A Better Family Law System

Submission to Parliamentary inquiry into a better family law system to support and protect those affected by family violence

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# About Victoria Legal Aid

Victoria Legal Aid (VLA) helps people with legal problems involving family separation, child protection, family violence, criminal matters, social security, mental health, discrimination, guardianship and administration, fines, immigration, tenancy and debt.

We provide:

* free legal information through our website, our Legal Help telephone service, community legal education (CLE), publications and other resources
* legal advice and minor assistance through our Legal Help telephone service, duty lawyer service and advice appointments on specific legal issues
* support to people in the mental health system through non-legal advocates in the Independent Mental Health Advocacy service
* family dispute resolution services to help families make decisions about family law disputes away from court, and
* grants of legal assistance to pay for legal representation by a lawyer in private practice, a community legal centre or a VLA staff lawyer.

Most of our clients are people who are socially and economically disadvantaged: people with a disability or mental illness, children, the elderly, people from culturally and linguistically diverse (CALD) backgrounds, Aboriginal and Torres Strait Islander people and/or people who live in remote areas.

In addition to helping people resolve their legal problems, we work to address the barriers that prevent people from accessing the justice system. We contribute to law reform, influence the efficient running of the justice system, and ensure the actions of government agencies are held to account. We take on important cases and campaigns that aim to improve the law and make it fairer for all Victorians. This is one way we extend the reach of our services and improve outcomes for the community more broadly.

We are funded by the Victorian and Commonwealth Governments to provide these services but we are independent from government. We are required by the *Legal Aid Act 1978[[1]](#footnote-1)* to provide services in the most effective, economic and efficient manner and manage our resources in a way that makes legal aid available at a reasonable cost to the community and on an equitable basis throughout the state.

By providing a range of services – from information and early intervention services to intensive assistance under a grant of legal assistance – VLA aims to provide improved access to justice and legal remedies for people when they need it most.

# VLA’s Family, Youth and Children’s Law program

VLA’s Family, Youth and Children’s Law Program plays a leading role in the coordination of family law and family violence legal services in Victoria. We provide:

* duty lawyer, legal advice, representation and information services including in child support, parenting disputes and family violence matters across the state
* lawyer-assisted and child-inclusive family dispute resolution to help settle disputes without going to court (through FDRS – our Family Dispute Resolution Service)
* independent children’s lawyers who promote the interests of children at risk and help judicial officers make good decisions
* the new Family Advocacy and Support Services (FASS) in Melbourne and Dandenong family law registries – providing specialist duty lawyers working alongside specialist violence support workers for families affected by family violence
* Family Violence to Family Law Continuity of Service Delivery pilot programs with two community legal centres, offering a continuing legal service from the time parents first appear at the state Magistrates’ Court seeking help with family violence intervention orders, through to addressing family law needs[[2]](#footnote-2)
* duty lawyer, legal advice, representation and information services to children and parents in the Children's and Magistrates' Courts of Victoria, including in child protection and family violence matters
* pilot programs with two community legal centres offering help to families in child protection matters and then with interrelated family law and other problems, and
* legal advice and education in the community.

In the year 2015–16, the Family, Youth and Children’s Law program:

* provided services to over 31,300 clients (including 1,354 clients from Aboriginal or Torres Strait Islander backgrounds)
* provided over 17,000 duty lawyer services and over 14,000 grants for ongoing legal representation
* provided 1,097 legally-assisted Family Dispute Resolution Service conferences, 83 per cent of which resolved some or all issues.

Demand in the family law courts continues to increase and become more complex. In the year 2015–16 we provided 9 per cent more grants in family, youth and children’s law than the previous year, including 20 per cent more for independent children’s lawyers and 17 per cent more for parenting disputes. As demand and complexity increase, legal aid family law grant guidelines increasingly prioritise the clients most in need and the matters with the most impact on children.

Informed by this broad experience and access to data, VLA has, over many years, worked with governments, the family law courts and family law professionals to identify and make improvements to the family law system to improve outcomes for our clients and most importantly for children. Our most recent work on improving the safety and accessibility of the family law system for vulnerable families includes:

* two submissions to the Family Law Council’s inquiry into Families with Complex Needs (April 2015 and October 2015) [[3]](#footnote-3)
* our submission to the Victorian Royal Commission into Family Violence (June 2015),[[4]](#footnote-4) and
* our own Family Law Legal Aid Services Review report (June 2015), the recommendations of which we are continuing to implement.[[5]](#footnote-5)

We also have ongoing engagement with the Victorian Government, State agencies and other partners in relation to the implementation of the recommendations of the state’s Royal Commission into Family Violence.

Our submission draws on this significant previous and ongoing work supporting families using the family law system.

# Executive summary

Victoria Legal Aid (VLA) welcomes this Inquiry as an opportunity to contribute our expertise and experience to a careful consideration of the changes that can best improve the family law system to respond to family violence. We thank the Committee for inviting written submissions.

Legal assistance is critical to preventing family violence and stopping it from escalating, and VLA is committed to being a part of the effort to eliminate family violence in the community.

In Australia, most separating parents resolve their own arrangements, and the family law system requires parents to attempt family dispute resolution before accessing the courts. This means that the relatively few cases that proceed to family law courts are the most complex, often involving family violence, child abuse, mental illness, substance abuse and/or cognitive impairment issues, and are less likely to resolve without court decisions. This increasing complexity requires an increasingly specialised family law system.

National Legal Aid data shows that family violence is a factor in most legally-aided cases before the family law courts; with around 79 per cent of all legally aid family law matters across the country in 2014–15 involving family violence.[[6]](#footnote-6)

The consequence is that family law courts processes’ need to change in recognition of the prevalence of family violence and associated complexity in proceedings.

There are clear improvements to be made to risk assessment, early-decision making for cases involving family violence, and management of high-risk cases in the family law system.

The family law system also needs to be supported by professionals, including judicial officers and legal professionals, with increased knowledge of family violence dynamics and of well-established indicators of elevated risk.

Whenever there are allegations of family violence, there should be an early referral for risk assessment and safety planning by a family violence specialist worker. That risk assessment should be used solely to promote safety, not be provided to the court. However, the underlying allegations or agreed facts regarding any of the attitudes, behaviours or contextual factors that elevate risk should be provided to the court by the parties or through existing avenues for information-gathering in the family law courts, to support good quality judicial decision-making.

The court should then make early determinations about family violence allegations in order to inform any orders made. Earlier determinations about family violence will require increased resourcing for judicial officers as well as for the mechanisms the court has for gathering information about family violence risk, like section 11F family reports, the appointment of independent children’s lawyers, and the own motion subpoena powers of judicial officers.

We also suggest increased funding to legally-assisted family dispute resolution services to promote safe and effective but swifter, less resource-intensive resolution before a matter reaches court.

When matters proceed to court, there are particular proceedings that cause undue distress to family violence survivors. These proceedings include: matters where they or the other party are self-represented and they are forced to undergo direct cross-examination; contravention proceedings; and small property claims.

Contravention applications, relating to breaches of parenting orders, can be used to prevent abusive breaches or can in themselves be abusive applications. A triage process could promptly assess applications to determine the appropriate response, so that meritorious applications can proceed promptly while abusive applications can be terminated promptly. A triage process might include a leave process where parties can apply for leave to bring a contravention/breach application, and might include assessment by a registrar at first instance. Triage might also determine that the appropriate response is swift access to a family dispute resolution service at court.

Currently it is rare for family violence survivors, who are often forced to leave the relationship with little financial assets or support, to obtain a property settlement in the family law system. Making small property settlements more accessible would have a significant positive impact for victims of violence. We recommend the introduction of a new simplified small property stream in the family law courts, and the extension of family dispute resolution to cover small property claims.

Our submission also supports a range of changes already proposed or being piloted, for example the creation of a national database of court orders, the proposed changes in the exposure draft Family Law Amendment (Family Violence and Other Measures) Bill 2017, [[7]](#footnote-7) and the new Family Advocacy and Support Services being piloted throughout Australia.

Our submission suggests a new pilot: of the Counsel Assisting model recently recommended by the Family Law Council, to begin to address the ongoing issue of direct cross-examination. We also suggest reducing the problems associated with self-representation by increased funding to legal aid commissions and by a practice direction to better utilise existing procedural mechanisms.

We also suggest review and codification of a range of other standards which are currently inconsistently applied, relating to the role of independent children’s lawyers, the role of the court in scrutinising consent orders and how family violence’s impact on finances is taken into account when dividing property and determining spousal maintenance.

# Summary of recommendations

**Term of reference 1 – Family violence identification, response and support**

1. Introduce a new requirement in the *Family Law Act* requiring the court to make a determination in relation to allegations of family violence at an earlier stage in proceedings.
2. Provide increased resourcing to enable more use of existing effective mechanisms, including specifically: more judges for earlier decision-making, subpoenas, and more scrutiny of consent orders; more independent children’s lawyers; and more family consultants.
3. Implement the exposure draft Family Law Amendment (Family Violence and Other Measures) Bill 2017 removal of the 21-day limit on state/territory courts’ variation of family law orders.
4. Ensure every family law court provides early referral to specialist family violence risk assessment.
5. Subject to positive evaluation of the pilot, expand Family Advocacy and Support Services (FASS) to provide early legal advice and non-legal support services to families at risk in all family law court locations.

**Term of reference 2 – Safer consent orders**

1. Confirm in the *Family Law Act* the court’s positive obligation to scrutinise consent orders to confirm they are in children’s best interests.
2. Increase government investment in Legal Aid Commissions to make legally-assisted family dispute resolution available in more matters involving family violence across Australia.
3. (same as recommendation 1 in Term of reference 1) Introduce a new requirement in the Family Law Act requiring the Court to make a determination in relation to allegations of family violence at an earlier stage in proceedings.
4. (same as recommendation 2 in Term of reference 1) Provide increased resourcing to enable more use of existing effective mechanisms, including specifically: more judges for earlier decision-making, subpoenas, and more scrutiny of consent orders; more independent children’s lawyers; and more family consultants.

**Term of reference 3 – Arrangements where parties are self-represented**

1. Implement Productivity Commission Access to Justice Arrangements Inquiry Report recommendations 21.4 and 21.5 to fund civil (including family) legal assistance services adequately.
2. That the Family Court and Federal Circuit Court issue a court practice note on maximising family violence survivors’ protection from self-represented litigants using existing mechanisms.
3. Extend relevant provisions in Part VII, Division 12A of the *Family Law Act* to apply in all family law proceedings.
4. Pilot a new Counsel Assisting role to eliminate direct cross-examination in family law proceedings where there are allegations or findings of family violence.
5. Codify the role of independent children’s lawyers including their relationship with the appointment of Counsel Assisting.
6. Implement exposure draft Family Law Amendment (Family Violence and Other Measures) Bill 2017 appeal provisions and monitor effectiveness.
7. Implement a triage process for contravention applications, supported by new funding.

**Term of reference 4 – Supporting family violence victims to recover financially**

1. Create a new simplified Federal Circuit Court stream for small property claims.
2. Consider extending funding for legally-assisted family dispute resolution in small property claims when family violence is alleged.
3. Amend section 75(2) of the *Family Law Act* to add to the list of matters to be considered in family law property matters, the extent to which the financial circumstances of either party have been affected by family violence perpetrated by the other party.

**Term of reference 5 – Strengthening family law professionals’ capacity**

1. Make regular family violence education compulsory for all family law professionals, including judges, lawyers, registrars, family dispute resolution practitioners and family report writers as well as child protection practitioners and police.
2. Implement the Family Law Council’s training recommendations to improve family violence competency.[[8]](#footnote-8)
3. Make family violence education an academic requirement of the law degree and/or a professional legal training requirement of admission to practice.

**Term of reference 6 – A national approach to intervention orders**

1. Prioritise creation of a national database of court orders.
2. Recognise and enforce interstate family violence protection orders nationally.

# 1 – Family violence identification, response and support

**How the family law system can more quickly and effectively ensure the safety of people who are or may be affected by family violence, including by:**

* 1. **facilitating the early identification of and response to family violence, and**
	2. **considering the legal and non-legal support services required to support the early identification of and response to family violence.**

## a. Early identification and response to family violence

In Australia, most separating parents resolve their own arrangements, and the family law system requires parents to attempt family dispute resolution before accessing the courts.

This means that the relatively few cases that proceed to family law courts are the most complex, often involving family violence, child abuse, mental illness, substance abuse and/or cognitive impairment issues, and are less likely to resolve without court decisions. This increasing complexity requires an increasingly specialised family law system.

National Legal Aid data shows that family violence is a factor in most legally-aided cases before the family law courts. Around 79 per cent of all legally aided family law matters across the country in 2014–15 involved family violence. This figure was 81 per cent in Victoria.[[9]](#footnote-9)

The consequence is that family law courts processes’ need to change in recognition of the prevalence of family violence and associated complexity in proceedings.

Increased specialisation of judicial officers and other family law professionals, clearly defined early decision-making pathways for family violence matters, and improved resourcing of family law courts are all required, together, to facilitate early identification of, and response to, family violence.

### Risk assessment and safety planning

Risk assessment and safety planning for parties at court and post-court is vital to ensure safety.

This risk assessment and management should be conducted by a specialist family violence worker in conjunction with the court registry staff, in accordance with an established, evidence-based risk assessment framework such as the CRAF (Victorian Common Risk Assessment Framework).

While legal professionals are not and should not be risk managers, it is important that lawyers and judges have a good understanding of risk indicators to inform their advice and decision-making in relation to legal issues.

It is also vital that they can recognise risk indicators and refer clients to a specialist family violence worker.

This is the approach supported by VLA’s Client Safety Framework (discussed under [term of reference 5 below](#_5_–_Strengthening)). We also therefore support the availability of specialist family violence services at court, as discussed in relation to the second part of this term of reference, [Services to support the response to family violence](#_b._Services_to).

However, ensuring parties undergo risk assessment and are referred for safety planning is only one aspect of safety in the family law system. As we set out in the [next section](#_Early_determination_(court), early judicial decision-making informed by sound knowledge of risk indicators is also required to improve safety outcomes in family law courts.

### Early determination (court decisions/findings of fact) about family violence

Presently, there may be many months between an allegation of family violence being raised by a party and the court making a decision about whether family violence occurred. Without this finding, decisions made – often by consent between the parties and then approved as orders by the court – are made without information that is vital to ensuring safety.

We therefore support earlier determinations about family violence being made by the courts.

Current legislation requires courts to take prompt action in relation to allegations of child abuse or family violence under section 67ZBB of the *Family Law Act*. However, in our experience, this is not by itself resulting in early findings in matters involving family violence allegations. Resourcing constraints, in particular a lack of judges to hear these interim matters, and an unavailability of the information required to make the decision at this early stage, contribute to there being few matters where findings are made at an early stage.

In our view an effective way to prompt earlier findings of fact relating to family violence would include a stronger and more specific legislative requirement that family violence allegations be determined early, and increased resourcing of courts to enable this earlier decision-making.

Prompting an early determination about family violence would be a significant change in current court process. This restructuring of court process would place enquiry about safety at the start and centre of the court’s task. Currently safety, although increasingly a court priority, remains the subject of later determination. This diminishes the court’s impact in managing and responding to family violence risk.

In addition to an increase in resources, it is important that the courts have access to adequate information to confidently make safe decisions. To do that, we believe that existing mechanisms in the family law system can be better utilised, supplementing the information provided by the parties to the dispute.

For example, we propose greater use of independent children’s lawyers (ICLs), of short-form (section 11F) reports by family consultants and of judicial officers’ subpoena powers. These steps can be taken early in a proceeding and would better assist decision making at the interim hearing stage. More detail on the proposed increased use of these investigative powers is detailed in our submission to the Family Law Council’s inquiry into *Families with Complex Needs*.[[10]](#footnote-10)

Another suggestion has been simply to provide a family violence worker’s risk assessment to the judicial officer. However, we are concerned that this would not be adequate for the court to effectively address risk.

Providing a risk assessment to the judicial officer cannot replace judicial decision-making. Risk is dynamic and risk assessments are not prepared for the purpose of adducing evidence (for example, a risk assessment may contain information that a victim does not want shared with the court and/or the perpetrator). Further, rules of procedural fairness and rules of evidence would significantly complicate the bare provision of a risk assessment to a judicial officer to inform their decision making.

In our view, provision of a completed risk assessment is less helpful to a judicial decision maker than ensuring that the relevant information that was used to complete the risk assessment is also provided to the decision-maker, through the usual court mechanisms such as an affidavit. We acknowledge that this is of course dependent on a shared understanding about the meaning of well-established indicators of elevated risk, for example controlling behaviours, choking, pregnancy or stalking. This should be addressed through strengthening the capacity of professionals working in the system, discussed further below under [Term of Reference 5](#_5_–_Strengthening).

Finally, culture and practice change can promote early decision making.

It is our court practice experience that there is currently some reluctance to make a determination at an early stage about whether family violence occurred as alleged. This determination is often deferred because it would be resource intensive, requiring the hearing and testing of evidence, and there is concern about making an incorrect determination without enough evidence.

However, this deferral prolongs the risk to victims of family violence. In addition, were determination about family violence risk made earlier in family law proceedings, it is likely there would be a significant reduction in the number of matters that reach final hearing, because in many cases the degree of the family violence perpetrated and its implications for future risk (and therefore the orders that are in the child’s best interests) is the sole or primary issue in dispute at the final hearing.

It is our view that legislative change to require this early decision making, combined with training of family law professionals (in relation to [Term of Reference 5](#_5_–_Strengthening)), will help to create this practice change. This early resolution with a focus on safety would also reduce the trauma to victims and families of being engaged in protracted litigation.

**Recommendations**

1) Introduce a new requirement in the *Family Law Act* requiring the court to make a determination in relation to allegations of family violence at an earlier stage in proceedings.

2) Provide increased resourcing to enable more use of existing effective mechanisms, including specifically: more judges for earlier decision-making, subpoenas, and more scrutiny of consent orders; more independent children’s lawyers; and more family consultants.

### Better resourcing and integration of the courts

Better integration of family court, child protection and family violence jurisdictions will promote safety and lessen the burden on victims who currently manage their matters across multiple jurisdictions with very different policy and legislative frameworks. We support the Family Law Council’s Families with Complex Needs report recommendations addressing the gaps between jurisdictions.[[11]](#footnote-11)

We note that integration must involve more than just information sharing, and will necessarily involve multi-disciplinary training of the professionals involved (as discussed in relation to [Term of Reference 5](#_5_–_Strengthening)).

Currently, magistrates in state courts are empowered to respond to new incidents or allegations of violence by altering a family law court order in the course of making a family violence intervention order. VLA supports the measures in the current exposure draft Family Law Amendment (Family Violence and Other Measures) Bill 2017 to remove the 21-day time limit on state or territory courts’ power to vary, discharge or suspend an order, to ensure that family violence and family law orders about the one family remain consistent and endure or lapse together. This was also supported in National Legal Aid’s previous submission on the exposure draft Bill.[[12]](#footnote-12)

**Recommendation**

3) Implement the exposure draft Family Law Amendment (Family Violence and Other Measures) Bill 2017 removal of the 21-day limit on state/territory courts’ variation of family law orders.

## b. Services to support the response to family violence

### Referral to early risk assessments

As [already noted](#_Risk_assessment_and), an assessment of the level of family violence risk (risk of using violence or being subjected to violence) is an important first step for families coming to the family law courts. A risk assessment can contribute to the development of a safety plan for the parties and other people at the court, and for the safety of the parties and children when they leave the court buildings.

Lawyers have a role in risk identification and responding appropriately to risks – including by seeking more information from clients – when family violence risk factors present, but a full risk assessment should be conducted by a family violence worker rather than by a lawyer. VLA’s Client Safety Framework trains lawyers to identify family violence risk and respond to clients at risk of perpetrating or experiencing family violence. An appropriate response will tend to include referral for a specialist family violence risk assessment and requires the lawyer to consider how that risk will impact the legal advice given and legal outcome sought. Our Client Safety Framework is described in more detail in our response to [Term of Reference 5 further below](#_5_–_Strengthening).

The following section ‘[Legal and non-legal help and triage at court](#Triage)’ describes the new Family and Advocacy Support Services now operating in most Family Court registries. Until those are extended to every family court registry and circuit location, we recommend that all family courts provide direct referral to specialist family violence support.

**Recommendation**

4) Ensure every family law court provides early referral to specialist family violence risk assessment.

### Legal and non-legal help and triage at court

Families where a parent is using violence are presenting to the family law courts with a cluster of legal and non-legal problems. The non-legal issues are a factor in the court’s assessment of safety and must be a factor in the orders that are made. It is VLA’s experience that timely access to legal and non-legal support services can improve safety and can reduce the issues in dispute and reduce the likelihood of protracted litigation.

The Victorian Royal Commission into Family Violence in its final report noted the benefit of the Family Violence Court Division model in some Victorian Magistrates’ Courts and recommended further roll-out of the model.

Key aspects of this model can be adopted to the family law courts setting. The co-location of non-legal specialist services with specialised duty lawyers is a particular strength of this divisional court model. It maximises the benefits of the legal intervention by coordinating the justice system’s response to a family violence incident with the non-legal response. Applicant and respondent workers at the division court identify the non-legal needs of the parties and work with each party to arrange the appropriate non-legal supports. For example, support workers link parties into counselling services, men’s behaviour change programs, alcohol and drug dependence services, and housing support services. This better supports long-term change by responding to the cluster of issues that a family presents with at court.

A similar co-location model at the family law courts will greatly assist in facilitating access to non-legal support services for both parents (and for children). To this end VLA welcomes the Commonwealth Government’s recent investment in the Family Advocacy and Support Services (FASS).

FASS is a new service involving family violence support workers working alongside lawyers, delivered through Legal Aid Commissions across Australia in selected family law court locations. The new service includes family violence support workers as well as more capacity for specialist lawyers.

Building on existing duty lawyer services provided by Legal Aid Commissions and community legal centre lawyers, FASS will help people navigating a complicated system at a stressful time to get legal help earlier as well as to get access to social services and referrals from support workers co-located at the court.[[13]](#footnote-13)

FASS is funded for three years through the Commonwealth Government as part of the third action plan under the National Plan to Reduce Violence against Women and their Children 2010–22. FASS is available in most permanent Family Court registries, but is not yet funded to extend to all circuit court locations under the current funding. An evaluation of the pilot is planned before the pilot ends in 2019.

**Recommendation**

5) Subject to positive evaluation of the pilot, expand Family Advocacy and Support Services (FASS) to provide early legal advice and non-legal support services to families at risk in all family law court locations.

# 2 – Safer consent orders

**The making of consent orders where there are allegations or findings of family violence, having regard to the legislative and regulatory frameworks, and whether these frameworks can be improved to better support the safety of family members, as well as other arrangements which may be put in place as alternative or complementary measures.**

There are, in general, two categories of consent orders currently entered into:

* Consent orders that are agreed between the parties, often through a mediation or dispute resolution process (rather than documenting the agreement reached by way of a parenting plan, the parties instead elect to file an application for consent orders with the court), or
* Consent orders which are agreed to by the parties after some litigation. This might be at the first court event or at any time prior to the final hearing.

In both cases, the court must be satisfied that any orders about children are in the best interests of those children before the orders are made. Orders about property must be just and equitable.

Current case law requires judicial scrutiny to be applied to applications for consent orders. No matter how a consent order has been negotiated, consistent application of this judicial scrutiny, informed by knowledge of the dynamics of family violence, is vital to ensure any consent orders support the safety of family members who have experienced family violence.

In VLA’s experience there continues to be inconsistent application of this scrutiny from the court. Shortages of judicial time, resources and training no doubt contribute to these inconsistencies. VLA suggests that one way to ensure greater judicial scrutiny in the making of consent orders is codification of the case law on this matter.

*T & N* [2003] FamCA 1129, at paragraph 39, holds that ‘consent does not displace the obligation of [the] Court to make orders that are judged to be in the best interests of children’. Including the rule in *T & N* in the legislation would provide a clearer direction to the Judiciary to more closely examine the arrangement agreed by the parties, on a more consistent basis, ensuring these arrangements are safe.

**Recommendation**

6) Confirm in the *Family Law Act* the court’s positive obligation to scrutinise consent orders to confirm they are in children’s best interests.

As codification of *T & N* does not in theory represent a change to the current law, we appreciate that to be fully effective codification would need to be supported by additional court time and more dispute resolution options to support parents to reach workable agreements in the children’s best interests.

## Consent orders agreed at mediation

A large number of family law matters are resolved by agreement without the need for litigation, and many of these matters are resolved at mediation. In fact, Section 60I of the *Family Law Act* requires parties to a parenting dispute to make a genuine effort to resolve a dispute by family dispute resolution (FDR) before seeking recourse before the family law courts.

VLA established Roundtable Dispute Management, now VLA’s Family Dispute Resolution Service (FDRS), in 2004, before the introduction of this legislative requirement. FDRS provides timely, legally-assisted family dispute resolution services to vulnerable people. It assists separated families to act in the best interests of their children by providing case management which involves risk assessment, preparation and referrals to legal and non-legal support services and, if assessed appropriate, by holding conferences facilitated by experienced chairpersons. Each of Australia’s legal aid commissions runs a similar legally-assisted family dispute resolution service in its jurisdiction.

FDRS case management and conferencing procedures are well regarded. FDRS case managers conduct a screening interview with all parties to a dispute and use the information gathered to complete a risk assessment to determine whether it is appropriate for a conference to take place. In making an assessment, the case manager considers the matters set out in regulation 25(2) of the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth), including any history of family violence and the risk that a child may suffer abuse.

FDRS provides a legally-assisted model of FDR. At least one party is legally aided throughout the dispute resolution process and all parties are encouraged to be legally represented. In cases where an invited party is ineligible for a grant of aid and is unable to afford a private lawyer, FDRS may arrange a lawyer from the Family Law Legal Service[[14]](#footnote-14) to represent a party. Legal representation in FDR helps address power imbalances for those in dispute and gives parents knowledge about the law and likely court outcomes so that they can make decisions that are in the best interests of their children.

In 2015–16, VLA delivered 1,097 FDR conferences with a settlement rate of 83 per cent. Most conferences occur at an early stage in a family law matter, avoiding the need to go to court. However, in appropriate matters conferences occur during court proceedings (called litigation intervention conferences) to help settle the dispute before a final hearing.

### Safety during FDRS

Legal representation of parties, combined with individual case management for clients and experienced chairpersons facilitating conferences, enables VLA to conduct FDR in circumstances where other FDR services might determine it inappropriate to proceed.

In the VLA FDRS assessment process, parties are encouraged to raise concerns about their emotional or physical safety with their FDRS case manager. Where risks are identified, the information obtained determines the appropriateness of progressing with FDR and, if so, the safety planning required to enable FDR to progress safely.

Safety planning occurs when the case manager identifies potential risk issues for a client during or after a conference or identifies that a party may be at risk if their matter is assessed as unsuitable for an FDRS conference. The case manager will work with the affected party to provide information and resources so that the party can make a decision about their physical and emotional safety. The case manager will also provide relevant referrals to external organisations and develop a practical plan that the affected party can implement should they feel their safety is at risk.

As part of safety planning, the case manager will determine a suitable conference format. For example, where risk issues are identified, but the matter is still suitable to proceed, a shuttle conference can be arranged. A shuttle conference is where parties do not have to see or speak to the other person directly. The FDR chairperson speaks to each party and their lawyer separately. Shuttle conferences can occur in the same building where each of the parties have a safe room in a separate area, or they can occur over the telephone.

Other measures can also be implemented to ensure the safety of the parties arriving and leaving the conference venue. For example, the case manager, in consultation with the affected person, can arrange separate arrival and departure times or for the party to be escorted to and from the conference by their lawyer or a trusted third party.

Our experience is that in matters involving family violence, a well-supported mediation process, with specialist lawyers and mediators, can be a positive experience for all parties, including a victim of violence, and can result in an agreement about children that is safe and in the children’s best interests.

Where this type of legally supported mediation is not an option, matters involving family violence might be deemed ‘unsafe’ for mediation and families with complex needs and safety risks are left with litigation as their only option.

We support, therefore, increased government investment in Legal Aid Commissions to make the FDRS legally-assisted model of mediation available in more matters and across Australia more broadly, particularly in regional, rural and remote areas which face significant access to justice issues due to a lack of court registries, infrequent or no court sittings.

**Recommendation**

7) Increase government investment in Legal Aid Commissions to make legally-assisted family dispute resolution available in more matters involving family violence across Australia.

## Consent orders agreed during litigation

The ability for parties to reach agreement about their matter at any point during the proceedings is a positive aspect of the family law system that allows parents to find common ground about what is in the best interests of their children.

However, it is currently common practice for consent orders which are agreed by the parties during litigation to be agreed at a court event with little or no negotiation occurring prior to that court event.

The practice of negotiating agreements in the court environment is extremely time restricted, stressful and can lead to parties feeling pressured or confused about what they are agreeing to. For some victims of family violence this environment is not conducive to reaching safe, well thought-out agreements, rather the fear of a less safe court-determined outcome or the desire to leave the traumatising environment of the court, where the other party is likely nearby, might cause unsatisfactory agreements to be reached.

In response to this common family law practice, VLA has implemented some measures to improve preparation and negotiation prior to court dates through the implementation of our Family Law Legal Aid Services Review recommendations.[[15]](#footnote-15) Measures have included reintroduction of an advice and negotiation legal aid grant for practitioners and the development of a suite of quality tools to assist practitioners in the preparation of matters, thinking through and getting detailed instructions on the issues in dispute and possible suitable settlement proposals.

It is also our experience that in a busy duty list the court will in some cases give a preliminary view about an aspect of a case or make a comment that is generalised – such as that there is an expectation that parents will facilitate the relationship between each other and the children.

Such a comment or preliminary view from a judicial officer may lead a party to believe they will risk a poor outcome if they do not reach agreement, without any determination being made about the circumstances in their individual case. The reality of long wait times for a judicial determination may also play a role in a party agreeing to an unsafe arrangement.

In order to improve consistency of safe outcomes in consent orders where there are allegations of family violence, VLA supports changes to the family law system that will result in earlier findings of fact by the court in relation to family violence (as discussed in relation to Term of Reference 1).

Knowing the facts in the individual case as they relate to family violence and therefore the risk to family members is a crucial piece of information in order for safe, well-informed agreements to be reached. This is far preferable to agreement reached on the basis of speculation about what a court might do in a matter based on an initial comment by a judicial officer or a generalised view about parenting disputes.

Similarly, agreement is regularly reached in light of the views expressed by the family report writer, which are in some matters involving family violence caveated by an uncertainty about whether allegations of family violence are accurate. It is therefore not uncommon for these reports to express alternate proposals which are contingent on the finding by the court about the family violence allegations.

Extract from a family report’s recommendations in a current VLA case file:

‘On the material at hand it is respectfully recommended that: … the child spend time with the father by agreement and failing agreement as follows [unsupervised contact including regular overnight contact with the father] … If the father is found to have breached the conditions of a current Intervention Order protecting [the mother], [as alleged,] the time with the child revert to [orders for supervised time].’

Family reports provide valuable psychological insights regarding the parties and the various issues and dynamics experienced by the family. The utility of these family reports, however, and the consent orders that are reached on the basis of the views expressed in them, would likely be greatly improved if there were findings about the allegations of family violence by the court prior to their preparation.

An early finding of fact in matters involving family violence will require amendment to the *Family Law Act* (as discussed in relation to Term of Reference 1). This amendment would create a new and clear legislative requirement for the determination to be made at an early stage, for example an interim hearing date to determine the issue of family violence to be set at the first mention.

**Recommendations** (as above in relation to [Term of Reference 1](#_1_–_Family))

1) Introduce a new requirement in the *Family Law Act* requiring the Court to make a determination in relation to allegations of family violence at an earlier stage in proceedings.

2) Provide increased resourcing to enable more use of existing effective mechanisms, including specifically: more judges for earlier decision-making, subpoenas, and more scrutiny of consent orders; more independent children’s lawyers; and more family consultants.

# 3 – Arrangements where parties are self-represented

**The effectiveness of arrangements which are in place in the family courts, and the family law system more broadly, to support families before the courts where one or more party is self represented, and where there are allegations or findings of family violence.**

The family law courts have always had to deal with large numbers of people without legal representation. Many parents simply cannot afford legal representation, and the legal aid system has never been funded at a level that would allow a lawyer appointed for every person who cannot afford one.

The means tests for financial eligibility for a grant of legal assistance set by each legal aid commission to manage their fixed funding responsibly are quite strict. Only parents with the very least financial means qualify for legal aid. In its recent report into ‘Access to Justice Arrangements’, the Productivity Commission found that there are more people living in poverty (14 per cent) than are financially eligible for legal aid (8 per cent).[[16]](#footnote-16)

Increased funding for legal assistance services would assist to better support families before the courts where one or more parties are self-represented, and where there are allegations or findings of family violence. While other measures, as described later in this section, will still be required, better resourcing for legal aid and other legal assistance service providers would of course go some way to addressing the issue.

The Productivity Commission’s Access to Justice Arrangements inquiry report interrogated the availability of legal aid services and found that funding provided to legal aid commissions is inadequate to fulfil the commissions’ roles, and that additional assistance in civil law areas (including family law) could prevent the costly escalation of disputes.[[17]](#footnote-17)

**Recommendation**

8) Implement Productivity Commission Access to Justice Arrangements Inquiry Report recommendations 21.4 and 21.5 to fund civil (including family) legal assistance services adequately.

## Addressing direct cross-examination

As the Productivity Commission acknowledged,[[18]](#footnote-18) adequate funding to legal aid commissions will not address completely the issue of direct or in-person cross-examination in the family law courts.

In our family law system, cross-examination is a way of testing evidence to give the court the confidence it needs to rely on that evidence when making rulings. However, if one or both parties are not legally represented, they will need to cross-examine the other party themselves (called direct or in-person cross-examination).

There will always be a number of people who do not qualify for legal aid. Legal aid also does not address when a parent chooses not to have a lawyer so that they can run their family law case on their own. Unfortunately, in a small number of cases this choice is made, including by an abusive party in order to use the legal process to intimidate or harass a victim of family violence.

VLA recognises that matters involving self-represented litigants present a challenge for the family law system to manage – particularly in relation to cross-examination – while promoting the safety of children and adult family violence survivors.

Currently the measures available to promote safety are inconsistently applied, and even where applied are ultimately inadequate in many cases. We recommend a range of enhancements.

Currently, in some family court disputes, a victim of family violence at the hands of their ex-partner can be made to sit in the witness box and be directly cross-examined by that ex-partner, re-living traumatic experiences. Just as harrowing is the situation in which a victim of family violence is expected to face their ex-partner directly and cross-examine them about the details of the violence.

Whilst only a small fraction of matters before the court reach a final hearing, the mere possibility that direct cross-examination could occur can, in our experience, cause victims of violence to agree to unsafe consent orders or to abandon a small and much needed property settlement claim.

As well as causing distress and discouraging use of the court system by the most vulnerable, it is in our view unlikely that cross-examination by a self-represented litigant in such circumstances will provide high quality evidence for the court. While judicial officers need good quality information about benefits and risks to children on which to base their decisions, it is questionable whether information elicited through this process (including any inferences drawn from parties’ conduct in the witness box or asking questions) will be particularly reliable.

### More consistent use of existing protections

There are currently several measures a judge can choose to employ to limit or control in-person cross-examination in child-related family law proceedings and limit other potentially abusive behaviors by self-represented litigants, contained in Part VII, Division 12A of the *Family Law Act*, including:

* limiting or controlling in-person cross-examination under section 69ZN
* using remote witness facilities under section 69ZQ, or
* making findings as to family violence at an early stage under section 69ZR.

There are also steps lawyers can take to encourage the use of these measures. One case in which a VLA lawyer used various procedural options to help a woman keep herself and her children safe from her self-represented violent ex-partner during family law litigation is written up as a case note on the VLA website.[[19]](#footnote-19)

Techniques available include careful responses to subpoenas, and requesting witness protections like remote evidence facilities. However, unrepresented survivors are unlikely to be aware of these measures.

Further, the use of these provisions is unpredictable, inconsistent and dependent on discretion of the individual judge. There is no certainty of process in the family law system for those experiencing or using violence. This unpredictability is distressing and can result in unsafe or inequitable outcomes.

Family violence survivors could make better-informed decisions and have more confidence about court processes if the use of current mechanisms was more consistent. VLA welcomed the recent revision of the Family Court and Federal Circuit Court’s Family Violence Best Practice Principles to include vulnerable witnesses content, and we expect this to continue to improve practice.[[20]](#footnote-20) However, to achieve real predictability and uniformity, we suggest the issue of a court practice note to provide guidance to all judicial officers.

In addition, these mechanisms do not currently apply to family law financial or property matters, only to child-related proceedings. However, a history of family violence may be present between separated parties whether or not there are children of the relationship. We recommend legislative change to make these provisions available to the court in all family law proceedings.

**Recommendations**

9) That the Family Court and Federal Circuit Court issue a court practice note on maximising family violence survivors’ protection from self-represented litigants using existing mechanisms.

10) Extend relevant provisions in Part VII, Division 12A of the *Family Law Act* to apply in all family law proceedings.

### Court-ordered representation for cross-examination

Again, a practice direction could significantly improve the situation for many litigants, but will not completely eliminate direct cross-examination. VLA supports the elimination of direct cross-examination where there are allegations or findings of family violence.

The difficult and persistent issue of cross-examination for self-represented parties has been repeatedly highlighted, and there have been understandable reservations about various potential solutions. In VLA’s view it is now time to consider the options, and choose one to pilot.

We have explained earlier in [this section](#_3_–_Arrangements) our view that increased funding to legal aid commissions would solve only part of the problem.

Another response proposed has been to assign a lawyer to a self-represented party to assist with cross-examination only, as occurs in Victorian Magistrates’ courts in contested family violence intervention order matters, or to assist with running the final hearing.

VLA administers the funding and allocation of court-ordered representation in Victorian family violence intervention order contested proceedings, and based on this experience we have several reservations about whether this model would work in family law proceedings.

Representation for cross-examination only – when a lawyer does little more than act as a mouthpiece for the litigant – can have only limited effectiveness at solving the problems presented by direct cross-examination. The trauma is presumably reduced because the questions are not asked directly by the perpetrator of violence, but the perpetrator still frames the questions and it is difficult for a lawyer in that role to determine whether the questions are necessary for the proceeding or are asked as a form of abuse.

More generally, joining a proceeding at trial stage is a very difficult task for a lawyer. In the considerably shorter and legally simpler Victorian family violence intervention order jurisdiction, lawyers allocated to a self-represented party for the purposes of cross-examination only, routinely conduct the entire contested hearing as it is difficult to prepare for and conduct only the cross-examination portion in a legally competent manner. This would, however, be a much larger task in family law proceedings, or alternatively lawyers would risk conducting a significantly under-prepared cross-examination or even full conduct of a trial, if they are not well across all the materials filed in the proceedings at interim stages.

We also note that the current National Partnership Agreement on Legal Assistance Services prioritises early intervention and dispute resolution in family law,[[21]](#footnote-21) as was the case in the previous National Partnership Agreement. An approach that prioritised the allocation of legal aid funding for final family law trial representation would potentially be inconsistent with several years’ appropriate focus on legal assistance services that support timely intervention and resolution of matters.

Accordingly, VLA does not recommend the implementation of a scheme for ordering the representation of self-represented litigants in certain circumstances in family law proceedings. Given this, VLA’s view is that a Counsel Assisting role should be piloted.

### Pilot a Counsel Assisting role

VLA supports the Family Law Council’s recommendation in their recent report on *Families with Complex Needs* that the government explore implementation of a Counsel Assisting model in cases where one or both parties is self-represented and issues of family violence or other safety concerns for a child have been identified.

VLA recommends the government invest in a pilot of the Counsel Assisting model in several family law court locations with a view to expanding the pilot if it proves effective.

As the Council noted, the Counsel Assisting model could be expected to have a range of benefits:

‘The use of this model in such cases would assist the court’s determination of the child’s best interests by ensuring that all relevant evidence is identified and collated and that all relevant issues are ventilated before the court in a coherent and efficient way.

Council also notes the potential benefits of a Counsel Assisting model for an unrepresented party who has experienced family violence, including by assisting them to narrow the issues in dispute. Council further notes the potential for this approach to help maintain a focus on the best interests of the child throughout the hearing, which may be otherwise compromised in the context of adversarial proceedings.’[[22]](#footnote-22)

There is a question as to how preventing direct cross-examination or using a Counsel Assisting role might operate in the family law courts, which traditionally operate on an adversarial model adjudicating private disputes.

Discussions on the benefits of establishing increased inquisitorial or investigative powers, including a Counsel assisting role, in the family law jurisdiction reflect the wider tension in adjudicating private law disputes between two parties where decision-making requires paramount consideration of the best interests of a third party (the child). This reflects the reality of the hybrid nature of the family law jurisdiction in practice.

There are indeed already investigative functions of the jurisdiction as mentioned earlier, including:

* independent children’s lawyers (ICLs)
* section 11F (family consultant) reports, and
* own motion subpoena powers of judicial officers.

ICLs assist judicial officers in family law court proceedings to make decisions based on the best available evidence and in the child’s best interests where a child is at risk of harm due to the conduct of one or both parents.

Effectively, ICLs inquire into the child’s best interests for the court, with the power to seek out relevant evidence. In addition to seeking information from the state or territory child protection authority and the police, for example, an ICL can also request and provide information to the court on the non-legal support services a parent is accessing outside the family law system (for example, drug and alcohol counselling or a men’s behaviour change program). In fulfilling these obligations, ICLs already provide a service to the court that is akin to an investigatory role.

Additionally, under rule 15.17 of the Family Law Rules 2004, the court may, on its own initiative, issue subpoenas requiring production of evidence or requiring a witness to attend court to give evidence. We understand that this power is rarely used, yet it is available to judicial officers in situations where decision-making may benefit from information not provided by the parties.

The increased complexity of the matters before the court, including an increasing number of matters involving allegations of violence, over the last decade, and the increasing interaction between state children’s courts and federal family law courts represents the reality of an evolving jurisdiction. The family law courts in 2017 do not operate as a purely adversarial jurisdiction, merely adjudicating private disputes.

Given the already hybrid nature of the family law jurisdiction, it is VLA’s view that the Counsel Assisting model would also be a reflection of the evolving nature of the family law courts from a private law jurisdiction to an intersection between private and public law, and the model merits a pilot.

In piloting the Counsel assisting model, we note the significant overlap between the role of the independent children’s lawyer and Counsel Assisting. On that basis, VLA also supports the review and codification of the law in *Re K* (1994) 17 FLR 537 (relating to the role of independent children’s lawyers).

There would be benefit in reviewing, for updating and legislating, the matters to be considered in appointing an ICL. The *Re K* factors were proposed as guidance in a 1994 decision of the Family Court of Australia. These factors have continued to guide ICL appointments since 1994 without review. In large part, this has focused ICL appointments on the matters that benefit most from an ICL appointment. However, the *Re K* factors do not, for example, refer to family violence. We do not suggest that an ICL should be appointed in all matters where an accusation of family violence is made. However, we recommend a process for considering, updating and legislating a framework for the appointment of ICLs.

Were *Re K* and a role for Counsel Assisting both codified, the relationship between the independent children’s lawyer and Counsel Assisting roles should also be codified, including clear delineation as to when independent children’s lawyer and/or Counsel Assisting would be appointed.

**Recommendations**

11) Pilot a new Counsel Assisting role to eliminate direct cross-examination in family law proceedings where there are allegations or findings of family violence.

12) Codify the role of independent children’s lawyers including their relationship with the appointment of Counsel Assisting.

## Dealing earlier with process abuse

Other aspects of family law process which are particularly onerous for victims of family violence include vexatious applications and appeals, and vexatious contravention applications.

### Vexatious applications

The court needs improved processes to dismiss vexatious applications.

Some relevant powers (relating to appeals) are included in the current exposure draft Family Law Amendment (Family Violence and Other Measures) Bill 2017.[[23]](#footnote-23) VLA supports these changes and the National Legal Aid submission on the exposure draft Bill.[[24]](#footnote-24)

VLA suggests that these changes should be implemented, monitored for effectiveness, and then enhanced if not effective. Enhancement should consider and address the impact of multiple vexatious applications in different jurisdictions.

**Recommendation**

13) Implement exposure draft Family Law Amendment (Family Violence and Other Measures) Bill 2017 appeal provisions and monitor effectiveness.

### Contravention applications

In a contravention application one parent asks the court to declare that the other parent has breached (contravened) a court order about children. The court can penalise parents for contravening the order without a reasonable excuse, and can make other orders requiring the parent to comply with the court order.

Prompter scrutiny of contravention applications would better promote safety.

Some applications relate to contraventions which constitute family violence (for example, when a parent who has used violence is appearing at the wrong times for contact in order to distress the other parent). VLA’s legal aid grant guidelines provide that a party is not eligible for family law funding if they have contravened a family law order in the past 12 months.

However, in other instances, the application itself is brought as an attempt to exercise abusive control (for example, an application by a parent who has used family violence about a contravention because the parent who has experienced the violence has dropped a child off 10 minutes late for contact).

In further instances, a variation of the original family law order may be required to prevent further breaches (for example, if the perpetrator parent is abusing the right to phone contact with the child and the order needs to be amended to limit their contact to email, which is easier for the other parent to keep safe).

Our experience is that both types of applications (those seeking to prevent abuse and those which are themselves abuse) have to be dealt with similarly by the court until the court has determined whether the application has merit. In our view, a triage process – alongside the good practice promoted by the recommendations we make in relation to Term of Reference 5 for professional development – could help greatly to promptly assess applications to determine the appropriate response, so that meritorious applications can proceed promptly while abusive applications can be terminated promptly.

A triage process might include a leave process where parties can apply for leave to bring a contravention/breach application, and might include assessment by a registrar at first instance.

Triage might also determine that the appropriate response is swift access to a family mediation/ dispute resolution service at court.

**Recommendation**

14) Implement a triage process for contravention applications, supported by new funding.

# 4 – Supporting family violence victims to recover financially

**How the family law system can better support people who have been subjected to family violence recover financially, including the extent to which family violence should be taken into account in the making of property division orders.**

Currently, without a lawyer’s assistance it is extremely rare to obtain a property settlement in the family law system. Legal aid is very limited for matters involving property, and private representation is prohibitively expensive for most.

A property settlement can bring huge material relief to separated parties in financial hardship; it can be a crucial part of preventing entrenched poverty following family violence. Women in particular who are unable to reach an agreement with an abusive ex-partner, as is common in family violence matters, are often forced to leave the relationship with nothing.

In our view the primary barrier victims of violence face is not related to the legislative framework. The barrier is access to an expensive and onerous system.

Making small property settlements more accessible would have a significant positive impact for victims of violence. That is why VLA supports the introduction of a new small property stream in the family law courts.

## Small property divisions

VLA proposes that the government invest in a new stream in the Federal Circuit Court that would be dedicated to determining small property divisions.

The new stream could function in a way similar way to the current divorce list. For example:

* the determination would be narrowed to a single issue (that is, property division)
* where there are associated children’s matters, these could proceed in the usual way in the family law courts and the matters could be dealt with concurrently but separately, though in some cases it will be appropriate to adjourn the property decision until after the determination of children’s matters or hear the matters together in the way they are currently dealt with
* parties could perhaps be able to apply using a single, tick-a-box style form which is written in plain English and designed to make it as easy as possible for the parties to provide the judicial officer with the information needed to make a property settlement decision without affidavits or other complex legal documents or legal assistance, and
* decisions in this list could be delegated to a judicial registrar, could be made in accordance with the current legislative framework and could be appealable in the usual way.

A simplified small property stream would determine matters more quickly and cheaply than the current court process. It would make small property settlements accessible.

A small property division would need to be limited to claims of property up to a certain ceiling. It would be important, however, that the potential share of the property pool a party is likely to receive – their claim, rather than the total pool – is used to assess eligibility for the list. This is because it is not uncommon for women in particular, including women experiencing family violence, to be entitled to a much smaller portion of the property pool than their former partner. This might be because of the length of the relationship and the contributions of the parties. These small claims in relation to a large property pool are among the least likely to be made in the current family law system because of an inability of one party to afford a lawyer, and these small claims can have a significant impact for people who are at risk of poverty following family violence.

**Recommendation**

15) Create a new simplified Federal Circuit Court stream for small property claims.

### The role of mediation in improved access to property settlement for people subjected to family violence

It is common for a party using violence to refuse to agree to a reasonable property settlement, as a form of financial abuse.[[25]](#footnote-25) In these cases, court-based, enforceable resolutions are required.

However, there is a proportion of small property divisions that could be resolved by specialised supported mediation, such as FDRS – VLA’s legally supported mediation service.

Currently, FDRS is offered in some limited property matters that also involve children’s disputes. However, the legal aid system is not currently funded at a level that would allow legally assisted mediation to be extended beyond these limited cases.

We recommend the government explore the viability and benefits of extending funding for FDRS for small property matters involving family violence, particularly to supplement any new small property stream in the Federal Circuit Court. The increased independence of family violence survivors after a legally-aided property claim is resolved through mediation may reduce the need for other government financial support for survivors and their children.

**Recommendation**

16) Consider extending funding for legally-assisted family dispute resolution in small property claims when family violence is alleged.

## Taking family violence into account in property division orders

The law currently allows the court to take family violence into account in property division orders. It does so, however, in a somewhat convoluted and opaque way.

This is partly because family violence is not an express legislative consideration, and partly because of the complex formulation of family violence as a consideration in the Full Court authority – *Kennon and Kennon* [1997] FamCA 27.

*Kennon* states that the financial consequences of family violence may be taken into account in determining property settlements under section 79(4) of the *Family Law Act* insofar as they made the contributions of the victim more difficult and give greater weight to those contributions. Financial consequences of family violence (for example, inability to work due to an injury caused by an abusive partner) are also likely to be relevant to spousal maintenance claims under section 75(2)(a) or (b), but family violence is not expressly named.

While it is increasing, family violence is a consideration in relatively little case law at present. VLA therefore supports codification of family violence as a consideration to be taken into account in determining property division. Specific legislative consideration of the impact of family violence would clarify the ability for family violence to be taken into consideration in a property settlement.

VLA recommends an amendment to section 75(2) to add to the list of matters to be considered, the extent to which the financial circumstances of either party have been affected by family violence perpetrated by the other party.[[26]](#footnote-26) Matters under section 75(2) are also relevant to property settlement decisions under section 79(4).

**Recommendation**

17) Amend section 75(2) of the *Family Law Act* to add to the list of matters to be considered in family law property matters, the extent to which the financial circumstances of either party have been affected by family violence perpetrated by the other party.

# 5 – Strengthening family law professionals’ capacity

**How the capacity of all family law professionals – including judges, lawyers, registrars, family dispute resolution practitioners and family report writers – can be strengthened in relation to matters concerning family violence.**

VLA supports compulsory and regular professional development for all family law professionals, covering the nature and dynamics of family violence and trauma-informed practice applied in a family law setting.

Our view is that to create the necessary shared understanding of the nature of family violence, education needs to be more systematised, less fragmented, and more consistent.

VLA lawyers report that comments demonstrating an insufficient understanding of the dynamics of family violence are still regularly made in court in front of family violence victims. For example, professionals can lack understanding of the reasons a victim may return to a relationship in which family violence was used, being dismissive of family violence concerns because a victim returned to a relationship with a perpetrator in the past. VLA lawyers also report comments suggesting emotional and psychological violence and controlling behaviour is not viewed as seriously as physical family violence. These comments are made by judges and by legal practitioners.

The view also persists that family violence allegations are commonly fabricated to support family law cases. This view persists among family law professionals as well as among the general public, despite lack of evidence for the view and counter-evidence that family violence is under-reported.[[27]](#footnote-27)

VLA has developed a Client Safety Framework in response to those sorts of persistent misconceptions about family violence and to capability gaps identified in our workforce, who work with both victims and perpetrators of family violence.

The Client Safety Framework was developed to increase our staff’s awareness and understanding of safety risk indicators, and promotes the safety of clients and their families by supporting our staff’s response to family violence and to suicide risk indicators.

By creating a tool that enhances and structures the professional judgement of our staff through training, VLA has created a new and innovative approach to family violence risk identification that is appropriate to the role of the legal professional. The Client Safety Framework is consistent with the set of ‘indicators’ of family violence set out in CRAF (Victorian Common Risk Assessment Framework) and is designed with VLA lawyers in mind, acknowledging that it is appropriate for lawyers to identify and respond to risk but not to comprehensively assess or manage risk.

We have now completed the delivery of the first round of Client Safety Framework training (covering current staff). Client Safety Framework sessions were attended by 328 VLA staff in 2016, including in all regional VLA offices and all teams based in Melbourne. Feedback from participants on these sessions was overwhelmingly positive: 98 per cent of participants indicated their knowledge of

safety risk indicators increased and 99 per cent stated they are now able to respond to safety risk indicators.

While we believe that the Client Safety Framework is positive development that has led to a more consistent approach within VLA as the largest family violence and family law legal service provider in the state, it has largely been limited to VLA staff presently, although it will be used in the Victorian Family Advocacy and Support Services (FASS) including by the community legal centre lawyers, and we have received some requests to train other professionals in the framework. More generally, there is no requirement for our staff or others working in the family law system to undertake this or similar training in family violence.

As well as those groups listed in Term of Reference 5, it is VLA’s experience from assisting children in families across the family law, family violence and child protection legal jurisdictions, that family law professionals participating in this education need to include child protection practitioners and police. This was also noted by the Family Law Council in its recent report, which found that professionals involved in family violence, child protection or family law all need to understand all three jurisdictions.[[28]](#footnote-28)

**Recommendations**

18) Make regular family violence education compulsory for all family law professionals, including judges, lawyers, registrars, family dispute resolution practitioners and family report writers as well as child protection practitioners and police.

19) Implement the Family Law Council’s training recommendations to improve family violence competency.[[29]](#footnote-29)

We also note the prevalence of family violence in legal disputes more generally.

In family law, as noted earlier, National Legal Aid data shows that family violence is a factor in most legally-aided cases before the family law courts, with around 79 per cent of all legally aid family law matters in 2014–15 involving family violence.[[30]](#footnote-30)

VLA’s Client Safety Framework relates to all aspects of legal aid practice, including criminal and civil law practice. We developed the tool in this way because family violence can often sit behind or impact on all manner of legal problems. For example, criminal charges, residential tenancy issues, and fines issues can all arise from family violence. Lawyers dealing with family businesses and with asset management and estate planning similarly need to be aware of the impact of family violence on client decisions and options.

VLA therefore suggests that family violence education should be a fundamental part of every Australian lawyer’s education.

**Recommendation**

20) Make family violence education an academic requirement of the law degree and/or a professional legal training requirement of admission to practice.

# 6 – A national approach to intervention orders

**The potential for a national approach for the administration and enforcement of intervention orders for personal protection, however described.**

VLA has advocated for a single national database of family law, family violence and child protection court orders for several years.

VLA supports recommendation 134 of the Victorian Royal Commission into Family Violence, that a single database for family violence, child protection and family law orders, judgments, transcripts and other relevant court documentation be created and be made available to each of the relevant state, territory and Commonwealth courts.

A national database of court orders applying to families dealing with parenting disputes, family violence and child protection would make courts more effective in protecting vulnerable children. VLA’s research on clients seeking help for family issues over the five years to June 2014 showed 12,844 people with multiple family law problems requiring legal assistance.[[31]](#footnote-31) Each of these people could have benefitted from a national database making previous orders easily available.

Though COAG has committed to the national database, it is unclear when it will be available. We recommend government investment prioritising and expediting the database’s creation. It is our view that the database will bring immediate, tangible safety improvements across all jurisdictions.

VLA also supports the introduction of national arrangements to automatically recognise and enforce interstate intervention orders. We note COAG commitment to automatic recognition and enforcement of interstate orders but delay in implementation because of technology and infrastructure gaps.

We recommend government investment that prioritises and expedites the introduction of automatic interstate recognition, including by prioritising creation of the national database of orders.

VLA supports the continued administration of intervention orders by states and territories. The recent investment and developments at a state level in administering and enforcing intervention orders have provided significant benefit to victims of family violence in obtaining a legal remedy in a safe and quick way. Continued state/territory administration of orders will preserve the benefit of those developments.

If application and other administration processes are to be standardised nationally, the standardised model should adopt best practice, drawing on states and territories’ examinations of various models, for example the Victorian Royal Commission into Family Violence. However, we consider that automatic recognition of interstate orders would sufficiently address current gaps regarding national enforcement of intervention orders.

**Recommendations**

21) Prioritise creation of a national database of court orders.

22) Recognise and enforce interstate family violence protection orders nationally.

1. Section 4. [↑](#footnote-ref-1)
2. See “New pilot to close the gap between family violence and family law help for parents and children” (9 November 2016) on [VLA website](http://www.vla.vic.gov.au/about-us/news/new-pilot-to-close-gap-between-family-violence-and-family-law-help-for-parents-and-children-0) (www.vla.vic.gov.au/about-us/news/new-pilot-to-close-gap-between-family-violence-and-family-law-help-for-parents-and-children-0). [↑](#footnote-ref-2)
3. Available on [our website](http://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/more-effective-responses-to-gender-inequality-including-sex-discrimination-and-family-violence/families-with-complex-needs) (www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/more-effective-responses-to-gender-inequality-including-sex-discrimination-and-family-violence/families-with-complex-needs). [↑](#footnote-ref-3)
4. Available on [our website](http://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/more-effective-responses-to-family-violence/royal-commission-into-family-violence) (www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/more-effective-responses-to-family-violence/royal-commission-into-family-violence). [↑](#footnote-ref-4)
5. Available on [our website](http://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/family-law-legal-aid-services-review/actions-from-review) (www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/family-law-legal-aid-services-review/actions-from-review). [↑](#footnote-ref-5)
6. National Legal Aid media release ‘COAG commitment welcomed as new DV figures released’ (18 April 2016) on [National Legal Aid website](http://nationallegalaid.org/home/nla-media/) (nationallegalaid.org/home/nla-media/). [↑](#footnote-ref-6)
7. Available on the [Attorney-General’s Department website](https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-Family-Law-Act-1975-to-respond-to-family-violence.aspx). [↑](#footnote-ref-7)
8. Family Law Council Final Report (2016), recommendations 11 and 12. [↑](#footnote-ref-8)
9. National Legal Aid media release ‘COAG commitment welcomed as new DV figures released’ (18 April 2016) on [National Legal Aid website](http://nationallegalaid.org/home/nla-media/) (nationallegalaid.org/home/nla-media/). [↑](#footnote-ref-9)
10. See the section “Ongoing and Timely Assessment of Risk”, at page 13 onwards of [our October 2015 submission](http://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/more-effective-responses-to-gender-inequality-including-sex-discrimination-and-family-violence/families-with-complex-needs) (www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/more-effective-responses-to-gender-inequality-including-sex-discrimination-and-family-violence/families-with-complex-needs). [↑](#footnote-ref-10)
11. Family Law Council [Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Terms 3, 4 & 5 (2016)](https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports.aspx) (www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports.aspx). [↑](#footnote-ref-11)
12. Available on [NLA’s website](http://nationallegalaid.org/home/nla-submissions/2017-submissions/) (http://nationallegalaid.org/home/nla-submissions/). [↑](#footnote-ref-12)
13. See “New integrated services to help address family violence start 1 May in Dandenong and Melbourne” (26 April 2017) on [VLA website](http://www.legalaid.vic.gov.au/about-us/news/new-integrated-services-to-help-address-family-violence-start-1-may-in-dandenong-and-melbourne) (www.legalaid.vic.gov.au/about-us/news/new-integrated-services-to-help-address-family-violence-start-1-may-in-dandenong-and-melbourne). [↑](#footnote-ref-13)
14. The Family Law Legal Service is a related organisation of the Women’s Legal Service Victoria. The Family Law Legal Service is currently involved in providing duty lawyer-type services at VLA FDRS. [↑](#footnote-ref-14)
15. [VLA Family Law Legal Aid Services Review Final Report June 2015](https://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/family-law-legal-aid-services-review/actions-from-review) (www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/family-law-legal-aid-services-review/actions-from-review). [↑](#footnote-ref-15)
16. Productivity Commission Inquiry Report “Access to Justice Arrangements” (2014) volume 2, page 719. VLA made changes to its means test in March 2016 to better reflect the rising cost of living and is also currently conducting a comprehensive review of its means test with the aim of making more people eligible for grants of legal assistance by developing an approach that is simple to understand, flexible, efficient to administer, financially sustainable and fair. However, the review recognises that the nature of the changes possible to the means test will remain limited by the extent of any additional funding received. See [our website](https://www.legalaid.vic.gov.au/information-for-lawyers/how-we-are-improving-our-services/means-test-review) (www.legalaid.vic.gov.au/information-for-lawyers/how-we-are-improving-our-services/means-test-review). [↑](#footnote-ref-16)
17. Productivity Commission Inquiry Report “Access to Justice Arrangements” (2014) volume 2, chapter 21: Reforming legal assistance services, at page 741, and recommendations 21.4 and 21.5. [↑](#footnote-ref-17)
18. Productivity Commission Inquiry Report “Access to Justice Arrangements” (2014) volume 2, page 865 and recommendation 24.2, where the Productivity Commission recommends amending the *Family Law Act* to restrict direct cross-examination when family violence is alleged. [↑](#footnote-ref-18)
19. Case note: when there is family violence in a family law litigation (July 2016) on [VLA website](http://www.legalaid.vic.gov.au/information-for-lawyers/practice-resources/family-law-resources) (www.legalaid.vic.gov.au/information-for-lawyers/practice-resources/family-law-resources). [↑](#footnote-ref-19)
20. See “Family Violence Best Practice Principles - December 2016” on the [Family Court Of Australia website](http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/family%2Bviolence/family-violence-best-practice-principles) (www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/family+violence/family-violence-best-practice-principles). [↑](#footnote-ref-20)
21. [National Partnership Agreement on Legal Assistance Services 2015-2020](https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Pages/National-Partnership-Agreement-on-Legal-Assistance-Services.aspx) (www.ag.gov.au/LegalSystem/Legalaidprogrammes/Pages/National-Partnership-Agreement-on-Legal-Assistance-Services.aspx). [↑](#footnote-ref-21)
22. Page 134 of Family Law Council [Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Terms 3, 4 & 5 (2016)](https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/FamilyLawCouncilpublishedreports.aspx). [↑](#footnote-ref-22)
23. These include proposed new provisions to clarify and modernise the powers of courts exercising jurisdiction under the *Family Law Act* to summarily dismiss unmeritorious applications: new section 45A in the exposure draft Bill available on the [Attorney-General’s Department website](https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-Family-Law-Act-1975-to-respond-to-family-violence.aspx) (www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-Family-Law-Act-1975-to-respond-to-family-violence.aspx). [↑](#footnote-ref-23)
24. That submission is Available on [NLA’s website](http://nationallegalaid.org/home/nla-submissions/2017-submissions/) (http://nationallegalaid.org/home/nla-submissions/). [↑](#footnote-ref-24)
25. Page 36 of Women’s Legal Service Victoria (2015) ‘[Stepping Stones: Legal barriers to economic equality after family violence](http://www.womenslegal.org.au/files/file/1.%20Final%20-%20Stepping%20Stones%20Report.pdf)’ ([www.womenslegal.org.au/files/file/1.%20Final%20-%20Stepping%20Stones%20Report.pdf](http://www.womenslegal.org.au/files/file/1.%20Final%20-%20Stepping%20Stones%20Report.pdf)).
About tactics of financial abuse through family property disputes see also of WIRE Research Report (2014) ‘[Relationship Problems and Money: Women talk about financial abuse](https://issuu.com/wirewomensinformation/docs/wire_financial_abuse_report)’ (issuu.com/wirewomensinformation/docs/wire\_financial\_abuse\_report), on page 34 at 4.1.1. [↑](#footnote-ref-25)
26. See recommendation in the [Family Law Council’s August 2001 Letter of Advice to the Attorney-General on Violence and Property Proceedings](https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/Lettersofadvice.aspx) (www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Pages/Lettersofadvice.aspx). [↑](#footnote-ref-26)
27. See “Claims of False allegations of family violence”, page 200-201, volume IV, report of Victorian Royal Commission into Family Violence, and the Australian Institute of Family Studies research cited there. [↑](#footnote-ref-27)
28. Family Law Council Final Report (2016), chapter 9.2. [↑](#footnote-ref-28)
29. Family Law Council Final Report (2016), recommendations 11 and 12. [↑](#footnote-ref-29)
30. National Legal Aid media release ‘COAG commitment welcomed as new DV figures released’ (18 April 2016) on [National Legal Aid website](http://nationallegalaid.org/home/nla-media/) (nationallegalaid.org/home/nla-media/). [↑](#footnote-ref-30)
31. See “Call for national court orders database follows new research on families with complex legal needs” (13 May 2015) on [VLA website](http://www.vla.vic.gov.au/about-us/news/call-for-national-court-orders-database-follows-new-research-on-families-with-complex-legal-needs) (www.vla.vic.gov.au/about-us/news/call-for-national-court-orders-database-follows-new-research-on-families-with-complex-legal-needs). [↑](#footnote-ref-31)