Department of Social Services on Implementing the successor plan to the National Framework for Protecting Australia's Children' (26 July 2021) at 19, 22-23.

<sup>8</sup> See Department of Social Services, *Women's Safety* (9 August 2019) <<https://www.dss.gov.au/our-responsibilities/womens-safety>>.

<sup>9</sup> For the purposes of this submission, the term 'family violence' will also be used to refer to domestic and family violence and abuse, which includes sexual violence and captures non-physical forms of abuse, including that which is technology-facilitated.

<sup>10</sup> Law Council of Australia, 'A national response to family, domestic and sexual violence is needed' (Media Release, 6 April 2021) <<https://www.lawcouncil.asn.au/media/media-statements/a-national-response-to-family-domestic-and-sexual-violence-is-needed>>.

<sup>11</sup> *Ibid.*

## Discussion and recommendations

11. The Law Council notes that the draft National Plan proposes a multi-disciplinary and multi-faceted approach to preventing FDSV. As a preliminary comment, the Law Council agrees that:
  - preventing FDSV will require addressing cultural norms of gender inequality at its foundation;
  - addressing gender-based socio-economic inequality will be key to both the prevention of FDSV and the recovery of victims;
  - measures for responding to FDSV should be evidence-based and local, targeted, accessible, culturally informed and trauma-informed;
  - responses should include integrated, sustainably resourced programs and services in areas such as police services, school and university based services, crisis health and accommodation services, financial assistance services, perpetrator behaviour change programs, legal services and justice responses;
  - First Nations peoples should be at the centre of all aspects of responding to violence in their communities; and
  - specialised skills will be required to understand and respond to particular cultural and linguistic contexts.
12. In view of the Law Council's objects, this submission focuses on law reform, legal services and legal system responses to FDSV. However, the Law Council notes that addressing FDSV to create safer communities for women and their children requires understanding of the broader social and economic factors that play into violence risk. These range from gender bias to economic inequality, homelessness, mental health issues and discrimination. Justice responses to FDSV must be cognisant of these factors.
13. Further, by way of overarching comment, the Law Council supports the recommendation in the SPLA Report that, in accordance with National Priority Two of the Fourth Action Plan, any FDSV policies, programs and legislative frameworks which affect First Nations peoples must be co-designed and co-evaluated by First Nations peoples along with government.<sup>12</sup> The National Plan should also be coordinated with the state and territory implementation of the relevant targets in the National Agreement on Closing the Gap.

### Gender equality and cultural attitudes

14. The Law Council notes that one of the principles which the DSS has identified in its consultation guide is that '[g]ender inequality is a key driver of violence against women, and reinforced by factors such as socio-economic status, mental illness and prejudice.'<sup>13</sup> Further, one of the key achievements cited by the DSS is that '[r]elationships are respectful and gender equality is reinforced'.<sup>14</sup> The Law Council agrees that gender equality and cultural attitudes are a major issue for people

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<sup>12</sup> House of Representatives Standing Committee on Social Policy and Legal Affairs, *Parliamentary Inquiry into Family, Domestic and Sexual Violence* (Final Report, March 2021) ('SPLA Report') Rec 36.

<sup>13</sup> Department of Social Services, 'Preventing and addressing violence against women and children: consulting on the next National Plan' (April 2021) <<https://engage.dss.gov.au/wp-content/uploads/2021/04/slide-deck-updated-13-april-2021.pdf>> ('Consultation Guide') 3.

<sup>14</sup> 'Consultation Guide' (n 13) 7.



experiencing family violence and must be addressed and, where necessary, changed before any real change can take place.

15. The Law Council supports existing policy initiatives to advance gender equality and respect for women, including:
  - to continuously improve community knowledge and attitudes by investing in primary prevention;<sup>15</sup> and
  - the 'Stop it at the Start' national primary prevention campaign,<sup>16</sup> which is designed to prevent the drivers of violence and promote a shift in culture and community attitudes.<sup>17</sup>
16. However, it is noted that there remains significant scope for improvement. The 2017 *National Community Attitudes towards Violence against Women Survey (NCAS)*, conducted by the independent, not-for-profit research organisation, Australia's National Research Organisation for Women's Safety Limited (**ANROWS**), indicates some positive progress in cultural attitudes towards women in the period between 2009 and 2017. Yet the NCAS also found that two in five Australians believe that gender inequality is exaggerated and that women make up false reports of sexual assault in order to punish men.<sup>18</sup> Further, one in five Australians believes domestic violence is a normal reaction to stress, and that sometimes a woman can make a man so angry that he hits her without meaning to.<sup>19</sup> It is well-accepted that such beliefs are harmful and perpetuate dangerous misconceptions about women and family violence.
17. In light of the enduring problematic gender attitudes throughout Australian society, evidence-based awareness and education initiatives, programs and infrastructure that respond to gender inequality and promote respectful relationships will form an essential aspect of any future National Plan. This will be assisted by ensuring that responsibility for the prevention of violence against women and children remains a core priority for all industries and areas of government, and that prevention initiatives and programs are coordinated and tailored so as to maximise their impact on community attitudes and behaviours that lead to violence.

### **Primary prevention and collaborative practice**

18. Addressing underlying structural and systemic gender inequalities and the patriarchal stereotypes that inform them is a crucial long-term measure to prevent violence against women and their children.<sup>20</sup> The Law Council considers that while early intervention and support for victims, and accountability for perpetrators, is paramount, primary prevention (which involves works 'across the whole population to address the underlying factors or causes of violence'<sup>21</sup>) should remain the key focus when developing the National Plan. Research suggests that primary prevention, as well as

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<sup>15</sup> See, Department of Social Services, 'Fourth Action Plan: National Plan to Reduce Violence against Women and their Children 2010–2022' <[https://www.dss.gov.au/sites/default/files/documents/08\\_2019/fourth\\_action-plan.pdf](https://www.dss.gov.au/sites/default/files/documents/08_2019/fourth_action-plan.pdf)> ('Fourth Action Plan') 5.

<sup>16</sup> Commonwealth of Australia, 'Stop it at the Start' (Web Page) <<https://www.respect.gov.au/>>.

<sup>17</sup> Ibid; 'Fourth Action Plan' (n 15) 16.

<sup>18</sup> ANROWS, *Are we there yet? Australians' attitudes towards violence against women and gender equality* (Research to policy and practice, March 2018) <<https://www.anrows.org.au/publication/are-we-there-yet-australians-attitudes-towards-violence-against-women-gender-equality-summary-findings-from-the-2017-national-community-attitudes-towards-violence-against-women-survey-nc/>>.

<sup>19</sup> Ibid.

<sup>20</sup> See, Mary Ellsberg et al, 'Prevention of Violence against Women and Girls: What Does the Evidence Say?' 385 (9977) (2015) *The Lancet* 1555–566.

<sup>21</sup> 'SPLA Report' (n 12) [6.4].



restorative justice initiatives, has the potential to have the largest impact on reducing the prevalence of violence against women and their children.<sup>22</sup>

19. The Law Council notes that in recent years, more attention has been given to ways to reduce or prevent violence, in addition to dealing with its effects.<sup>23</sup> This is reflected in the Fourth Action Plan, which places emphasis on the importance of preventative strategies.
20. Alongside primary prevention and collaborative practice initiatives, the Law Council emphasises the need for professionals working in relevant sectors, including health and social support services, to engage in ongoing professional development on violence against women and their children. The Law Council recognises the benefits of encouraging family violence training across the entire legal profession, appreciating that family violence is not only relevant to family lawyers.<sup>24</sup> This includes education on complex family dynamics and diverse family structures, as well as the particular impacts and experiences of violence for First Nations women, women from culturally and linguistically diverse backgrounds, women with disability and LGBTQI+<sup>25</sup> people.

## Language and accountability

21. The Law Council considers that the language used in the National Plan and the Action Plans which implement it should be carefully considered. It is observed that the Existing Plan and previous Action Plans have utilised language which focuses primarily on women and their experience as victims of violence.<sup>26</sup>
22. In the Law Council's view, the issue of violence against women should, where appropriate, be framed with a focus on perpetrators and, therefore, on changing the behaviour of men and boys – who are, overwhelmingly, the perpetrators.<sup>27</sup> Maintaining focus on holding perpetrators to account is considered essential in effectively addressing violence against women, by shifting responsibility away from victims and recognising that using violence is a choice.

## Law reform

### Definition of family, domestic and sexual violence

#### Current definitions

23. The Law Council notes that there continues to be significant differences between the definitions of family violence both within federal legislation and across state and territory legislation.

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<sup>22</sup> L Bartels, 'Emerging Issues in domestic/family violence research' (Research In Practice Report no 10, 2010) *Australian Institute of Criminology*.

<sup>23</sup> 'SPLA Report' (n 12) [6.7].

<sup>24</sup> Law Council of Australia, 'Legal profession leading change on domestic and family violence' (Media Release, 30 May 2021) <<https://www.lawcouncil.asn.au/media/media-releases/legal-profession-leading-change-on-domestic-and-family-violence>>.

<sup>25</sup> LGBTQI+ stands for Lesbian, Gay, Bisexual, Transgender, Queer and Intersex. The '+' can include other letters, including Q (Queer or Questioning), A (Asexual), or P (Pansexual). The acronym is intended to be inclusive of a diverse group of people based on sex characteristics, intersex status, gender expression and sexual orientation. The Law Council adopts the outlook of Pride in Diversity, who acknowledge that 'terminology can be contentious, but we also understand the importance of a consistent language for employers. We use the acronym LGBTI as a representative term for our community. We do not in practice, education, service delivery or intention exclude any one identity or person from within our community'.

<sup>26</sup> See, for example, *Existing Plan* (n 1); *Fourth Action Plan* (n 15).

<sup>27</sup> Australian Bureau of Statistics, '4906.0 Personal Safety, Australia' (8 November 2017) <<https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>>.

24. In some states and territories (eg, Victoria and the Australian Capital Territory), the use of coercion, control or instilling fear is not a mandatory element of the definition of family violence, whereas in New South Wales (**NSW**) at least one of those elements is required. Further, in Western Australia and Queensland, the state legislation requires the identification of the person most in need of protection; other states have different approaches intended to identify the primary aggressor. The use of the term/s also varies; for example, the Queensland state legislation refers to ‘domestic and family violence’.
25. At the federal level, the definition at section 4AB of the *Family Law Act 1975* (Cth) (**Family Law Act**) was most recently amended in 2011 to reflect the recommendations of the Australian Law Reform Commission (**ALRC**) and the NSW Law Reform Commission in 2010.<sup>28</sup> The intention of the amendment was to capture ‘a wide range of behaviour including assault, sexual assault or other sexually abusive behaviour, stalking, emotional and psychological abuse, and economic abuse’ and to encompass both ‘patterns of family violence and single violent events’.<sup>29</sup> The approach adopted in the drafting of section 4AB contains two elements, namely:
- a ‘core’ definition of family violence, which includes a requirement for the behaviour to involve coercion, control or to have caused fear to a family member; and
  - a non-exhaustive list of the behaviours which may constitute family violence.

#### **Benefits of a harmonised definition**

26. The Law Council has argued that there is benefit in harmonising the definition of family violence,<sup>30</sup> including as a way of addressing some concerns with the Family Law Amendment (Federal Family Violence) Orders Bill 2021 (**the FVO Bill**), for example.<sup>31</sup>
27. One recognised benefit to definitional consistency is that it may improve the ability to ensure more accurate data collection across jurisdictions. The efficient collection, measurement and analysis of data has been considered key to improving the efficiency of government spending and delivering more effective and better targeted government policies, programs and services.<sup>32</sup> In 2018, the Australian Institute of Health and Welfare (**the AIHW**) identified the diversity of definitions as a problem in data collection.<sup>33</sup> The Australian Bureau of Statistics also noted in the Conceptual Framework for Family and Domestic Violence as follows:

*alternative definitions contribute to a field of data in which terms can mean slightly different things to different sectors and can lead to measurements of*

<sup>28</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response* (November 2010).

<sup>29</sup> Explanatory Memorandum to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011, 5.

<sup>30</sup> See, Law Council of Australia, ‘Submission to the Review of the Family Law System – Issues Paper 48’ (7 May 2018) [173]-[177].

<sup>31</sup> See, Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry on the Family Law Amendment (Federal Family Violence Orders) Bill 2021 <<https://www.lawcouncil.asn.au/publicassets/a6c111b6-cbe5-eb11-943e-005056be13b5/4027%20-%20Family%20Law%20Amendment%20%20Federal%20Family%20Violence%20Orders%20%20Bill%202021.pdf>> (‘LCA FVO Submission’) 19.

<sup>32</sup> Department of the Prime Minister and Cabinet, ‘Review of Australian Government Data Activities 2018’ (25 July 2018).

<sup>33</sup> Note, however, that in a review paper in the following year, the data gaps identified by the AIHW related to more complex forms of violence, problems in the capture of support services and perpetrator interventions rather than problems caused by inconsistent definitions: *AIHW 2019 Report* n 2.

*slightly different behaviours. This produces varying understandings of prevalence and incidence rates, and other such indicators.*<sup>34</sup>

28. Consistent use of definitions by agencies, including in relation to statutory definitions in the laws dealing with family law and family violence, may, in turn, better inform policy responses, resource allocation and service delivery. Harmonising the definition of family violence was a key recommendation of the SPLA Report.<sup>35</sup>
29. However, there are also some potential risks associated with shifting to a common definition of family violence, including that it may:
  - only be achieved by reducing the definition to the ‘lowest common denominator’ and thereby limiting the protection of victims of violence;
  - limit the potential for innovative approaches to family violence by individual governments; and
  - cause net-widening effects, with the consequence that the courts (particularly the family courts which already have a very large percentage of cases which include allegations of family violence) may be unable to respond adequately to increased allegations of family violence, due to resourcing constraints.
30. Whilst a unified definition of family violence remains a desirable goal, it will be important to ensure that it offers the flexibility to recognise and protect victims from newly emerging forms of family abuse (such as the dissemination of intimate images online) or forms of abuse which affect specific sections of the community, as discussed further at paragraphs 105 to 167 below and as including identity-based abuse in the LGBTQI+ community.
31. It is also noted that harmonising the definition should not be viewed as a catch-all solution to every problem caused by inconsistencies or differences between the various jurisdictions in respect to their family violence regimes. The disparity between state and territory legislative definitions has not prevented the inception of the National Domestic Violence Order (**NDVO**) Scheme, nor national initiatives such as the National Domestic and Family Violence Bench Book. Research on the operation of the NDVO Scheme, which is described at paragraph 87 below, indicates that resource problems, issues with inter-agency information sharing and cooperation, as well as the training and attitudes of professionals, present greater difficulties than any definitional problems.<sup>36</sup>

### **Proposed way forward**

32. As the peak representative body of the national legal profession, the Law Council considers that it has an important role to play in leading the conversation with respect to the definition of family violence. Participants at the Law Council’s National Roundtable on Family Violence: Awareness, Education and Training (**the LCA Roundtable**), held in May 2021, agreed that a consistent definition which is correctly drafted should be pursued and that the potential benefits of such a definition outweigh the risks. The definition should include agreed core principles, accompanied by a non-

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<sup>34</sup> Australian Bureau of Statistics, *Conceptual Framework for Family and Domestic Violence* (Information paper 4529.0, 2009) <<https://www.abs.gov.au/ausstats/abs@.nsf/2f762f95845417aeca25706c00834efac4b065e9441f901fca2575b70016d915!OpenDocument>> 4.

<sup>35</sup> ‘SPLA Report’ (n 12) at [2.191].

<sup>36</sup> ANROWS, *Domestic and family violence protection orders in Australia: an investigation of information-sharing and enforcement* (Final Report, November 2017) <[https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Horizons\\_legal\\_FINAL.pdf](https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Horizons_legal_FINAL.pdf)> 6.

exhaustive list of examples helping lawyers (and others) to better understand family violence issues and more readily identify possible instances of family violence.

33. The Law Council and its Family Law Section are currently working with its state and territory Constituent Bodies and stakeholders to develop and advocate for potential legislative reforms regarding the proposed definition. The Australian Government also has an important role to play in leading efforts to harmonise the definition and would be pleased to assist in any work on this subject. The significant work already undertaken by the ALRC in relation to the definition of family violence in federal legislation is also acknowledged.<sup>37</sup>
34. While the Law Council supports the development of a uniform definition, it also emphasises that funding and resource issues (as addressed at paragraphs 56 to 78 below) are ultimately more important to the experience of victims of family violence than the difficulties which arise from the current diversity of definitions. Further, the Law Council notes that a number of Australian jurisdictions are exploring the possibility of criminalising ‘coercive control’ behaviour – as described further below. The varying approaches being taken to these issues, which overlaps significantly with the issue of defining family violence, demonstrates the difficulty that may be experienced in developing a consistent national definition.

### Coercive control

35. The Law Council notes that coercive control is a broad concept and difficult to define. However, it generally describes a pattern of abusive behaviours and control over time intended to create fear. As the behaviours are deeply contextual and often occur slowly over a period of time, it can be difficult to identify.
36. In the experience of the Law Council’s members, coercive control can be perpetrated through the family law system. Members report instances where one party brings multiple applications in order to exhaust their opponent’s resources to retain legal representation,<sup>38</sup> or brings an application for more time with children in order to exert financial pressure in the form of reduced child support. The Law Council shares the concern expressed in the ALRC’s Final Report on *Family Law for the Future – An Inquiry into the Family Law System*, as released in March 2019 (**ALRC Report**) about psychological abuse that occurs through repeated applications brought by one party, and agrees on the need to address the difficulty in obtaining a declaration that the applicant is vexatious under section 188 of the Family Law Act.<sup>39</sup> The Law Council would support measures that extend the courts’ powers of summary dismissal to respond to such instances of procedural abuse.
37. The Law Council also supports the recommendation by the SPLA Committee that the Commonwealth develop shared principles to guide any criminalisation of coercive control by states and territories and run a public awareness campaign on the nature of coercive control.<sup>40</sup> The Law Council notes there is already movement in this area amongst the states and territories. For example:

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<sup>37</sup> See, ALRC, ‘Family Violence – A National Legal Response’ (Final Report, 2010) 114

<<https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114 WholeReport.pdf>>, Recs 5-6.

<sup>38</sup> See also Jane Wangmann et al, ‘Self-represented litigants in family law proceedings involving allegations about family violence’ (Research Report, December 2020) *ANROWS*

<<https://www.anrows.org.au/publication/no-straight-lines-self-represented-litigants-in-family-law-proceedings-involving-allegations-about-family-violence/>> 149.

<sup>39</sup> See, Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (ALRC Report 135, March 2019) (*‘ALRC Family Law Report’*), Rec 19.

<sup>40</sup> ‘SPLA Report’ (n 12) 159 [4.260].

- various elements of coercive control were criminalised in Tasmania in 2004;<sup>41</sup>
- the Northern Territory Government has announced it is considering criminalisation;<sup>42</sup>
- the NSW Joint Select Committee recommended in its report on Coercive Control in Domestic Relationships that coercive control be criminalised following a considerable program of education, training and consultation with police, stakeholders and the frontline sector;<sup>43</sup> and
- an independent taskforce has been established in Queensland to review the possibility of criminalisation.<sup>44</sup>

### Statutory tort of family violence

38. The Law Council notes that one of the outcomes proposed in the consultation guide is that perpetrators stop their violence and are held to account.<sup>45</sup> Current measures in this regard tend to focus on preventing and punishing domestic violence behaviour, including through perpetrator behavioural adjustment and restorative justice programs. However, the Law Council notes that there are few measures in place to account for the loss, damage, pain and suffering occasioned to the victim, and the perpetrator's obligation, by the principle of *restitutio in integrum*, to restore the victim to the situation that would have prevailed but for the abuse.
39. On this subject, the Law Council notes the recommendation in the ALRC Report for the development of a statutory tort of family violence.<sup>46</sup> The potential benefits of such a measure would include the recognition of the financial, psychological and other impacts of family violence on victims. These may range from ongoing poor physical and mental health, to lost income and career opportunity, sudden loss of possessions and resources, reduced educational opportunity and increased risk of homelessness, further abuse and substance dependency. A statutory tort of violence may also support prevention of FDSV, given that financial dependence can be a significant deterrent to leaving an abusive relationship.<sup>47</sup>
40. The Law Council's Family Law Section has expressed neither support nor opposition to this suggestion, though has noted concerns that adopting a statutory tort pathway may not achieve the stated goal of the reform in that it will be more costly for litigants, increase the time that hearings take and thus further impact judicial resources, and not adequately address the financial consequences of family violence.<sup>48</sup>

<sup>41</sup> See, Chelsea Heaney, 'New domestic violence laws may criminalise coercive control in the Northern Territory' (12 February 2021) *ABC news* <<https://www.abc.net.au/news/2021-02-12/coercive-control-criminalise-nt-domestic-violence-laws/13096102>>.

<sup>42</sup> *Ibid.*

<sup>43</sup> NSW Joint Select Committee on Coercive Control, *Coercive Control in Domestic Relationships* (Report 1/57, June 2021), Rec 1.

<sup>44</sup> See, Stephanie Zillman et al, 'Queensland sets up taskforce to investigate coercive control laws one year after Hannah Clarke's murder' (17 February 2021) *ABC News* <<https://www.abc.net.au/news/2021-02-17/hannah-clarke-domestic-violence-laws-coercive-control-taskforce/13162226>>.

<sup>45</sup> 'Consultation Guide' (n 13) 7.

<sup>46</sup> See, Rec 19.

<sup>47</sup> See, for example, J Stoeber, 'Transforming Domestic Violence Representation' 101(3) (2013) *Kentucky Law Journal* 36.

<sup>48</sup> See, Law Council of Australia, 'Submission to the Attorney-General's Department: A new decision-making framework for property matters in family law' (21 July 2021) <<https://www.lawcouncil.asn.au/publicassets/17898bf2-a8ea-eb11-943e-005056be13b5/4047%20-%20Decision-making%20framework%20for%20property%20matters.pdf>> Attachment A, 35.



## Parenting arrangements

41. The Law Council suggests that reforming the Family Law Act in relation to parenting arrangements would assist in cases where children are at risk of FDSV. Under the Act as it stands, fathers who use violence may assume they are entitled to spend equal time with their children, whilst mothers experiencing violence may believe they are unable to protect their children from contact with their abuser and may enter negotiations around parenting under these false beliefs.<sup>49</sup> In this way, it is the experience of members of the Law Council that Part VII has posed particular problems in matters involving family violence. The Law Council repeats its previous calls for the removal of the presumption of equal shared parental responsibility (**ESPR**) under section 61DA in Part VII of the Family Law Act, and the requirement for the consideration of equal time which flows from the making of an ESPR order under section 65DAA. Parental responsibility should be a matter for the court to determine in the circumstances of each case, guided by the paramount consideration principle.<sup>50</sup>
42. The Law Council notes that the ALRC recommended this legislative reform as part of the ALRC Report.<sup>51</sup> The ALRC noted that research conducted on the effects of the 2006 amendments to the Family Law Act indicated that in more than half of cases where there was family violence, the non-resident parent (usually the father) maintained expectations of obtaining orders for equal time and an unhelpful focus on the 'quantity' of time they spent with the child.<sup>52</sup>

## Family violence education and training

### Education and training for legal professionals

#### **Continued Professional Development**

43. The Law Council and its Family Law Section have long supported the benefits of training for legal practitioners in family violence,<sup>53</sup> acknowledging that Continuing Professional Development (**CPD**) programs are the primary responsibility of state and territory bodies.
44. In response to options presented in late 2020 by the Attorney-General's Department (**AGD**) during a targeted consultation process with key stakeholders on options to enhance the family safety competency of legal practitioners, the Law Council formed the preliminary view that of the options presented by AGD, it would be preferable to pursue an approach whereby all members of the legal profession are strongly recommended to undertake at least one unit of CPD in family safety each.
45. This matter was considered once more at the LCA Roundtable, where participants agreed that legal practitioners most commonly encounter the signs and symptoms of family violence in the family and criminal law contexts, however other areas of law are not immune. Wherever family violence arises in legal practice, the roundtable attendees acknowledged that it was essential that the practitioner understands the impact of trauma and how to apply a trauma-informed approach regarding

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<sup>49</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 15 June 2020 (Graham Perrett MP). Mr Perrett was making the Second Reading Speech for the Family Law Amendment (A Step Towards a Safer Family Law System) Bill 2020.

<sup>50</sup> Richard Chisholm, 'Rewriting Part VII of the Family Law Act: A modest proposal' (2015) 24/3 *Australian Family Lawyer*.

<sup>51</sup> See, *ALRC Family Law Report* (n 40) [5.115].

<sup>52</sup> *Ibid* [5.112].

<sup>53</sup> Law Council of Australia, 'Inquiry into family, domestic and sexual violence' (7 August 2020) ('*LCA Family Violence Submission*') at [251].

experiences of violence, abuse, neglect and exploitation. It was agreed that ongoing education is critical to developing practitioners' ability to identify risk and respond appropriately.

46. The practical difficulties with enforcing family violence training on a mandatory basis were acknowledged by several roundtable participants, and until such hurdles can be adequately addressed, it was agreed that the profession as a whole should be strongly encouraged to pursue training on a regular basis.
47. Accordingly, in June 2021, Law Council Directors resolved to invite Constituent Bodies to consider that CPD rules should strongly recommend that all practitioners, especially those who practice in family or criminal law, or who practice in areas of law (such as wills, property law etc) or with victims that may raise family violence issues, complete at least one CPD unit in relation to family violence per annum.
48. The Law Council notes that training in trauma-informed lawyering for responding to FDSV should provide practitioners with skills to do the following, amongst other things:
  - recognise the indicia of trauma and its effect on FDSV-affected clients;
  - build trust and the perception of safety in trauma-affected clients;
  - minimise the re-traumatisation of clients in their engagement with the legal system;
  - minimise the risks of physical danger and vicarious trauma to themselves and their colleagues; and
  - respect the client's autonomy and right to self-determination.<sup>54</sup>

### **Education more broadly**

49. The Law Council also continues to advocate for further education about family violence amongst law students, graduates and the legal profession more broadly, including the judiciary.
50. The Law Council suggests consulting with academic institutions regarding the potential incorporation of education on family violence into their curricula. It is also notes that several education providers have already started to make these changes. By way of example, in Queensland, the Queensland University of Technology (**QUT**) and Griffith University currently offer courses in family violence. QUT offers a graduate Certificate in Domestic Violence Responses at the post-graduate level, and Griffith University offers an elective course at undergraduate level providing the practical skills required to practice in the area of family violence. Other tertiary education providers offering related courses include Sydney University and the Royal Melbourne Institute of Technology.
51. In respect to CPD offerings, there are also other examples of progress which may be drawn upon as further opportunities are explored. The College of Law has recently started to provide CPD units targeting family violence guidance for practitioners, with assistance from some judicial officers of the Magistrates Court. Further, in May 2021, the Law Society of Tasmania introduced a fifth mandatory category of CPD, entitled 'Equality and Wellbeing'. Under this changed system, a practitioner will need to

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<sup>54</sup> Examples of this type of training include the NSW Law Society's continuing professional development programs, which incorporate skills-based training in areas such as family violence and 'fundamentals' for family law practitioners. The Law Council understands that Legal Aid NSW also offers comprehensive training for panel solicitors, and that private consultancies offer training on trauma informed practice.



include at least one point from this new category in their 10 mandatory CPD points.<sup>55</sup> The category will specifically include a CPD topic of Family Safety and Family Violence.

52. Further, the Law Council has long supported ongoing training and education for judges on family violence. Again, there have been recent developments in this area. In April 2021 the Chief Justice of the Federal Circuit Court of Australia and Family Court of Australia (**the Family Courts**) announced that these Courts had recently engaged the services of the Safe & Together Institute, a United States-based initiative, to deliver training to Judges, Registrars, Family Consultants and other court staff on the issues of family violence.<sup>56</sup> Critical to the possibility and success of such training continues to be the issue of adequate budgetary allocation and staff time for training to take place.

### **Education and training for the community**

53. Beyond specific perpetrator intervention programs, the Law Council notes that reliable, accessible legal information for victims and perpetrators is an important part of responding to FDSV and should be promoted when developing the National Plan.
54. Examples of possible innovations for delivering information include the 'Avow' App recently released by the NSW Government.<sup>57</sup> The App provides perpetrators with information about Apprehended DVOs and about support services, including the NSW Men's Referral Service. By way of another example, Legal Aid NSW is providing information for perpetrators online through channels such as YouTube.
55. It is noted that effective maintenance and promotion of such resources will be key to their uptake and success. Services must also be trauma-informed.

### **Funding and resourcing the family law system**

56. The Law Council has consistently recognised the continuing impact upon Australian families of the ongoing inadequate resourcing of the family law courts and the components of the family law system more generally – from National Legal Aid, to the providers of frontline supports to women and children at risk.<sup>58</sup> Education, awareness and primary prevention about respectful relationships and the nature of FDSV play a fundamental role in addressing family violence in the community. However, despite decades of research, inquiries and reports addressing how to prevent and reduce

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<sup>55</sup> The Law Society of Tasmania, 'CPD Requirements' <<https://www.lst.org.au/members/continuing-professional-development/resources/CPD-requirements/>>.

<sup>56</sup> See, Family Court of Australia, 'The Courts engage internationally recognised expert to undertake family violence focussed training' (Media Release, 21 April 2021) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/mr210421>>.

<sup>57</sup> See, NSW Government Communities & Justice, 'Avow' <<http://www.crimeprevention.nsw.gov.au/domesticviolence/Pages/Avow.aspx>>.

<sup>58</sup> See, for example, past Law Council submissions to the Inquiry into family, domestic and sexual violence (7 August 2020) and supplementary submission to the same inquiry (28 September 2020); Justice Project Final Report, 'People who Experience Family Violence' (August 2018); submission to the 'Options for improving the family violence competency of legal practitioners: Consultation Paper' (30 September 2019); submission to the 'Review of the Family Law System: Discussion Paper' (16 November 2018) and associated Issues Paper (7 May 2018); submission on the Family Law Amendment (Family Violence and Other Measures) Bill 2017 (7 February 2018) and related Public Consultation Paper input on the exposure draft provisions (17 February 2017); submission to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence (22 May 2017); and submission to Inquiry into Domestic Violence in Australia (20 August 2014).

violence to women and children, it still occurs at alarming rates.<sup>59</sup> There is, therefore, a clear ongoing need to properly fund the family law system, including the courts.

57. The importance of adequate funding formed a significant part of the focus of the Law Council's Justice Project Final Report to the extent it addressed the needs of people experiencing family violence.<sup>60</sup> Those recommendations remain essential, and include that:

- the Australian, state and territory governments should increase funding to courts to match overarching family violence reforms; and
- governments should also invest in evidence-based early intervention and prevention initiatives, such as holistic family support programs and education campaigns.<sup>61</sup>

58. In brief, the Law Council considers that apart from adequacy, the key to funding in the FDSV context – whether of the courts or of specialist FDSV services – is sustainability. Short-term funding grants and requirements for repeated applications create instability, making it difficult for the system to build and sustain effective initiatives, recruit and maintain staff and develop and retain relevant expertise. Further comments more specific to funding the court and legal assistance systems are outlined below.

### The Family Courts

59. The Law Council notes the important role played by the Family Courts in helping to reduce the risk of FDSV. In matters commenced in the Family Courts, it is common that one or both parties will make allegations of family violence.<sup>62</sup> Not all separating couples require the assistance of lawyers and/or the court process to resolve family law disputes between them, but research conducted by the Australian Institute of Family Studies reveals that of those who require legal assistance, their experiences will routinely include some of the following additional complexities:

- allegations of family violence;
- allegations of sexual abuse of children;
- drug and alcohol dependence or addiction; and
- mental health challenges.<sup>63</sup>

### **Successful court-based initiatives**

60. The Law Council joins with the SPLA Committee in welcoming initiatives such as the Lighthouse Project pilot, which shows early signs of helping to address FDSV within

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<sup>59</sup> The most recent relevant, large-scale representative survey around the prevalence of domestic and family violence in Australia, the Australian Bureau of Statistics 2016 *Personal Safety Survey*, estimated that intimate partner violence was estimated to have been experienced by 17 per cent of women and 6.1 percent of men since they were aged 15, and partner violence was estimated to be experienced by 1.7 percent of women and 0.8 percent of men in the 12-month-period prior to the survey. See, Australian Bureau of Statistics, '4906.0 Personal Safety, Australia' (online at 2016) <<https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>>. For a discussion of the adequacy of the qualitative and quantitative evidence base around the prevalence of domestic and family violence, see also, *LCA Family Violence Submission* n 28, 21.

<sup>60</sup> Law Council of Australia, *Justice Project Final Report*, 'People who Experience Family Violence Chapter' (August 2018).

<sup>61</sup> *Ibid* 4-6.

<sup>62</sup> See, Australasian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (2018) 10.1.7.

<sup>63</sup> Rae Kaspiew et al, 'Court Outcomes Project' (October 2015) *Australian Institute of Family Studies* <<https://aifs.gov.au/sites/default/files/efva-courtoutcomes.pdf>> 47.

the family law system.<sup>64</sup> The project concerns parenting-only proceedings and involves offering to screen parties for the risk of FDSV, responding by triaging high-risk cases to appropriate case management pathways so as to manage risk within the family law system, and making appropriate referrals to external legal and other support services.<sup>65</sup>

61. The Law Council understands that in over 700 cases (62 per cent of those in the pilot), litigants have accepted the opportunity to screen for FDSV, and 64 per cent of those returned a high risk rating. In many of these cases, FDSV was previously not disclosed and the parties were receiving no support.<sup>66</sup> The Law Council considers that the Lighthouse Project pilot should be viewed as an important evidence base for the benefits of:
- targeting support to families who by definition are already in situations of conflict;
  - enabling parties to self-identify their need for assistance;
  - prioritising the protection of parties who are in the court system; and
  - co-integrating legal services and other FDSV support services.
62. Case management of property proceedings is another area in which the Family Courts can play an important role. In the Law Council's experience, parties who are engaged in a protracted property dispute can be at greater risk of FDSV if they have unstable or inadequate housing. The Law Council therefore supports the SPLA Committee's recommendation that, subject to positive evaluation of the Legal Aid Small Claims Property Trials, funding be provided for the establishment of a small property mediation program.<sup>67</sup>

### Areas for improvement

63. In the context of those who have experienced or are at risk of FDSV, and who are required to have contact with the family law system, it is crucial to ensure that they receive the necessary and proper protections to be safe from further risk of harm. Yet the funding of state and territory courts, along with the family law courts, has failed to keep pace with the increased demand and complexity of matters coming before the courts involving serious family violence and with the crushing workloads on judges and court staff, thereby adding to court delays.<sup>68</sup>
64. Such delays are of great concern, given that the hearing and determination of important issues by the courts often involves the assessment of risk and how to keep children and parties safe. Delays are widely recognised as one of the great additional burdens for those using the family law system. The consequences – that urgent issues may not be addressed and that inadequate parenting arrangements and violence and risk dynamics may continue – are too serious to be ignored.<sup>69</sup>
65. The Law Council understands that in some registries, there are instances where interim hearings<sup>70</sup> do not take place for many months. This may allow the continuation

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<sup>64</sup> 'SPLA Report' (n 12) 341 [8.188].

<sup>65</sup> The project is being rolled out over a two-year period in the Parramatta, Brisbane and Adelaide Registries in conjunction with the specialist list, known as the 'Evatt List', to hear high risk matters.

<sup>66</sup> Information provided at Lighthouse Project Stakeholder meetings, April and May 2021.

<sup>67</sup> 'SPLA Report' (n 12) Rec 80; Australian Institute of Family Studies, *Evaluation of the Lawyer-assisted Property Mediation: Legal Aid Commission Trial* (undated) <<https://aifs.gov.au/projects/evaluation-lawyer-assisted-property-mediation-legal-aid-commission-trial>>.

<sup>68</sup> *LCA Family Violence Submission* (n 54) 63-70 [51].

<sup>69</sup> *Ibid* [196]-[197].

<sup>70</sup> In which urgent orders are sought until further order.

of sub-optimal or, in some instances, dangerous arrangements for children and others at risk of FDSV.

66. When interim hearings do occur, they often take the form of an abridged process with no cross examination of witnesses. In such hearings, judges and registrars are asked to make essential decisions, often about the safety of women and children, in over-subscribed duty lists where little time can be allocated to each matter. The careful assessment of the evidence and considered review of risk is difficult in such pressured circumstances.
67. If timely and appropriate engagement with allegations of FDSV cannot occur because of overburdened court lists, there is a corresponding increase in risk for those turning to the courts for assistance in resolving interim parenting matters. In some cases, a delay occurs in circumstances where a child has been removed from his or her usual carer by the other party, and risk considerations which would normally inform the urgent prioritisation of that matter are over-ridden by the simple reality that the court does not have a judge or senior registrar with time available to hear the matter.
68. Once interim matters have been determined, it is common for the final hearing of applications before the Family Courts to occur two to three years after filing. The burdens and risks attached to that delay, where serious matters of FDSV have been alleged, are unacceptable.
69. The Law Council has acknowledged and welcomed the increase in funding to the Family Courts in the 2021-2022 Federal Budget, noting that the Australian Government has announced that it will provide \$123.8 million over four years to support the reform of the family law system and improve access and safety for children and families.<sup>71</sup>
70. However, despite this recently announced funding, as well as the appointment of registrars to assist with the Courts' increasing case load, the Law Council understands that judges in the Federal Circuit Court of Australia commonly hold 400 to 600 cases in their dockets. Funding remains inadequate to properly address the decades of sustained under-resourcing of the courts by successive governments, as was acknowledged in the ALRC Report.<sup>72</sup> This is especially so when the courts are managing the process of their merger, which will come into effect on 1 September 2021.
71. The Family Courts have developed a range of initiatives intended to detect and assess the more serious matters of family violence and child sexual abuse and direct those matters to a separate triage process and the allocation of priority hearings.<sup>73</sup> However, the creation and resourcing of those initiatives has not resolved the risks and pressures for other families, who are at increased risk because their matters remain pending and unresolved.
72. The Law Council submits that a fundamental policy shift is required from government to prioritise the protection of women and children who have experienced family violence, and ensure that the family law system receives resourcing appropriately directed to supporting and assisting them. The Family Courts must be fully resourced to deal properly with allegations of family violence in a systemic and prompt fashion, assessing and prioritising those families considered to be at high risk, and ensuring

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<sup>71</sup> See, Law Council of Australia, 'Significant funding for Federal Courts applauded' (Media Statement, 12 May 2021).

<sup>72</sup> ALRC *Family Law Report* (n 40) 32

<sup>73</sup> See, for example, the Evatt List and the Lighthouse Project.

more generally that all users of the courts can be confident that their matters will be dealt with in a timely manner.

73. The Law Council refers the DSS to the submissions it has previously made to a range of inquiries and reviews in respect to the continuing impacts upon Australian families of the inadequate resourcing of the Family Courts and the family law system.<sup>74</sup>

### Legal assistance providers

74. There remains a significant cohort of at-risk people who require immediate access to safe and competent frontline services. It is essential that services are appropriately resourced so that people affected by FDSV have timely access to suitable and safe accommodation and trauma-informed health, legal and other support services. The Law Council is aware of reports by practitioners that many FDSV victims are unable to leave their abusive relationship without access to legal services.
75. In addition to these time-critical needs, victims may also be deterred from pursuing their entitlements to a family law property settlement or from seeking child support payments due to significant power imbalance, fear or intimidation. Victims may also be unaware of entitlements such as the ability to split superannuation assets.
76. While the importance of access to legal assistance is clear, essential frontline support services remain chronically underfunded and unable to meet the needs of those affected by FDSV. The Law Council has long advocated for additional funding to the legal assistance sector to enable the provision of timely, specialised assistance and support to clients.<sup>75</sup>
77. The Law Council commends the Fourth Action Plan for its focus on improving support and service system responses, including access to suitable and safe accommodation, as well as trauma-informed support.<sup>76</sup> The \$340 million investment over three years made by the Australian Government in 2019 to implement that Plan is also noted.<sup>77</sup> More recently, the Law Council has welcomed the announcement for the 2021-22 Federal Budget of \$416.2 million over four years to support women and families experiencing family and domestic violence.<sup>78</sup> These proposals form the Australian

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<sup>74</sup> See, for example, Law Council of Australia, 'Submission on Information sharing between the family law and criminal justice and child protection systems' (27 November 2020)

<<https://www.lawcouncil.asn.au/publicassets/2b77a2ad-4e34-eb11-9437-005056be13b5/3929%20-%20Family%20violence%20info%20sharing.pdf>> ('LCA Information Sharing Submission'); submissions to the Inquiry into family, domestic and sexual violence (7 August 2020) and supplementary submission to the same inquiry (28 September 2020); Justice Project Final Report, 'People who Experience Family Violence' (August 2018); submission to the 'Options for improving the family violence competency of legal practitioners: Consultation Paper' (30 September 2019); submission to the 'Review of the Family Law System: Discussion Paper' (16 November 2018) and associated Issues Paper (7 May 2018). See also, Law Council of Australia, 'New money for domestic and family violence a step in the right direction' (Media Release, 12 May 2021) <<https://www.lawcouncil.asn.au/media/media-statements/new-money-for-domestic-and-family-violence-a-step-in-the-right-direction>>.

<sup>75</sup> Law Council of Australia, 'Submission to the Joint Select Committee on Australia's Family Law System' (25 September 2019) <<https://www.lawcouncil.asn.au/resources/submissions/joint-select-committee-on-australias-family-law-system>> ('LCA Joint Select Committee Submission') 41 [98].

<sup>76</sup> See, 'Fourth Action Plan' (n 15) 6.

<sup>77</sup> Commonwealth of Australia, *Overview of the Fourth Action Plan 2019-2022, National Plan to reduce Violence against Women and their Children 2010-2022* (5 August 2019) <[https://www.dss.gov.au/sites/default/files/documents/08\\_2019/overview-commonwealth-key-initiatives-under-fourth-action-plan-5-august-2019.pdf](https://www.dss.gov.au/sites/default/files/documents/08_2019/overview-commonwealth-key-initiatives-under-fourth-action-plan-5-august-2019.pdf)>.

<sup>78</sup> Law Council of Australia, 'New money for domestic and family violence a step in the right direction' (Media Release, 12 May 2021) <<https://www.lawcouncil.asn.au/media/media-statements/new-money-for-domestic-and-family-violence-a-step-in-the-right-direction>>; Attorney General for Australia, 'Enhanced Legal and Workplace Services to support Australians' (Media Release, 11 May 2021)



Government's transitional strategy ahead of the development of the National Plan. The Law Council is hopeful that the portion of funding which provides a range of further legal assistance resourcing under the National Legal Assistance Partnership is, particularly, a recognition by the Australian Government of the positive return on investment into the legal assistance sector.<sup>79</sup>

78. However, the Law Council notes that legal assistance providers such as legal aid commissions (**LACs**), community legal centres (**CLCs**), Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) and Family Violence Prevention Legal Services (**FVPLS**)<sup>80</sup> remain subject to strict resourcing limitations that reduce their capacity to provide support throughout the litigation process. Even where initial legal advice is obtained, funding constraints may mean that ongoing assistance is not available.
79. For those who cannot obtain legal representation as a result of these limitations, the process of self-representing and engaging with authorities in matters involving FDSV can be stressful and traumatic. Stress, trauma and inexperience can impede evidence gathering and the conduct of the matter before the court. In addition, families will often deal with multiple courts and systems, and navigating these complex processes without legal advice and representation can add to delay and increase risk for the most vulnerable.
80. These challenges highlight the numerous important benefits to being able to access timely legal assistance, which can also prevent or reduce the escalation of conflict. In addition, an understanding of legal avenues and supports can assist victims in making better informed choices and can improve their and their children's safety. Similarly, appropriate and timely legal services can assist respondents in making better informed choices and enhance the families safety.
81. The costs associated with legal proceedings – including copying material produced under subpoena, process server fees and conduct money to issue subpoenas – can also be prohibitive. Together, these barriers within the legal system can prevent those affected by FDSV from receiving effective legal remedies. The National Plan must, for these reasons, have a significant focus on resourcing frontline services to address the immediate impacts of FDSV. The Law Council endorses the SPLA Committee's call for sustainable funding for community legal centres and legal aid programs that help those who are at risk of FDSV to build independent lives,<sup>81</sup> including funding under the National Legal Assistance Partnership and the Family Advocacy and Support Service.

### **Legal Aid Commissions**

82. The Law Council acknowledges that the Australian Government has increased funding to support the Legal Aid Commission Small Claims Property Pilot.<sup>82</sup> This recognises that people who are seriously financially disadvantaged with property pools that comprise negative equity or debt-only matters may require legal assistance

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<<https://www.attorneygeneral.gov.au/media/media-releases/enhanced-legal-and-workplace-services-support-australians-11-may-2021>>.

<sup>79</sup> Law Council of Australia, 'Funding Boost Welcome for Legal Services' (Media Release, 12 May 2021) <<https://www.lawcouncil.asn.au/media/media-releases/funding-boost-welcome-for-legal-services-supporting-women-and-those-experiencing-mental-health-issues>>.

<sup>80</sup> See, National Family Violence Prevention and Legal Services Forum, 'Submission to the Inquiry on Developing the next National Plan to reduce Violence against Women and their Children' (July 2021) (*'NFVPLS Submission'*) 7-8.

<sup>81</sup> Rec 78.

<sup>82</sup> See, Family Court of Australia, 'The Courts to receive \$100 million in Government funding announced in the 2021-22 Budget' (Media Release, 12 May 2021)

<<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/mr110521>>.

to resolve their financial issues and access justice expeditiously and cost effectively, in the context of research suggesting that ‘many women simply walk away from seeking their share of property’ where there is a small pool of assets, or assets are made up of superannuation or debt.<sup>83</sup> However, the Law Council notes that the scope of the Pilot is limited: it only extends to property, and people who do not meet the means test are unable to access ongoing assistance if their matter does not resolve through family dispute resolution.

83. On this subject, the Law Council notes that National Legal Aid has supported the 2014 recommendation by the Productivity Commission that funding be invested to relax the means tests for grants of aid for representation and family dispute resolution by Legal Aid Commissions, noting the real amount required for such funding in 2020 has been estimated as approximately \$134.5 million.<sup>84</sup> The Law Council also supports this recommendation, particularly in cases of family violence, so that both victims and perpetrators can access supports for early resolution of their family law and family violence matters. This will increase their participation in early resolution processes that are safe, voluntary and specialised, and permit them to access referrals to services which can provide holistic supports and ongoing assistance.
84. It is noted that the 2021-22 Federal Budget does not appear to have provided funding specifically for children who have experienced family violence, separately to addressing their experience as an extension of that of their parent/s as victims or perpetrators. The Law Council supports the call by National Legal Aid for additional funding to provide appropriate resourcing and training for Independent Children’s Lawyers (ICLs),<sup>85</sup> including expanding the pool of ICLs, increasing their awareness of the intersection between family law and child protection, and supporting their skills to engage meaningfully and effectively with the children they represent in accordance with their obligations.

### **Jurisdictional divides and information sharing**

85. The Law Council notes its previous advocacy in respect to the complexity, costs and delays which can be caused for many families as a result of the divide between the family law jurisdiction for matrimonial, parenting and property matters in the Family Courts, on the one hand, and the family violence and child protection jurisdictions in the state and territory courts, on the other.<sup>86</sup> These issues can tend to increase the risk of FDSV, and the Law Council supports measures that better integrate these jurisdictions and ensure that FDSV issues that have arisen either within family law proceedings or in separate criminal proceedings are considered as soon as possible.<sup>87</sup> Similarly, while it is recognised that the police services in each jurisdiction have different processes and procedures, measures are required to ensure consistency in their recognition of family court orders.
86. In all cases, increased information sharing must be supported by training of the professionals involved to ensure information is managed in ways that are culturally safe, trauma-informed and free of the risk of victim-blaming.

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<sup>83</sup> See, Federal Circuit Court of Australia, ‘New approach to resolve family law property disputes will save time and money through the Court’s “PPP500”’ (Media Release, 1 March 2020) <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/news/mr010310>>.

<sup>84</sup> National Legal Aid, ‘Submission to Inquiry into family, sexual and domestic violence’ (18 August 2020) <<https://www.nationallegalaid.org/resources-2/nla-submissions/>> 22.

<sup>85</sup> *Ibid* 4.

<sup>86</sup> See, *LCA Family Violence Submission* (n 54)11-13.

<sup>87</sup> See, *ibid* 12.



## Domestic Violence Orders

87. It is well-recognised that a variety of practical problems have arisen from the range of jurisdictions offering protective orders – referred to collectively in this submission as domestic violence orders (**DVOs**). The Law Council acknowledges that some of these problems were resolved by the adoption by all states and territories of the **NDVO** Scheme, which provides that all DVOs made in any jurisdiction on or after 25 November 2017 are automatically recognised and enforceable nationally. Other problems may be resolved by creating the possibility to make federal DVOs, as proposed under the FVO Bill, although the Law Council repeats the concerns expressed in its submissions dated 25 June 2021 as to the effectiveness and utility of the FVO Bill in its current form.<sup>88</sup>
88. The Law Council strongly supports the inter-governmental project currently underway to develop a national database of DVOs to improve information sharing. The Law Council is aware of reports that in family law matters, the production of existing state or territory domestic violence records can cause delay, which in itself can put parties at further risk of FDSV. Accordingly, the Law Council agrees with the SPLA Committee’s recommendation that the national database should record provisional, interim and final DVOs, any breaches, orders made under the Family Law Act, and relevant child protection orders made under state or territory legislation.<sup>89</sup>
89. The national database of DVOs will need to be adequately resourced.<sup>90</sup> Further, any expansion of the information sharing platform to include orders made by the Family Courts and under state and territory child protection legislation should be subject to privacy concerns being addressed and sensitive information redacted.<sup>91</sup>
90. The potential benefits to a national database facilitating information sharing between states and territories are clear. Currently, an apprehended violence order (**APVO**) made in NSW, for example, for the protection of a person who is not and has not been in a relationship with the defendant, can be registered in another jurisdiction. If the protected person moves to another state or territory, they can apply to have the APVO registered with a court in that state or territory. In the absence of a national database, this process can be difficult to achieve and not straightforward for a victim to navigate. Additionally, the process for the protected person to vary the DVO, or extend the DVO when it nears its expiry date, can be difficult to navigate and may place the protected person at risk of exposure to the defendant.
91. The Law Council also maintains that, as it has previously submitted, state and territory legislation should undergo coordinated reforms enabling the various state and territory Children’s Courts to make orders under the Family Law Act, including parenting orders, recovery orders and Family Law Watch List Orders. This proposal is consistent with the Family Law Council’s 2016 recommendation<sup>92</sup> that sections 69J and 69N of the Family Law Act be amended to remove any doubt that Children’s Courts, no matter how constituted, have the power to make orders under Part VII. In the Law Council’s view, Children’s Courts should also have the power to transfer appropriate cases to the Family Courts. Any reforms to this effect should be accompanied by appropriate training for Children’s Court magistrates and state child

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<sup>88</sup> ‘LCA FVO Submission’ (n 31) 5.

<sup>89</sup> ‘SPLA Report’ (n 12) Rec 81. See also, NSW Joint Select Committee on Coercive Control, *Coercive Control in Domestic Relationships* (Report 1/57, June 2021), Rec 7.

<sup>90</sup> ‘LCA FVO Submission’ (n 31) 23.

<sup>91</sup> See, on this subject, *LCA Information Sharing Submission* (n 76) 17-18.

<sup>92</sup> Family Law Council, *Families with Complex Needs and the Intersection of the Family Law System and Child Protection Systems* (Final Report, June 2016) 203.

protection workers, to ensure the child protection jurisdiction makes appropriate use of the family law jurisdiction as a less invasive early intervention method.

92. With respect to information sharing between child protection and police services, the Law Council notes that a pilot program that co-locates state and territory child protection and policing officials in 22 Family Court registries is being implemented as part of the current National Plan.<sup>93</sup> The Law Council repeats its recommendation that funding of that program be extended beyond June 2022.<sup>94</sup> The pilot demonstrates the potential for co-location of these services to be an effective form of information sharing.
93. Police access to parenting orders and section 68B injunctions under the Family Law Act would also be beneficial. In matters where family court orders have been made restricting the access of a parent to children or providing for only supervised access due to risk of harm, access to this information would help law enforcement agencies to assess risk issues. This would be particularly helpful if, for example, a welfare check was requested by a parent or if there was a need to interact with a victim or perpetrator.<sup>95</sup>

### Information sharing more generally

94. In addition to DVOs specifically, the Law Council has also identified the sharing of information more generally as a major area for improvement between and within the states and territories, as well as regional areas. Improving information sharing will reduce the frequency with which victims must recount their experience to the different stakeholders in the court and justice system, and improve the availability of supports with members of the community who may need them.
95. The Law Council refers on this subject to its submission to the AGD's 2020 consultation on *Information sharing between the family law and criminal justice and child protection systems*.<sup>96</sup> In that submission, the Law Council noted that the National Framework for Information Sharing between the Family Law and Family Violence and Child Protection Systems (**National Framework**) will be an important tool to co-ordinate ongoing input and consultation on this very significant aspect of the lives of so many families.
96. As such, the Law Council continues to support measures that will improve interaction and information sharing between the Family Courts and other agencies as a means of enhancing the capacity of the family law courts to properly assess the risk of family violence. Crucially, the success of these initiatives will depend upon adequate and sustained resourcing of both Federal and state/territory agencies. The vulnerability around such is a significant factor which informs the viability of these initiatives. Insufficient resourcing of these services renders them ineffective, thereby increasing risk for some people.
97. The Law Council understands that navigating the supports and processes available for victims of family violence in the court system is a key area of confusion. Once within the system, victims can find themselves in multiple courts dealing with various issues. This can mean needing to tell their story on multiple occasions to multiple different people and agencies, an experience which is frequently confronting or

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<sup>93</sup> Australian Government, *Co-location of State and Territory child protection and other officials in Family Law Court Registries* <<https://plan4womenssafety.dss.gov.au/initiative/co-location-of-state-and-territory-childprotection-and-other-officials-in-family-law-court-registries>>.

<sup>94</sup> *LCA Information Sharing Submission* (n 76) 16.

<sup>95</sup> See, also, 'SPLA Report' (n 12) 341 [8.187], 342 [8.192], Rec 81.

<sup>96</sup> *LCA Information Sharing Submission* (n 76).

retraumatising. A victim may, for example, need to repeat the same story to the following stakeholders:

- the Police, in relation to criminal matters after they report family violence;
- a Magistrate's Court, to obtain a Family Violence Restraining Order;
- a Children's Court, if any reports have been made to child Protection Authorities as a result of violence in the home; and/or
- the Family Courts, with respect to children's living arrangements, maintenance and financial support.

98. It is recognised that some state and territory jurisdictions have significantly more information sharing arrangements than others (such as Western Australia, Victoria and South Australia).<sup>97</sup> The Law Council continues to endorse recommendation 2 from the ALRC Report,<sup>98</sup> being that the Australian Government work with the state and territory governments to develop and implement a national information sharing framework to guide the sharing of information about the safety and wellbeing of families and children between family law, family violence and child protection systems.<sup>99</sup> The Law Council refers to the extensive previous submissions it has made on this subject.<sup>100</sup> As the ALRC suggested, in addition to DVOs (as discussed at paragraphs 85 to 93 above) the framework should include:

- the legal framework for sharing information;
- relevant federal, state, and territory court documents;
- child protection records;
- police records;
- experts' reports; and
- other relevant information.<sup>101</sup>

99. The Law Council also suggests that consideration be given to developing a National Bench Book with respect to child protection matters, with a view to providing clear information as to how these matters intersect with family law matters.<sup>102</sup> This would provide a single, comprehensive resource with respect to the legislation relating to child protection as it varies across jurisdictions, and would assist in educating practitioners who work across child protection and FDSV.

100. The proposed National Bench Book with respect to child protection matters should contain similar information to the existing *National Domestic and Family Violence Bench Book*, particularly with respect to the sections which target vulnerable groups, including women who are victims of violence, and children. The *National Domestic and Family Violence Bench Book*,<sup>103</sup> as developed by the Australasian Institute of Judicial Administration, contains useful information and resources with respect to vulnerable groups and offers practitioners an educational resource to identify relevant issues that may arise in a matter involving domestic violence. It also includes

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<sup>97</sup> In Western Australia (WA), for example, protocols already exist for information sharing as between the Department of Communities, the WA Police and the State-run Family Court of Western Australia (FCWA). This means that the FCWA has relevant information about children and their families before it at an earlier stage than do other family law courts, meaning that victims do not need to repeat their stories and/or wait for subpoena to issue before the relevant information can come before the court.

<sup>98</sup> ALRC *Family Law Report* (n 40).

<sup>99</sup> See, for a recent submission on this subject, 'LCA FVO Submission' (n 31) 22-23.

<sup>100</sup> See, for example, *LCA Family Violence Submission* (n 54) 11; *LCA Information Sharing Submission* (n 76).

<sup>101</sup> ALRC *Family Law Report* (n 40) 15.

<sup>102</sup> See, *LCA Sub to Children Protection Framework* 22-23.

<sup>103</sup> Australasian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (2018).

information relating to family law proceedings under the Family Law Act and the *Family Court Act 1997* (WA).

### **Availability of supports**

101. The Law Council notes that outside the court system too, victims of FDSV are often overwhelmed and uncertain as to what support services are available to assist them and their children. The support required can include, but is not limited to:
- accommodation, including refuges, so that women and children can escape violence and have somewhere safe to go;
  - medical assistance for both short term and long term injuries;
  - counselling and psychological services;
  - access to courts and legal representation (including legal aid);
  - navigating Commonwealth assistance such as Centrelink and family benefits;
  - the retrieval of necessary items from their homes; and/or
  - clothing, basic toiletries, food and day to day necessities.
102. Whilst the Law Council acknowledges that many different agencies exist to offer victims of FDSV support in these areas, victims often do not know where to start and/or find it difficult to navigate the various services. The Law Council commends information sharing platforms such as The Orange Door, which is part of the Victorian Government's response to the Royal Commission into Family Violence and provides victims with a directory of help and support near them.<sup>104</sup> Such platforms should be the subject of increased funding and awareness-raising by governments.
103. The provision of critical support services is another key element of an integrated response to FSV, noting that victims often have multiple, complex needs and require a range of support services in order to leave violent relationships.<sup>105</sup> The Law Council repeats its calls for these services and refers the DSS to the its submission to the Parliamentary Inquiry for further detail on the nature of supports which should be provided for in the National Plan.<sup>106</sup>
104. In relation to the Law Council's recommendation to the Parliamentary Inquiry that different types of legal services be joined up, it is noted that the SPLA Committee recommended the appointment of a National Commissioner for the Prevention of Family, Domestic and Sexual Violence to address the fragmentation of legal services for those experiencing FDSV.<sup>107</sup> The Law Council supports this recommendation in principle, however suggests that the role of Commissioner would be most effective if its functions extended beyond monitoring, evaluating and reporting on services, and included receiving complaints and making referrals.

### **Specific needs and diverse experiences of women**

105. The Law Council endorses the Principle set out in the consultation guide that 'Our approach to women and children with diverse lived experiences needs to be inclusive, strengths-based, and promote social cohesion',<sup>108</sup> and emphasises that future National Plans must focus on delivering policies and services to address the disproportionate impact of FDSV on particular groups, noting the specific needs and

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<sup>104</sup> See, The Orange Door <<https://orangedoor.vic.gov.au/>>.

<sup>105</sup> See, *LCA Family Violence Submission* (n 54) 18-20.

<sup>106</sup> Ibid.

<sup>107</sup> See, 'SPLA Report' (n 12) 100-101 at [3.217]-[3.222].

<sup>108</sup> 3.

diverse experiences of women and communities. Properly understanding FDSV will often require an understanding of local community, language, culture and location. There are, in the Law Council's view, a number of diverse groups who are affected by multiple forms of discrimination or inequality and must be accommodated in any future National Plan.

106. As an overarching approach to assist in identifying and listening to these diverse groups, the Law Council emphasises the need to implement robust community-led and tailored initiatives. This suggestion is elaborated upon further below. The Law Council also supports the SPLA Committee's recommendation for greater involvement of local governments in prevention and early intervention initiatives, including that:
- local government be directly involved in the development and implementation of the National Plan;<sup>109</sup>
  - a representative of the Australian Local Government Association (**ALGA**) be made a member of the National Federation Reform Council Taskforce on Women's Safety;<sup>110</sup>
  - each local government association have a dedicated policy offer for family and domestic violence;<sup>111</sup> and
  - the Australian, state and territory governments work with the ALGA to determine whether additional resources are required.<sup>112</sup>

#### **First Nations women and their children**

107. The Law Council notes its support for the Principle set out in the consultation guide that 'Aboriginal and Torres Strait Islander people must be at the centre of all aspects of responding to violence in their communities'.<sup>113</sup> It is also noted that the consultation guide refers to 'Aboriginal and Torres Strait Islander communities' as one of the key focus areas for its consultation activities and states that the National Plan will be informed by the Wiyi Yani U Thangani (Women's Voices) project, amongst other things.<sup>114</sup>
108. This carries on from the vital focus on First Nations women and children in the Fourth Action Plan, which recognises that preventing and responding to family violence will need to prioritise cultural healing, rebuilding proud traditions and support networks, and strengthening First Nations identity.<sup>115</sup> Such a recognition should also be carried forward into the National Plan.
109. Similarly, the National Plan must acknowledge the context of 'deep, complex and sensitive issues such as dispossession, intergenerational trauma and gender inequality'<sup>116</sup> facing First Nations peoples. It must continue to evolve in its approach and prioritise addressing intergenerational trauma for First Nations peoples through primary prevention, with the aid of rehabilitative programs and holistic healing

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<sup>109</sup> *SPLA Report* (n 12) Rec 16.

<sup>110</sup> *Ibid* Rec 15.

<sup>111</sup> *Ibid* Rec 17.

<sup>112</sup> *Ibid*.

<sup>113</sup> 'Consultation Guide' (n 13) 3.

<sup>114</sup> *Ibid* 10.

<sup>115</sup> 'Fourth Action Plan' (n 15) 22.

<sup>116</sup> Australian Institute of Health and Welfare (AIHW), *Family, domestic and sexual violence in Australia*; SNAICC – National Violence for Our Children National Family Violence Prevention Legal Services Forum (NFVPLS) and National Aboriginal and Torres Strait Islander Legal Services (NATSILS), *Strong Families, Safe Kids*.



strategies that help men to evaluate their relationships, at the same time as strengthening connections to traditional knowledge culture, language, and identity.<sup>117</sup>

110. In the Law Council's experience, systemic racism and discrimination play a role in poor responses to situations where First Nations women and children experience violence. In addition, it is well-recognised that First Nations women experience FDSV at higher rates<sup>118</sup> and greater severity<sup>119</sup> than non-Indigenous women, with statistics considered not to be reflective of the actual numbers due to high underreporting rates.<sup>120</sup> Violence against First Nations women is also significantly more likely to result in death<sup>121</sup> and First Nations women are approximately thirty-two times more likely to be hospitalised for family violence-related assaults.<sup>122</sup>
111. Further, research suggests that First Nations women who experience violence are more likely to engage in resistant behaviours and use retaliatory violence as a survival method.<sup>123</sup> In the experience of the Law Council's members, this can result in First Nations women being misidentified as the primary aggressor.

### First Nations services

112. In this context, access to legal advice and representation through culturally competent legal services, particularly the FVPLS (which assist women and children, typically the victims of FDSV) as well as ATSILS (which provide mostly criminal legal assistance relevant to perpetrators) is essential in order to facilitate proper access to legal education, advice and representation for and from First Nations peoples.
113. The Law Council acknowledges recent welcome funding injections to FVPLS and to ATSILS family violence programs more broadly. The 2021-22 Federal Budget allocated \$57.6 million for targeted measures to address violence against First Nations women and children, including funding for legal services, a dedicated survey and improving the quality, capability and cultural safety of family violence services.<sup>124</sup> The Commonwealth Closing the Gap Implementation Plan (**the CTG Plan**) notes that of this figure, \$26 million will go towards improve the safety of First Nations women seeking support and legal assistance, including by:
- expanding the FVPLS program to address critical service gaps;
  - improving the quality and capability of Aboriginal and Torres Strait Islander family safety organisations; and

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<sup>117</sup> See, for examples of effective early intervention and prevention programs, *NFVPLS Submission* (n 82) at 6-7.

<sup>118</sup> See, Australian Institute of Health and Welfare, Family, domestic and sexual violence in Australia, 2018 (28 February 2018) <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-in-australia-2018/summary>> ('*AIHW 2018 Report*').

<sup>119</sup> ANROWS, *Existing knowledge, practice and responses to violence against women in Australian Indigenous Communities: Key findings and future directions* (Compass, Issue 01, January 2016).

<sup>120</sup> Victoria Tauli-Corpuz, Special Rapporteur on the Rights of Indigenous Peoples, *End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia* (2017) <<http://un.org.au/2017/04/03/end-of-mission-press-conference-and-end-of-missionstatement-by-the-un-special-rapporteur-on-the-rights-of-indigenous-peoples-victoria-tauli-corpuz-on-her-visitto-australia/>>.

<sup>121</sup> *Ibid.*

<sup>122</sup> See, *AIHW 2019 Report* (n 2) citing *AIHW 2018 Report* (n 120).

<sup>123</sup> Mandy Wilson et al, 'Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia, (2019) *SAGE* <<https://journals.sagepub.com/doi/pdf/10.1177/2158244016686814>>.

<sup>124</sup> Federal Budget 2021-22, 'Women's Budget Statement 2021-22' (11 May 2021) <[https://budget.gov.au/2021-22/content/womens-statement/download/womens\\_budget\\_statement\\_2021-22.pdf](https://budget.gov.au/2021-22/content/womens-statement/download/womens_budget_statement_2021-22.pdf)> 23.

- enhancing the cultural safety of non-Indigenous family safety organisations.<sup>125</sup>

114. However, the Law Council is concerned that this funding is insufficient. The FVPLS estimates \$26 million to be only a quarter of what is necessary to meet demand in the community.<sup>126</sup> Insufficient or short-term funding makes it difficult to implement programs, recruit and retain staff, develop expertise in the field,<sup>127</sup> and develop connection with community to support referral pathways.

115. The Law Council supports the National ATSILS' recommendations for funding to be directed to the National FVPLS Forum to support specialised, tailored and culturally safe services that are created and led by First Nations services for First Nations clients, and for long-term sustainable funding cycles for established services.<sup>128</sup> The National FVPLS Forum has also called for a dedicated funding stream to its NFVPLS Program with increased, long-term funding arrangements.<sup>129</sup>

### Community-led programs

116. The Law Council notes that Target 13 of the CTG Plan is that 'by 2031, the rate of all forms of family violence and abuse against Aboriginal and Torres Strait Islander women and children is reduced by at least 50%, as progress towards zero.'<sup>130</sup> The CTG Plan states that the National Plan will be the 'primary mechanism' for implementing this target.<sup>131</sup> It states that strategies in the National Plan will be determined by the Aboriginal and Torres Strait Islander Advisory Council on family, domestic and sexual violence (**the Advisory Council**), working in partnership with governments. Specifically, the Advisory Council will work with the National Federation Reform Council Taskforce on Women's Safety, which the Minister for Families and Social Services and the Minister for Women will co-chair and whose membership will be made up of the state and territory women's safety ministers.<sup>132</sup>

117. FVPLS were also excluded from the Advisory Council. The Law Council wrote to the relevant Ministers on 21 July 2021, expressing its disappointment at the exclusion of the FVPLS from this advisory group.

118. The Law Council notes the huge potential for the National Plan to implement greater access to community-led and co-designed services with First Nations peoples, and commends the commitment in Fourth Action Plan to engaging the expertise of First Nations people, communities and organisations to 'lead in the creation and implementation of community-led solutions to build and manage change.'<sup>133</sup> This important commitment should be retained in the National Plan, which should construct a comprehensive framework that:

- enables governments to facilitate community-led and co-designed services with First Nations peoples; and

<sup>125</sup> See, National Indigenous Australians Agency, *Commonwealth closing the gap implementation plan* (5 August 2021) <<https://www.niaa.gov.au/resource-centre/indigenous-affairs/closing-gap-implementation-plan>> ('*Closing the gap implementation plan*') at 58.

<sup>126</sup> See, Change the Record, 'Clear, consistent action to #CloseTheGap requires leadership at all levels' (Media Release, 5 August 2021).

<sup>127</sup> *LCA Joint Select Committee Submission* (n 77) 11.

<sup>128</sup> National Aboriginal and Torres Strait Islander Legal Services, 'Submission to the inquiry into family, sexual and domestic violence' (August 2020) <<https://www.natsils.org.au/wp-content/uploads/2020/12/NATSILS-Submission-to-the-Family-Violence-Inquiry-2020e1e.pdf>> 6.

<sup>129</sup> *NFVPLS Submission* (n 82) at 10.

<sup>130</sup> *Closing the gap implementation plan* (n 127) 57.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid* 57.

<sup>133</sup> 'Fourth Action Plan' (n 15) 5.



- helps to guide mainstream services to adapt their models to meet the needs of individuals and communities.

119. The Justice Project Final Report also noted that NATSILS and NFVPLS have both emphasised that culture is a central and key protective factor that supports families to be free of violence, and have noted the importance of holistic, strength-based approaches.<sup>134</sup>
120. At a high level, this can be achieved through collaboration with Aboriginal Community Controlled Organisations to develop culturally appropriate multidisciplinary responses, place-based approaches,<sup>135</sup> alternative therapeutic models for victim support and the rehabilitation of men who use violence.
121. As to more specific examples, highly successful First Nations community-led models such as the Maranguka Justice Reinvestment Project in Bourke, NSW, can be drawn upon. This project involved First Nations community members in the development, implementation and review of local responses to FDSV.<sup>136</sup> [AM1] An impact assessment performed by KPMG found a 1-year reduction between 2016 and 2017 (the program having started in 2015) of 23 per cent in police-recorded incidents of domestic violence, and a 42 per cent reduction in days spent by adults in custody, amongst other things.<sup>137</sup> This illustrates the great success of bundled-up community-led justice initiative in First Nations communities. The Law Council notes, however, that if it is to reach its full potential, rollout of the Justice Reinvestment model will require legislative amendment to ensure that the savings produced by the each community are returned to that community.
122. Other possibilities are to seek Indigenous knowledge in re-formulating the Cross Borders Indigenous Family Violence Program (**CBIFV**), a family violence perpetrator program and initiative of the Department of Correctional Services which commenced in 2007 with the support of the Western Australian Department of Corrective Services and the Northern Territory Department of Justice. The CBIFV services remote First Nations-occupied lands across Western Australia, South Australia and the Northern Territory. The CBIFV that operates primarily within the Ngaanyatjarra Pitjanjatjara Yankunytjatjara (**NPY**) Lands is delivered over a four-week period.<sup>138</sup> As the webpage for the program states, it:

*...concerns the criminality of family violence and the content aims to challenge abuse-supportive attitudes in a non-threatening manner to*

<sup>134</sup> Law Council of Australia, 'People who Experience Family Violence Chapter' *Justice Project Final Report* (August 2018) 56. See also, Secretariat of National Aboriginal and Islander Child Care, National Family Violence Prevention Legal Service and National Aboriginal and Torres Strait Islander Legal Service, *Strong Families, Safe Kids: Family violence response and prevention for Aboriginal and Torres Strait Islander children and families* (September 2017) <[http://www.natsils.org.au/portals/natsils/Strong\\_Families\\_Safe\\_Kids-Sep\\_2017.pdf?ver=2017-10-18-111427-643](http://www.natsils.org.au/portals/natsils/Strong_Families_Safe_Kids-Sep_2017.pdf?ver=2017-10-18-111427-643)>; National Family Violence Prevention Legal Service, *Submission No 105 to the Justice Project*.

<sup>135</sup> Our Watch, *Summary of evidence documented, Changing the picture, Background paper: Understanding violence against Aboriginal and Torres Strait Islander women and their children* (2018) 35–41 <[https://www.ourwatch.org.au/getmedia/adbd148c-eda4-44c1-b0ea-ba040e5c4ad1/Changing-the-picture-backgroundpaper-AA-\(1\).pdf.asp](https://www.ourwatch.org.au/getmedia/adbd148c-eda4-44c1-b0ea-ba040e5c4ad1/Changing-the-picture-backgroundpaper-AA-(1).pdf.asp)>.

<sup>136</sup> *SPLA Report* (n 12) 296-7 [7.242]-[7.245].

<sup>137</sup> See, KPMG, 'Maranguka Justice Reinvestment Project' (Impact Assessment, 27 November 2018) *Just Reinvest* <<https://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>> 22.

<sup>138</sup> Government of South Australia Department of Correctional Services, 'Domestic and Family Violence Intervention Program' <<https://www.corrections.sa.gov.au/Rehabilitation-education-and-work/rehabilitation/rehabilitation-programs>>.

*encourage participants to take responsibility for their thoughts, feelings and behaviour.*<sup>139</sup>

123. The CBIFV Program is also delivered in Port Augusta Prison to First Nations men who have engaged in FDSV and are planning to return to the NPY Lands. However, currently, the CBIFV Program is only available once every year (running for four weeks) within the Port Augusta Prison. In the other communities, the program is also only available once yearly. The Law Council calls for the National Plan to provide for greater access for remandee populations to such programs.
124. Another valuable example, this time of a successful collaborative practice initiative in the context of First Nations peoples, is the so-called Lansley Model, which was formulated by Ms Julia Lansley of the Ceduna FVPLS in South Australia. An understanding was formed between the relevant prosecutions unit and the FVPLS such that the prosecution of the defendant was in the hands of the prosecutions unit, but the specific conduct of the matter would occur through the FVPLS pursuant to the instructions of the complainant. This gave a voice to the complainant, allowing her to seek for conditions of counselling and anger management rehabilitative programs designed to improve the domestic relationship.

### **Recidivism and remand – an opportunity for restorative justice**

125. The National Plan must aim to improve access to perpetrator intervention programs for the remandee population in order to cease cycles of FDSV and its clear nexus to First Nations overrepresentation in both the general criminal justice system and, more specifically, the remandee population.
126. It is well recognised that First Nations peoples are disproportionately represented in the criminal justice system. As of 30 June 2020, First Nations peoples made up 29 per cent of all prisoners in Australia,<sup>140</sup> yet First Nations persons account for only around 3 per cent of the Australian population.<sup>141</sup>
127. Overrepresentation of First Nations people was also reflected in the remand population, defined to comprise those who have not yet been convicted or sentenced and who have either not applied for bail, or to whom bail has been denied. The offence category of ‘acts intending to cause injury’ accounts for the largest proportion of remandees and 42 per cent of First Nations remandees.<sup>142</sup> First Nations peoples remain over-represented in all offence types, but especially so in ‘serious assault not resulting in injury’, for which First Nations peoples constituted 51 per cent of remandees. The Law Council notes that the CTG Plan acknowledges the link between family violence, as well as other social and economic issues, and the over-representation of First Nations peoples in the criminal justice system.<sup>143</sup>
128. The Law Council notes that while the remand prison population has grown generally, First Nations peoples have continued to be over-represented in the remand

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<sup>139</sup> Government of South Australia Department of Correctional Services, ‘Domestic and Family Violence Intervention Program’ <<https://www.corrections.sa.gov.au/Rehabilitation-education-and-work/rehabilitation/rehabilitation-programs>>.

<sup>140</sup> Australian Bureau of Statistics, Prisoners in Australia, 2020 (3 December 2020).

<sup>141</sup> Australian Institute of Health and Welfare, ‘Profile of Indigenous Australians’ (23 July 2020) <<https://www.aihw.gov.au/reports/australias-health/profile-of-indigenous-australians>>.

<sup>142</sup> Ibid.

<sup>143</sup> *Closing the gap implementation plan* (n 127) 48.

population by a factor of over 11.<sup>144</sup> The proportion of First Nations prisoners with a prior record is 76 per cent.<sup>145</sup>

129. For many in the remandee and prison population, FDSV is the norm. Caroline Atkinson found that of 58 First Nations men jailed for violent crimes who she studied as part of an anthropological PhD on intergenerational violence, almost 90 per cent had been exposed to family violence and almost 60 per cent met the benchmark for Post-Traumatic Stress Disorder.<sup>146</sup> Despite these figures, the Law Council understands that there is currently very little opportunity for First Nations peoples in remand to access rehabilitative services, programs or therapeutic discourse which analyses FDSV and its root causes.<sup>147</sup>
130. These figures and examples crystallise the paramount need to shift towards rehabilitation and restorative justice as a way of dealing with FDVS against women and children, and preventing future instances of FDVS, at its source. This policy focus will not only assist the aims of the National Plan, but will also assist in reducing the overrepresentation of First Nations peoples in the criminal justice system.
131. To remedy over-imprisonment and address the current shortage of access to rehabilitative services and programs generally (including with respect to FDSV), and/or to address access to justice issues for First Nations peoples more generally, the Law Council's Justice Project Final Report made a number of recommendations. These included that:
- ongoing cultural competence training, informed and led by First Nations people and organisations, should be provided to lawyers, judicial officers, police, corrections and broader justice system professionals who work with First Nations peoples. Strategies to increase the employment of Aboriginal and Torres Strait Islander peoples across these professions should be adopted. First Nations organisations should be appropriately resourced to engage in this work;
  - culturally sensitive non-custodial sentencing options, co-designed by First Nations community-controlled organisations and run by them or in partnership with them, should be readily available in all jurisdictions and RRR locations, underpinned by sufficient culturally appropriate, trauma-informed services;
  - Courts should be supported to provide culturally appropriate support services and to ensure the facilitation of specialist sentencing courts; and
  - culturally competent prison rehabilitation, through-care and post-release accommodation support programs should be expanded, including tailored programs for First Nations women.<sup>148</sup>
132. This will, however, only be possible with adequate funding. To receive funding, service providers will need to be able to 'undertake robust project and impact evaluations' in order to understand whether they are effective.<sup>149</sup> The CTG Plan contemplates reviews of relevant First Nations community-controlled organisations and other First Nations organisations, and more detail on the processes for such

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<sup>144</sup> See, Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 2018).

<sup>145</sup> See, *ibid.*

<sup>146</sup> Jessica Hill, 'See what you made me do: Power, Control and Domestic Abuse' (2019) *Black Inc* 331.

<sup>147</sup> See, Law Council of Australia, 'Aboriginal and Torres Straits Islander Peoples Chapter' *Justice Project Final Report* (August 2018) <<https://www.lawcouncil.asn.au/justice-project/final-report>> at 45, 61, 76.

<sup>148</sup> *Ibid* 96-98.

<sup>149</sup> *SPLA Report* (n 12) Rec 10 at [3.141], 86.

reviews should be added to the National Plan.<sup>150</sup> The comments set out at paragraph 113 above are also repeated here. Further, it is emphasised that rehabilitation, restorative justice and perpetrator responses to people in remand will not displace the need for primary prevention, or for urgent, targeted assistance in cases where FDSV does arise, as outlined at paragraphs 107 to 112 above.

### Women with disability

133. The National Plan should address the challenges unique to women and children with disability in both their experience of FDSV, and of seeking support to escape it.
134. People with disability, and women in particular, experience disproportionately high rates of FDSV. This is illustrated by the fact that almost sixteen per cent of women with a physical or cognitive disability or long-term health condition reported experiences of violence in the past year, compared to just over four per cent of women without a disability.<sup>151</sup> Moreover, in consultations for the Law Council's Justice Project, family violence was raised as a pressing area of legal need by people with disability.<sup>152</sup>
135. The Law Council understands that women with disability experience distinct and particular forms of family violence, including threats and withdrawal of care, medication and other assistance. In the context of the ongoing COVID-19 pandemic, crisis and emergency response situations can have a particular impact on increased rates of violence, the reduced ability of service systems to respond, and reduced availability of supports for women with disability.
136. Women with disability who live in group homes or other shared accommodation, or who rely on carers and others for support, are at particular risk of violence in an intimate setting. However, this type of violence is not always recognised or captured by legislative and policy frameworks as constituting FDSV, given that it occurs beyond the typical intimate partner relationship. The Law Council considers that the capacity for systems to recognise and respond to this form of violence must be considered.
137. Further, the tendency not to believe women's reports of their experiences of violence is exacerbated for women with disability. For this group, ableism and problematic assumptions around the credibility of victims is particularly pronounced.<sup>153</sup> Queensland Advocacy Incorporated, a not-for-profit advocacy organisation and community legal centre for vulnerable people with disability in Queensland, reports that the 'differential treatment and disempowerment, including by people and organisations in protective roles (such as service providers)' of people with disability

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<sup>150</sup> See, *Closing the gap implementation plan* (n 127) at 78.

<sup>151</sup> Australian Bureau of Statistics, *Personal Safety Survey 2016*,

<<https://www.abs.gov.au/statistics/people/crime-and-justice/personal-safety-australia/latest-release>>.

<sup>152</sup> See, Law Council of Australia, 'People with Disability Chapter' *Justice Project Final Report* (August 2018) <<https://www.lawcouncil.asn.au/justice-project/final-report>> 14, citing Consultation, 08/09/2017, Perth (Sussex Street Community Law Services); Consultation, 03/08/2017, Darwin (NT Shelter); Consultation, 28/09/2017, Teleconference (Developmental Disability WA); Consultation, 10/08/2017, Canberra (Intellectual Disability Rights Service); Consultation, 29/08/2017, Townsville (Queensland Legal Aid); Adam Johnston, Submission No 28; Queensland Advocacy Incorporated, Submission No 43.

<sup>153</sup> ANROWS, *Women, Disability and Violence: Barriers To Accessing Justice: Key Findings and Future Directions*, (February 2018) <<https://www.anrows.org.au/publication/women-disability-and-violence-barriers-toaccessing-justice-key-findings-and-future-directions/>> ('*Women, Disability and Violence*').

'can normalise inappropriate treatment of people with disability and can subject people with disability to violence, abuse and neglect, including domestic violence'.<sup>154</sup>

138. Similarly, increased social isolation, difficulties accessing appropriate services, communication barriers and difficulties associated with reporting violence can compound experiences of violence for this group.<sup>155</sup>
139. Finally, it will be important to recognise in the National Plan that the impact of family violence is often compounded by the experience by women with disability of intersectional discrimination and disadvantage. This is particularly so for First Nations women with disability.

### Women from Culturally and Linguistically Diverse Backgrounds

140. The Law Council considers it crucial that the National Plan also address the impact of violence experienced by women from culturally and linguistically diverse (**CALD**) backgrounds, which can be exacerbated by numerous factors. These range from language barriers and reliance on interpreters for assistance, to a lack of familiarity with Australian laws and processes, mistrust of police, isolation from family and mainstream society, and a concern that speaking out would betray or bring shame to one's extended family and community.<sup>156</sup>
141. A recent study conducted by the Monash University Migration and Inclusion Centre (**the Monash Study**) examining the FDSV-related experiences of 1392 migrant and refugee women in Australia before and during the March-September 2020 COVID-19 lockdown<sup>157</sup> found that complex cultural dynamics were often a factor in relation to physical, financial or sexual abuse and that amongst victims there were low levels of trust in services such as police.<sup>158</sup> Indeed, it is well-recognised that women from CALD backgrounds are particularly vulnerable to financial abuse, including dowry abuse. Financial dependence is also particularly problematic where a person experiencing violence is ineligible for Centrelink support. Further, women from CALD backgrounds may experience particular forms of violence, including threats of deportation and threats of harm to relatives not living in Australia. The consultation guide refers to evidence of forced marriage involving young females amongst people from CALD backgrounds.<sup>159</sup>
142. The Law Council highlights the importance of incorporating these findings into practical solutions to reduce violence against women and children in CALD communities under the National Plan. The Law Council also notes the conclusion in the Monash Study that responses to FDSV should be local, specialised and co-designed with relevant communities.<sup>160</sup>

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<sup>154</sup> See, Law Council of Australia, 'People with Disability Chapter' *Justice Project Final Report* (August 2018) 40, citing Queensland Advocacy Incorporated, Submission No 43 to the Law Council of Australia's Justice Project.

<sup>155</sup> See, eg, *Women, Disability and Violence* n 155. See also Australian Human Rights Commission, *A Conversation in Gender Equality* (2017) 16, cited in Law Council of Australia, 'People with Disability Chapter' *Justice Project Final Report* (August 2018) 24.

<sup>156</sup> Cathy Kezelman and Pam Stavropoulos, *The Last Frontier' - Practice Guidelines for Treatment of Complex Trauma and Trauma Informed Care and Service Delivery* (2012) <<https://www.childabuserovalcommission.qov.au/sites/default/files/IND.0521.001.0001.pdf>>. See also, Law Council of Australia, 'Aboriginal and Torres Straits Islander Peoples Chapter' *Justice Project Final Report* (August 2018) at 71-72.

<sup>157</sup> Marie Segrave et al, 'Migrant and Refugee Women in Australia: The Safety and Security Survey' (2021) *Monash University*.

<sup>158</sup> See, for example, *ibid* 10-11, 40-41.

<sup>159</sup> 'Consultation Guide' (n 13) 5.

<sup>160</sup> *Ibid* 65-66.



## Family violence and temporary migration

143. The issues facing CALD women and children may overlap with those faced by members of Australia's migrant community. The National Plan should recognise and address the fact that the impact of FDSV on visa holders in Australia can be exacerbated by a range of factors. These include language barriers and reliance on interpreters to seek help, lack of familiarity with Australian laws and processes, mistrust of police as a result of past experiences, isolation from family and mainstream society and a concern that speaking out would betray or bring shame to their extended family and community. The inability of temporary visa holders to access social supports can exacerbate the impacts of this abuse.
144. The National Plan should also address the below specific concerns and recommendations with respect to dependent temporary visa holders experiencing family violence.

### **Dependent Temporary Visa Holders**

145. Visa status and deportation threats by a perpetrator represent acts of violence. Temporary migration status creates significant leverage for control and intimidation by an abusive partner. In the experience of members of the Law Council's constituent bodies and section committees, visa dependence is a key barrier to accessing legal support for domestic and family violence. Where a victim of domestic and family violence holds a visa that is conditional upon the existence of the relationship with their perpetrator, the capacity for the victim to access support and escape the violence is limited.
146. The Law Council acknowledges the family violence provisions under the Migration Regulations 1994 (Cth) (**the Regulations**), which were introduced to avoid circumstances where visa applicants and holders are compelled to remain in violent relationships for migration reasons. While accessing these provisions involves a range of complexities and difficulties, the family violence provisions allow applicants or holders of temporary partner visas and Distinguished Talent visa applicants access to permanent residency if they can demonstrate that the relationship was genuine; that family violence occurred and that the violence, or part of the violence, occurred during the course of the relationship.<sup>161</sup>
147. In contrast, dependent temporary visa holders, such as international students or skilled workers, cannot access the family violence provisions. As a requirement of the visa, the visa holder must remain in a relationship with their partner who holds the primary visa. As a consequence, a dependent visa holder experiencing family violence may be compelled to either remain in a violent relationship or leave Australia.<sup>162</sup> This gap empowers perpetrators by creating a tool for exercising coercive control. In the Law Council's view, this framework is inconsistent with the intention of the Australian Government to prevent family violence, as it aims to do via

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<sup>161</sup> Migration Regulations 1994 (Cth) div 1.5.

<sup>162</sup> The Law Council recognises that the Department of Home Affairs' policy in relation to the cancellation of visas under section 116 of the *Migration Act 1958* (Cth) requires that delegates consider the circumstances in which the ground for cancellation arose, including: 'whether there were any extenuating circumstances beyond the visa holder's control that led to the grounds existing. If cancellation is being considered because of a relationship breakdown, delegates should consider whether the relationship has broken down as a result of family violence. As a general rule, a visa should not be cancelled where the circumstances in which the ground for cancellation arose were beyond the control of the visa holder': Department of Home Affairs, *Procedures Advice Manual 3 (PAM 3) – Visa cancellation instructions* (1 July 2017). However, this is policy only, and should be included in the legislation to offer more substantial protection to temporary visa holders experiencing family violence.

the family violence provisions. The Law Council strongly supports urgent adoption of the following to address this gap.

### **Expansion of family violence provisions**

148. The family violence provisions were adopted to ensure that visa holders did not feel compelled to remain in violent relationships so as to be granted permanent residency. Currently the family violence provisions are limited in scope and can only be accessed by applicants and holders of a small number of visas.
149. As above, other temporary visa holders, such as dependent skilled or employer sponsored visa holders who have made applications for permanent residence based on the relationship with the primary visa holder, must also remain in a relationship with the perpetrator to be eligible for permanent residency. These visa holders face the difficult decision to either remain in a violent relationship or forego permanent residency.
150. To ensure the safety of these visa holders and to ensure consistency of approach, it is recommended that the family violence provisions be expanded to provide a pathway to permanent residency for those who have applied for permanent residency as dependents.

### **Protection for un-married subclass 300 visa holders currently excluded from family violence provisions**

151. The Regulations provide permanent residency pathways for survivors of family violence who:
  - have applied onshore for a Partner (subclass 820) visa;
  - have applied onshore for a Distinguished Talent (subclass 858) visa;
  - hold a Partner (subclass 820 or subclass 309) visa; or
  - hold a Prospective Marriage (subclass 300) visa, have married their sponsor and are onshore.
152. The current drafting of the Regulations<sup>163</sup> means that a subclass 300 visa holder who has been in a relationship with their violent partner, but has not yet formally married, is excluded from accessing the family violence provisions.
153. The Law Council recommends that the Regulations are amended to ensure that unmarried subclass 300 visa holders are also protected by the Family Violence division.

### **'Evidence' of family violence**

154. In order to be eligible for the grant of a permanent visa under the current family violence exceptions in Division 1.5 of the Regulations, the applicant must provide evidence that the family violence occurred. This may be either through 'judicially determined' evidence such as an injunction, court order or conviction, or 'non-judicially determined' evidence which includes either a joint undertaking made in court in relation to proceedings or a statutory declaration outlining the nature of the violence plus two items of evidence outlined in Legislative Instrument 12/116.<sup>164</sup> If an applicant provides evidence in line with the 'non-judicially determined' requirements and the decision-maker is not satisfied that the applicant suffered family violence, the

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<sup>163</sup> Migration Regulations 1994 (Cth) paras 820.211(7)(b), 820.211(8)(b) and 820.211(9)(c).

<sup>164</sup> Ibid, regs 1.23-1.24.



decision-maker must seek the opinion of an independent expert as to whether the applicant has suffered family violence.<sup>165</sup>

155. The items of evidence include reports issued by medical practitioners, police, welfare agencies, crisis centres or a statutory declaration by psychologists, social workers, family consultants or school counsellors or principals.
156. The Law Council's members report examples in which genuine survivors of extreme forms of family violence have not been able to meet the evidentiary requirements. This may be a result of language barriers, fear of authorities, or an inability to access or afford medical assistance or legal advice.
157. The Law Council proposes amendments to the Regulations which provide for the power for a decision-maker to refer an applicant to an independent expert where the documentary evidence has not been provided in strict compliance with the legislative instrument, and where the decision-maker is satisfied that there are compelling and compassionate circumstances that warrant the referral to an independent expert.

### **New Temporary Visa**

158. It is proposed that a new temporary visa be available for temporary visa holders who have not lodged permanent residence applications, but who have experienced family violence and therefore:
  - are unable to comply with their current visa conditions; or
  - are at risk of or have had their visas cancelled.
159. The creation of a new temporary visa category would allow dependent temporary visa holders experiencing domestic and family violence, to remain in Australia for a minimum of one year or longer to access and consider legal advice including other possible visa options.
160. The availability of a further visa option for victims of family violence would limit the use of migration status as a means to coerce and control. The visa would allow dependent visa holders to take control of their own visa status and migration pathway and addresses the dangerous power imbalance that exists between primary and dependent visa holders.
161. Importantly, the visa would allow victims of family violence time to secure their own and their family members' safety and seek the support they need. Work and study rights would attach to the visa and holders would be entitled to Medicare benefits. The visa would not create a guaranteed pathway to permanent residency but would allow holders to apply for any further onshore visas they might be eligible to obtain.
162. The efficacy of this visa is dependent on it being accessible and this requires recognition that people fleeing relationships characterised by violence may not have access to documents commonly used to evidence strict visa criteria. This reality must be taken into account in developing eligibility criteria so that visa extensions are readily available to those who need them.
163. The Law Council would welcome the opportunity to work with the Australian Government in its consideration of the above proposals, including more specific

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<sup>165</sup> Migration Regulations 1994 (Cth) sub-reg 1.23(10).

recommendations with regard to Schedule 1 and Schedule 2 eligibility criteria as well as the associated policy instructions guiding processing.

### LGBTQI+ communities

164. The Law Council recognises there are unique forms of family violence facing people who identify as LGBTQI+. Such violence can occur through tactics of control such as forced outing, whereby the perpetrator threatens or does disclose their victim's gender identity or sexual orientation to family, friends or colleagues without consent can have profound detrimental impacts.<sup>166</sup> Older people are also at heightened risk of homophobic family violence, especially as they become 'more dependent and frail'.<sup>167</sup> Further, people who identify as LGBTQI+ can also experience additional systemic and service barriers, including fear of encountering homophobia, biphobia or transphobia.<sup>168</sup>
165. Family violence is also a key cause of homelessness for LGBTI+ young people, which brings its own set of legal need related to housing and child protection.<sup>169</sup>
166. The Law Council notes that the consultation guide draws attention to evidence of higher instances of workplace sexual harassment among those identifying as LGBTQI+.<sup>170</sup> More broadly, it is important, in the context of the LGBTQI+ community, to recognise the particular experiences of trans women, people who identify as non-binary and gay men in the National Plan – while also rightly focussing on the experiences of women.
167. Compounding the challenge for addressing family violence against LGBTI+ victims is that these victims are also often reluctant to report. A Sydney study found that 53.5 per cent of 116 female respondents and 67.1 per cent of 70 male respondents who had experienced abuse in a current or previous LGBTI+ relationship did not seek any form of assistance.<sup>171</sup> This may explain why little research has been conducted into family violence in LGBTI+ relationships, though it has been characterised as a 'major issue' for the LGBTI+ community.<sup>172</sup>
168. The Law Council understands that FDSV interventions and supports available for members of the LGBTQI+ community are very limited. For example, there are no family violence shelters available for gay men in same-sex relationships. Further,

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<sup>166</sup> Monica Campo and Sarah Tayton, 'Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities' (2015) *AIFS* <<https://aifs.gov.au/cfca/publications/intimate-partner-violence-lgbtq-communities>>.

<sup>167</sup> Law Council of Australia, 'LGBTI+ People Chapter' *Justice Project Final Report* (August 2018) 19, citing Victorian Royal Commission into Family Violence, *Report and Recommendations* (2016) 5, 145.

<sup>168</sup> See, Catalyst Foundation, 'Towards a Safe Place' <<http://catalystfoundation.com.au/ourservices/lgbti/toward-safe-place-raising-awareness-domestic-violence-lgbtq-communities/>>; Law Council of Australia, 'LGBTI+ People Chapter' *Justice Project Final Report* (August 2018) 19.

<sup>169</sup> Law Council of Australia, 'LGBTI+ People Chapter' *Justice Project Final Report* (August 2018) 19, citing Consultation, 18/08/2017 Melbourne (LGBTI Network).

<sup>170</sup> 'Consultation Guide' (n 13) 5.

<sup>171</sup> See, Law Council of Australia, 'LGBTI+ People Chapter' *Justice Project Final Report* (August 2018) 21, citing Victorian Royal Commission, vol 5, 145, citing Janine Farrell and Somali Cerise, Same Sex Domestic Violence Interagency Group, *Fair's Fair: A Snapshot of Violence and Abuse in Sydney LGBT Relationships 2006* (2007).

<sup>172</sup> See, *ibid* at 18, citing Carrie Chan, Australian Domestic and Family Violence Clearing House, *Domestic violence in gay and lesbian relationships*, (2005), 2; Victorian Royal Commission into Family Violence, *Report and Recommendations* (2016) 5, 144, citing Marian Pitts et al, 'Private Lives: A report on the health and wellbeing of GLBTI Australians' (2006) *Australian Research Centre in Sex, Health and Society, La Trobe University* 51-52.

there are very limited, if any, services available to assist people who identify as female and perpetrate abuse.

169. This means that, while it is well-understood that this community is not immune to the impacts of FDSV, there is a significant gap in knowledge around how violence operates in the context of same-gender and gender diverse relationships. The National Plan should address this gap.

## Perpetrator interventions

170. The Law Council supports the inclusion of interventions for perpetrators of FDSV as a key priority area for the National Plan. Consideration should be given to the capacity and capability of current systems to support effective models of perpetrator interventions. Ongoing evaluations into the efficacy and safety of perpetrator intervention programs will also be necessary, to ensure such programs achieve their aims without compromising the safety of women and children.
171. The Law Council notes with approval that the Third and Fourth Action Plans included as key priorities the support for perpetrators of violence to engage in behaviour change programs to address the drivers of their violence.<sup>173</sup> Maintaining the focus on holding perpetrators to account in the National Plan will be essential in effectively addressing violence against women. To this end, the draft national priority to 'work with perpetrators' as set out in the consultation guide<sup>174</sup> is welcomed, as is the intent to explore a focus area on 'men in different capacities including role models and perpetrators'.<sup>175</sup>
172. Perpetrator intervention programs work by recognising the importance of challenging and shifting abusive and violent behaviours and represent an opportunity for men who use violence to change. These programs aim to break down misogynistic views and a deeply held sense of entitlement which perpetrators use to justify their abuse.
173. The Law Council notes that discussion around perpetrator interventions is often simplistic and an order or direction for a perpetrator to attend a perpetrator program should not be treated as guaranteeing the safety of their victim. Indeed, the end of a relationship does not mark the end of risk. Research repeatedly confirms that separation increases risk and that the 12 months following separation is often the most dangerous period for victims.<sup>176</sup> Consistent with this, research indicates that perpetrator programs which run for around 52 weeks allow for proper monitoring of the behaviour change trajectory.
174. This highlights problems with the typical duration of existing perpetrator intervention programs, noting in some jurisdictions they only run from 16 to 27 weeks. Models and approaches also vary depending on whether programs are held in the community or in a custodial environment.
175. The Law Council acknowledges the range of complexities and challenges involved in the delivery of perpetrator intervention programs. Based on feedback from experts who facilitate these interventions, perpetrator programs are likely to be more effective if they sit within an integrated and well-funded service response and are closely connected to the justice system, including the courts and police, as well as

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<sup>173</sup> See, Department of Social Services, *Third Action Plan 2016-2019 of the National Plan to Reduce Violence against Women and their Children 2010-2022*, National Priority Area 6; 'Fourth Action Plan' (n 15) 5.

<sup>174</sup> 'Consultation Guide' (n 13) 8.

<sup>175</sup> *Ibid* 10.

<sup>176</sup> Attorney-General's Department (Cth), *National domestic and Family Violence Bench Book* <<https://dfvbenchbook.aija.org.au/dynamics-of-domestic-and-family-violence/factors-affecting-risk/>>.

departmental and service delivery providers. This ensures that they are safety-oriented and hold perpetrators accountable. Similarly, it is critical that each component of perpetrator interventions has a FDSV lens and takes a safety-oriented approach.

176. It is also recognised that engaging perpetrators can be more difficult when there are other factors at play, such as mental health issues, addiction and job or housing insecurity. In view of this, perpetrators must be supported by other tailored services. These may include drug and alcohol programs or mental health programs. For First Nations men, supports may include participation in programs which acknowledge past and present injustices and promote cultural healing; this is discussed further at paragraphs 107 to 132 above.
177. Similarly, drawing on from the discussion at paragraphs 107 to 167 above, perpetrator programs are also more likely to be effective where they acknowledge the diversity of those participating. To this end, consideration must be given to the availability of perpetrator intervention programs for specific groups, including young people and individuals who identify as LGBTIQ+.
178. It is further noted that there is a substantial gap in understanding and availability of perpetrator intervention programs for fathers in family law matters. The Law Council encourages the Federal Government to explore ways in which these programs could be introduced and appropriately funded in an effort to better protect women and their children in matters where there is a history of FDSV. The Law Council also supports ongoing evaluations of perpetrator intervention programs as a measure for improving safety for women and their children.<sup>177</sup>
179. The Law Council welcomes the additional funding in the 2021-22 Federal Budget of \$4.9 million over three years for perpetrator-focused services, including the *No to Violence* Men's Referral Service and MensLine Australia's *Changing for Good* program.<sup>178</sup>
180. However, the Law Council considers that there are further opportunities for perpetrator intervention programs, particularly in respect to rural and regional locations nationwide, and the creation of culturally appropriate programs. For example, the Law Council understands that in the Northern Territory there are limited perpetrator intervention programs available beyond the Darwin and Alice Springs regions.<sup>179</sup> In short, there is a lack of specialist FDSV services to support men who use violence by simultaneously holding them accountable for the impact of their behaviour, working with them to change their behaviour and prioritising the safety of victims.<sup>180</sup>
181. A possible result of the failure to adequately fund nationwide programs is that perpetrators may rely on their lawyers for the non-legal supports they need, where

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<sup>177</sup> ANROWS, *Men's Behaviour Change Programs: Measuring Outcomes and Improving Program Quality: Key Findings and Future Directions* (Research to Policy and Practice, Jan 2019) <<https://www.anrows.org.au/publication/mens-behaviour-change-programs-measuring-outcomes-andimproving-program-quality-key-findings-and-future-directions-2/>>.

<sup>178</sup> No to Violence, '2021-22 Budget continues national access to Men's Referral Service for another 12 months' <[https://ntv.org.au/wp-content/uploads/2021/05/NTV\\_FederalBudget\\_Release\\_Mar10.pdf](https://ntv.org.au/wp-content/uploads/2021/05/NTV_FederalBudget_Release_Mar10.pdf)>.

<sup>179</sup> See, however, programs being piloted in the Wadeye and Tiwi Islands by CatholicCare NT: CatholicCare NT, 'Men's Behaviour Change Program - CatholicCare NT' <<https://www.catholiccarent.org.au/our-service/mens-behaviour-change-program/>>.

<sup>180</sup> Northern Territory Council of Social Service, 'Submission to Inquiry into domestic, family and sexual violence' (August 2020) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Social\\_Policy\\_and\\_Legal\\_Affairs/Familviolence/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Familviolence/Submissions)> 8.

lawyers are not qualified to provide such supports. Anger management programs are an alternative, but are not recommended as primary interventions.<sup>181</sup> There is also an increased risk that anger management programs may encourage an improper focus on the victim, who may be held accountable for failing to self-protect and protect their children.<sup>182</sup> The Law Council recommends that funding arrangements be put in place to support tailored perpetrator intervention services across Australia.

## Performance, monitoring and reporting

182. The Law Council considers that to be effective, the National Plan and future associated Action Plans must be monitored and regularly reassessed. Frequent reporting will enable governments to monitor national progress against the long-term objectives of the National Plan, making it possible to identify any changes that may improve the Plan's outcomes. Acknowledging that the Fourth Action Plan provides for monitoring and reporting frameworks, including requiring governments to report their key achievements and progress through national progress reports,<sup>183</sup> the Law Council considers that reporting and monitoring requirements should be made more detailed and transparent in the National Plan. This will ensure its effectiveness and governmental accountability.
183. Similarly, robust project and impact evaluations will be required in order to assess the effectiveness of specific services and programs.<sup>184</sup> It will also be important to provide for the tracking of behaviour and attitude change beyond the length of a program in order to gain a complete understanding as to whether a program has had a lasting impact and whether further funding should be provided. As noted at paragraph 27 above, obtaining consistent data will help to support ongoing monitoring and evaluation of services.
184. The Law Council supports the recommendation by the SPLA Committee that the Australian, state and territory governments provide appropriate funding and support to service providers to implement reliable data collection procedures.<sup>185</sup> The Law Council also recommends engaging in further consultation on the possible adoption of uniform national standards for FDSV services, which may assist in ensuring consistency in evaluation across different projects.<sup>186</sup>

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<sup>181</sup> Northern Territory Council of Social Service, 'Submission to Inquiry into domestic, family and sexual violence' (August 2020) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Social\\_Policy\\_and\\_Legal\\_Affairs/Family\\_Violence/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Family_Violence/Submissions)> 8.

<sup>182</sup> Lucy Healey et al, 'Invisible practices: Intervention with fathers who use violence' (Research report, April 2018) ANROWS <<https://www.anrows.org.au/publication/invisible-practices-intervention-with-fathers-who-use-violence/>>.

<sup>183</sup> See, 'Fourth Action Plan' (n 15) 49-52.

<sup>184</sup> *SPLA Report* (n 12) Rec 10 [3.141] 86.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid* [2.219] xxiv.