

**Submission:
Review of the Family Law System**

SUBMISSION COMPILED BY
Wirringa Baiya Aboriginal Women's Legal Centre

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1. Introduction to Wirringa Baiya Aboriginal Women's Legal Centre

Wirringa Baiya Aboriginal Women's Legal Centre is a New South Wales state-wide community legal centre for Aboriginal and Torres Strait Islander women, children and youth. The focus of our service is to assist victims of violence, primarily domestic violence, sexual assault and child sexual assault.

Over our nineteen (19) years of operation we have given advice and support to over nine thousand women and children who have been victims of violence. In addition to our day-to-day advice and casework services, we also provide legal advice clinics in several outreach locations including in women's correctional centres, health care centres and community centres.

Our Centre regularly advises Aboriginal women on a range of family law matters. However, until the beginning of this year we had no capacity to act for women in family law proceedings. We have now received some Family Violence, Family Law funding over the next 3 years from the Commonwealth Government. We have employed a Family law solicitor and will employ an Aboriginal support worker with this funding. We intend to increase the amount of family law representation that our Centre does.

Aboriginal staff at our Centre also provide court support to Aboriginal women whose matters are listed in the specialist Indigenous List previously before Judge Sexton and now Judge Boyle at the Sydney Registry of the Federal Court of Australia.

Both our Aboriginal staff and solicitors are on the roster to provide court support for Aboriginal women seeking the protection of domestic violence protection orders (ADVO) at Local Court ADVO list days across Sydney.

We also participate in the Legal Education and Advice in Prison program (LEAP) which we attend at Emu Plains Correction Centre once a month to provide legal advice to Aboriginal women in custody. Most of the advice involves domestic violence, sexual assault and work around the family of the women whose children are removed from them due to their incarceration. This is either family law or Care and Protection work.

We provide advice to:

- Aboriginal women who have experienced family violence from their partners;
- Aboriginal women who have been sexually assaulted by their partners;
- Aboriginal women who are separated from their partners who want to know about suitable arrangements for their children and how to keep them safe;

- Aboriginal women whose children have been removed by either their partners or a family member ;
- Aboriginal grandmothers and other family members with concerns about the safety and care of young family members or want contact with them; and
- Aboriginal women who have been contacted by Family and Community Services (Community Services) with concerns about their children.

We provide ongoing community legal education workshops to community members and support workers in New South Wales, in both regional and metropolitan locations. We have provided community legal education workshops on family violence, sexual assault, care and protection.

Our experiences are informed by the Aboriginal women we work with and the clients we support. Where relevant we have used case studies in this submission to illustrate our points.¹

Our Governing Committee is comprised of Aboriginal women. We currently have four Aboriginal identified positions and our legal staff consist of two full-time solicitors and three part-time solicitors.

Any reference to “Aboriginal people” or “Aboriginal women” in this submission includes Aboriginal and Torres Strait Islander people or women.

Any reference to “family violence” or “domestic violence” in this submission refers to a situation where domestic violence is perpetrated by men against women, as this occurs in the majority of cases and this is the experience of the Aboriginal women with whom we work. However we acknowledge that women may also be perpetrators of violence in both heterosexual and same sex relationships.

Where we refer to the “family court” or the “family courts” we are referring to both the Family Court and the Federal Circuit Court.

We endorse the submissions filed by Women’s Legal Services Australia. We would like to submit our own submissions below and thank you for this opportunity.

Access and Engagement

2. Improving Accessibility of the family law system for Aboriginal people

Question 5: How can the accessibility of the family law system be improved for Aboriginal and Torres Strait Islander people?

¹ All names have been changed for privacy.

This section is relevant to Questions 3-13 and 31-32 (Integration and Collaboration) of the Issues Paper.

In order to improve accessibility for Aboriginal people to the family law system we consider that it is necessary to invest significant time and resources. Changing the legislation alone will not improve access.

Below we discuss some of the barriers to accessing the family law system for Aboriginal women.

2.1. Family Violence in the family law system

We submit that the whole approach in the family law system should have a strong emphasis on family violence and child protection. Most of our work with Aboriginal women and children involves domestic violence and/or sexual abuse. These experiences usually affect the whole family creating trauma that is so insidious that it will frequently impact on them for the rest of their lives. We recommend that safety of family members must be the primary focus in the family law system. Without safety the family will be unable to lead functional lives.

We note from our experience in the Children's Court that the Magistrates there will often take a much more cautious approach in giving a party unsupervised time where there have been allegations of family violence made compared with Judges in the Family Court.

We are concerned about how family violence is dealt with in the family law system. We have witnessed a judge "glossing over" an Aboriginal woman's concerns about domestic violence and child safety in order to allow the father to spend unsupervised time with a child. Allegations of family violence were "simply ignored" in one case which was overturned by the Full Court on appeal.²

We note the *Family Violence Best Practice Guidelines of the Family Court of Australia and Federal Circuit Court* and the *National Family Violence Bench Book* that should guide the bench and practitioners in cases where domestic violence is raised.

We also note the 2015 Australian Institute of Family Studies (AIFS) analyses of the Court Outcomes Project data showed that the introduction of section 4AB(3) has made little impact in Courts when make decisions in parenting disputes. It stated that:

[t]hese findings indicate very limited change in the extent to which concerns about children and family violence are raised, suggesting the recognition of

² In Salah & Salah [2016] Fam CAFC 100 (17 June 2016)

*children's exposure to family violence in s 4AB(3) has thus far had limited effects.*³

In particular it noted that:

*Overall, the patterns in orders for parental responsibility and care time reported in this chapter raise some interesting issues when considered against the objectives of the 2012 family violence amendments. The findings arising from the cases that demonstrate the most direct effect of the law—the judicial determination sample—show that orders for shared parental responsibility decreased after the reforms but that changes in patterns of care-time orders were almost negligible. Small but not statistically significant shifts away from shared care-time orders were evident in matters where family violence and child abuse allegations had been raised. These aggregate-level data suggest that since the reforms, courts have been more likely to make decisions against shared parental responsibility pursuant to non-application or rebuttal of the presumption and the application of the best interests discretion. This does not translate, however, into a substantial shift in approaches to care-time arrangements, with the aggregate-level data indicating little change. This suggests that the 2012 family violence amendments have had limited effect on the overall pattern of judicial determination outcomes for care-time arrangements. As the discussion of factual issues indicates, this is despite the fact that evidence raising protective concerns was adduced more often than it was before the reforms, and that cases in which such evidence was adduced were less likely to be amenable to resolution without judicial determination than previously.*⁴

Through our advice work we have case studies, one of which is set out below to show that in cases where there has been significant domestic violence Courts have ordered shared parental responsibility or that children primarily live with the violent parent.

Case study: DV perpetrator parent given sole PR of children.

In 2015 a FCC Judge made parental orders for a violent, non-Aboriginal father to have sole parental responsibility of his 2 biological children and his step son. The orders allowed the children to spend time with their mother every second weekend.

The Aboriginal mother was not legally represented and had no support in court. The mother at the time did not have access to stable accommodation and suffered from

³ Kaspiew, R., Carson, R., Qu, L., Horsfall, B., Tayton, S., Moore, S. et al. (2015). *Court Outcomes Project* (Evaluation of the 2012 Family Violence Amendments). Melbourne: Australian Institute of Family Studies, page ix

⁴ *ibid*, page 66

historical childhood sexual assault, childhood physical abuse and later intimate family violence.

The other party (without her consent) took off with her children, at a time when she was vulnerable and trauma affected. The mother was unaware that she could apply for a recovery order, thus providing the father the opportunity to be the primary carer and minimise the mother's involvement in the children's lives.

When the mother eventually went to a regional Federal Circuit Court to get her children back. The mother said: "Court was frightening, intimidating and was difficult to understand. Being in court made me feel sick. I was looked down on, I had to represent myself, I had no Aboriginal support person, or any support whatsoever. I was questioned about my trauma and my childhood violence and it made me feel physically sick. I couldn't talk about the violence he put us through, the beatings and all that".

In May 2018 the mother called our centre again asking for help to vary the parenting orders made by the Judge . Her oldest son (aged 14) refused to return to live with the other party (his step father). The other party threatened that he'll get the police to charge her and she'll go to goal unless the son returns to him. The son was frightened of his step father and disclosed many violent assaults by the other party.

Within minutes of our centre agreeing to assist the mother, she received a text message that FACS obtained an emergency order to remove all three children from the father's care.

We contacted FACS and the caseworker said: "There were over 40 recent ROSH reports plus a long history of violence by the dad. The caseworker explained that she and her colleagues "...were dumbfounded why a family law judge will hand over the children to a violent dad".

The FACS caseworker has spoken to the mother and the teenage son and are allowing the mother to care for the son. The matter is currently in the Children's Court.

The above case is one of many cases we hear about, where the violent father is awarded primary care of his children and the trauma affected Aboriginal mother is disadvantaged by the court process.

The barriers to Aboriginal women reporting family violence should be well known to the Government. The reasons include: deep shame; systemic racism; general poor response from agencies; fear of repercussions by the offender, his family and community; fear of children being removed by Family and Community Services (the statutory child protection agency in NSW) and a desire to keep the family together (especially against the backdrop of the Stolen Generations). We note that the barriers Aboriginal women have been noted in the Benchbook. However, the one page about "Cultural Context" in the Best Practice Guidelines makes no specific reference to the complexities of Aboriginal people reporting domestic violence.

It is also important to understand that where there is family violence racist abuse is frequently used by non-Aboriginal partners against Aboriginal women. This can be in the form of racist comments; belittling/denial of cultural values and practices; threats to make reports to Family and Community Services; telling the Aboriginal mother that when it comes to any dispute about children that white privilege will work to the favour of the non-Aboriginal father.

Often the only witness to the domestic violence our clients experience are their children. In some instances adult family members and friends may have witnessed violence, or the injuries caused by the violence, but are reluctant to provide evidence about what they witnessed (due to fear of the offender or repercussions from family and community).

Alternatively, it may be that there is a single Apprehended Violence Order or one or two reports to police, but with a very long history of violence.

The family courts then have to consider whether further evidence of family violence is available and weigh up that evidence. This process automatically creates a problem for many women in the family courts as it has been well documented, as discussed above, that incidents of family violence are often unreported to police for many years.

How then does a woman prove that she has been subjected to family violence during a relationship? Often the allegations of family violence are disputed by the other party and he may allege that in fact he is the victim of violence not his partner. So without some corroborative evidence (eg Counsellor's notes, statements from friends and family or workers, reports to government agencies) it is difficult for a Judge to decide whether or not family violence has occurred as it is a matter of one party's word against the other.

In assessing the reliability and credibility of each party's evidence, due to the intrinsic nature of family violence it is quite likely that the perpetrator will present to the court as confident, articulate and engaging. He is in control of the situation and knows the correct answers to give. He knows how to manipulate a situation to suit his own purposes.

On the other hand, the victim of violence is likely to present as unsure of herself, timid, confused and anxious. There may be a general numbness or mental paralysis as a result of the trauma. Along with memory issues regarding the history of family violence (as discussed below), who is likely to make the better witness?

We note that recently the Full Court⁵ made comments that a party is not required to produce corroborative evidence of allegations of family violence in order to prove them. But we do not know how often a judge will find that family violence has occurred where a woman makes allegations of family violence but has no corroborative evidence to support her claims. We consider that it would be only rarely. **We recommend** that this Full Court approach should be included in the legislation so that judges are obliged to take it into account when they are being pressured by a father to be able to spend unsupervised time with the kids.

Evidence of family violence is usually included in the affidavit of the party. Judges have stated at Conferences that the affidavit evidence presented at court is often poor and just an overall summary of family violence without a detailed account of what has occurred. **We recommend** that family lawyers be fully trained in how to draft detailed accounts of family violence. This is not an easy task.

It is our extensive experience that family violence causes significant psychological trauma to those who have experienced and those that have witnessed it. It is our experience that many Aboriginal women may still have scars or ongoing physical pain from the physical assaults, but more commonly significant levels of anxiety and depression. In our previous victims compensation work, clients who had experienced family violence were assessed by clinical psychologists to establish injury. For many of these women it was the first time they ever had any contact with a mental health expert. Many of these clients were diagnosed with post-traumatic stress disorder and high levels of anxiety and depression caused by the domestic violence they had suffered.

In our experience it can be very difficult to obtain instructions from a victim of violence as the trauma they have experienced may affect their memory and cause them to block out chunks of what has happened. As a coping mechanism, parts of the family violence may be compartmentalised and is simply not available to them. The loss of memory may then affect the reliability of their evidence. The trauma may cause “numbness” so that it is extremely difficult for them to talk about the history of violence and also how that has impacted upon them emotionally.

Lawyers and judges may consider that the disparities in a woman’s story of family violence make that story unbelievable. However, the point is that the disparities themselves are the story- the disparities are symptom of the trauma which a woman has experienced.

It is increasingly being understood by practitioners in the criminal justice system that trauma significantly affects memory, and the way those who have

⁵ In Salah & Salah [2016] par 43 cited above.

experienced violence recount their experiences when being interviewed. See for example the work of Russell W Strand, who writes:

Stress and trauma routinely interrupt the memory process thereby changing the memory in ways most people do not accurately appreciate. One of the mantras of the criminal justice system is “inconsistent statements equals a lie.” Nothing can be further from the truth when stress and trauma impact memory, research shows.

In fact, good solid neurobiological science routinely demonstrates that, when a person is stressed or traumatized, inconsistent statements are not only the norm, but sometimes strong evidence that the memory was encoded in the context of severe stress and trauma.⁶

To this end, interview techniques such as the Forensic Experiential Interview have been developed to help practitioners in the criminal justice system better interview people who have experienced violence.⁷

When family violence is raised as an issue in the family law system men are often referred to “Men’s Behavioural Change Programs.” This is seen as an acceptable method of “addressing” the issue of risk of harm to a child. But there seems to have been little research on just how effective these programs are in reducing the incidence of family violence recurring. Are these behavioural change programs effective in changing the attitudes of men towards women and children? How can this be measured? How do we know whether the male participants have fully engaged with the program and it has had an impact on them? Or are men enrolling in these programs so that it appears they have done the right thing for the judge? **We recommend** that further research be conducted around the impact of Men’s Behavioural Change Programs on the recurrence of family violence.

Recommendation

While we note that the AIFS evaluation of a number of published judgements for a period up to 2015, after the 2012 amendments, we recommend a further evaluation of judgements where family violence was raised, and what evidence was relied upon by Judges in making their decisions. In particular we recommend a specific evaluation of court decisions concerning parenting disputes about Aboriginal children, and an analysis of all the issues that were considered when making decisions about shared parental responsibility and care-time arrangements.

⁶ Russell W Strand “The Forensic Experiential Trauma Interview (FETI) USA Army Military School <http://www.mncasa.org/assets/PDFs/FETI%20-%20Public%20Description.pdf>, pages 1 and 2.

⁷ See Russel W Strand’s article, as cited above.

Recommendation

It is our view that the family law system and its practitioners, including the judiciary, need to equally understand the impact of trauma and how those who have experienced may present when interviewed or providing evidence. We recommend that such education/training be mandatory, ongoing and comprehensive.

Sexual Violence

Many of our clients who have experienced family violence disclose that the violence involved sexual violence. This can range from violent sexual assaults to intimidation and coercion to engage in sexual activity. For some of our clients the children of that relationship may be the product of sexual violence. Sexual violence is something that is very difficult to disclose, and in our experience is often disclosed after a relationship of trust has been developed with our service. However, it is an issue that clients are reluctant to disclose to others for reasons of deep shame, trauma and a need to protect their children from that trauma. The trauma of sexual violence only compounds the difficulties of dealing with a violent ex-partner about the parenting of a child that was conceived in violence.

Recommendation

All practitioners who work in the family law system need to better understand how frequent sexual violence occurs in relationships where there is family violence, and the impact that it has on those women who have experienced it. In particular, practitioners need to understand the concept of shame in Aboriginal culture and that sexual violence is especially difficult to disclose.

2.2. Provision of Culturally Competent Services for Aboriginal people

We consider that there should be a strong focus on cultural competence of the workforce and legal officers including the judiciary to improve the accessibility of the family law system for Aboriginal people. A lack of Aboriginal specific services which are culturally appropriate creates a barrier for Aboriginal people which makes them reluctant to engage in the family law system.

Indigenous Court List observations

Wirringa Baiya has been involved in providing non-legal Court Support at the specialist Indigenous List at the Sydney Registry of the Federal Circuit Court since it commenced in late 2016. Our Indigenous workers and non-Indigenous solicitors

have observed that the approach taken by Judges in the Indigenous List may provide an improved experience for Aboriginal people.

The impact of Australia's history has resulted in profound levels of mistrust of government, the legal system and mainstream service systems by Aboriginal communities. The usual court systems that Aboriginal people engage with are either the criminal courts where the outcome may be custody or the Children's Court where their children may be removed. Generally Aboriginal people have not approached the courts to resolve a family or personal matter, their court contact has been forced upon them to impose punishment.

In view of this over-riding negative experience of courts and judges, it is often difficult for Aboriginal people to approach the family court to seek assistance for their family. Once they have found the courage to commence court proceedings, they will be met with an adversarial system that is often alienating and incomprehensible to them. However the Judges in the Indigenous List have taken some steps to try to reduce the often hostile and confusing face of the Court.

During the Indigenous List, the Judge sits at the same level as the bar table. Both parties and their lawyers and support persons (usually extended family members) all sit at the bar table or if there is not enough room, on the bench seat immediately behind the bar table. So the Judge and parties and support persons are all sitting at the same level and are quite close to each other, which promotes communication and eye contact. This change to the physical layout of the court provides a less formal atmosphere than the regular family court room.

The Judge appears more engaged with each party than in the regular Court list. She encourages the parties to respond to her questions rather than the lawyers speaking on behalf of their clients. In one case observed by our solicitor, the Judge was more or less mediating between the parties in relation to safe contact arrangements for the child. This approach of each party being able to tell their story to the Judge and having a "yarn" is far more culturally appropriate for Aboriginal people than the more traditional adversarial approach of the Court. In the scenario described, the parties had a chance to tell their story and be heard by the Judge. It also provides an opportunity for the parties to develop respect for and rapport with the Judge.

At the Indigenous List days there are many Indigenous and non-Indigenous services available to support the parties if needed. For example there are Indigenous Court support workers with extensive experience in domestic violence, Family Advocacy and Support Services (FASS) legal and social support workers, Early Intervention Unit solicitors and Legal Aid solicitors. The Court officer is also Indigenous. The visibility and availability of Indigenous workers in the court may provide reassurance to parties and help to alleviate their fears about accessing

the family court system. The specialist Indigenous List appears (at least to some extent) to improve the cultural safety of court processes for Aboriginal people to meet their special needs.

But there is room for improvement in providing culturally appropriate services. Some other ways in which the accessibility of the family law system could be improved for Aboriginal people are:

- the expansion of the specialist family violence service, FASS, to provide legal and social support services to all clients affected by family violence in all registries of family courts across Australia. At present in NSW, FASS is operating only at the Family Law Court Registries in Sydney, Parramatta, Newcastle and Wollongong. This service would be beneficial in all Family Court Registries. As FASS lawyers can assist with sorting out arrangements for children and also with getting an ADVO, FASS is a one-stop shop for urgent family law matters involving domestic violence especially in rural areas where legal services can be limited. In the Australian Bureau of Statistics 2016 Census, Indigenous Australians were estimated to represent 3.3% of the total Australian population. There are significant numbers of Aboriginal people in many areas around the NSW Family Court rural registries eg Dubbo (14.6% of population), Coffs Harbour (5.6%) and Lismore (6.2%). So the roll out of FASS to the rural registries would also target Aboriginal communities.
- The expansion of FASS into the rural family courts would also go some way towards alleviating the issue of not having enough family lawyers available in some rural towns. We also note that FASS services are not means-tested. This allows parties who have experienced family violence but who are ineligible for Legal Aid and are unable to afford a lawyer to obtain assistance and referrals from the FASS worker.
- In preparation for making a submission, our service Wirringa Baiya met with workers from other Aboriginal services including the Aboriginal Legal Service, Women's Legal Service (which has an Aboriginal program) Mudgin-Gal and Binaal Billa Family Violence Prevention Service (BBFVPLS), which is a rural service. The solicitor from BBFVPLS told us that their Centre has started attending on the Local Court ADVO List day at a number of rural courts at Parkes, Forbes, Cargellico and Peak Hill. On the list day the solicitor speaks to the PINOPS (usually women) in the ADVOS to discuss whether there are any family law issues to be sorted about contact arrangements for their children. If there is an issue then they will assist the mother to negotiate an agreement with the defendant partner about his contact time with the children. Any agreement is put into writing either as a Parenting Plan or Consent Order.

- We are aware that a similar model to the BBFVPLS service referred to above has been used by the WDVCLAS duty solicitors across NSW in many Local Courts. They also encourage parents involved in ADVO matters to reach agreement about child contact. This service at the Local Court could be extended to other Local Courts as it has many benefits such as:
 - Quick, affordable method of getting simple Parenting Plans or Consent Orders in place. The contact arrangement included in the agreement could be just a starting point for contact between the father and the children. The agreement could provide that the parties attend FDR with a service provider at a later time or further negotiations could be conducted between the solicitors;
 - Having a written agreement in place at the time of the ADVO about contact between the father and children makes it more likely that the defendant father will consent to the ADVO being made at Court. This is because often the defendant will object to Order 6 of the ADVO Conditions being made which provides:

Order about family law and parenting

6. You must not approach (the PINOP) or contact them in any way, unless the contact is:

A) through a lawyer

B) to attend accredited or court-approved counselling, mediation and/or conciliation

C) as ordered by this or another court about contact with child/ren

D) as agreed in writing between you and the parent(s) about contact with child/ren,

E)-NA

- If there is no agreement in writing about the defendant father's contact with children prior to an AVO order being made, then the "no contact" provision will prevent the defendant father from contacting the PINOP mother directly to try to arrange contact. Sometimes children have a close relationship with the defendant father. The lack of agreement for contact in writing may cause a breach of the ADVO.
- The lack of arrangements for contact in writing, may also cause an escalation of conflict and hostility between the parties. This seems to entrench the conflict even further. Entrenched conflict will probably make it more difficult to reach a suitable contact agreement in the future. In cases where there are safety risks for the defendant father to have contact with

the children, appropriate measures need to be made eg supervised contact. The safety of the PINOP mother will also need to be considered especially at changeovers.

- Having a written contact agreement in place when the ADVO comes before the Court may also remove an obstacle in the path of the defendant father consenting (without admissions) to an ADVO being made. Encouraging a defendant father to consent to an ADVO also has strong benefits for the PINOP mother. It means that the ADVO can be finalised quickly thus avoiding long delays for a hearing date. It also means that the PINOP mother will not have to attend at a defended hearing, to give evidence and be cross-examined. This removes a lot of stress from the PINOP mother and allows her to focus on getting therapeutic support for herself and her children around the domestic violence and the separation.
- The service referred to also means that the parties will not need to attend at more than one Court. This is an issue for many clients due to the nature of family law matters involving family violence. The victim usually contacts police to report an incident and will then apply to the Local Court for an AVO. The victim may then have to make a separate application to a family court for child contact and live with Orders. Hence the parties will probably have to navigate their way around 2 courts with 2 completely different systems. This is a very difficult and emotionally draining process. It is even more difficult for an unrepresented litigant.
- If parties are encouraged to enter into a written agreement about child contact on the ADVO list day, this would however necessitate two separate legal services to provide independent legal advice to both parents. Even if the parties intend to enter into a Parenting Plan (rather than Consent Orders), both parties will require legal advice before signing the Parenting Plan (PP), as the PP can override existing Parenting Orders. A Parenting Plan can also be taken into consideration by a court when considering parenting arrangements in the future.
- We note that the Domestic Violence Practitioner Service already exists in many metropolitan and rural areas and are already available to provide advice on ADVOS and family law matters.
- Increased funding to CLCs, Legal Aid and Family Violence prevention Services to provide extra services around family law and family violence matters. CLCs and other legal services may be able to undertake document preparation on behalf of unrepresented parties i.e. Applications, Affidavits, Notice of Risks even if litigation can't be provided. We understand that

Hunter Community Legal Centre is already undertaking this support and does it well. We consider that if the initiating documents for court are well drafted then this sets up the case soundly for the party. It may also increase the prospects of early settlement of the matter at FDR if the issues in dispute are clearly outlined in the documents.

- Increasing Aboriginal Court Liaison Officers to family courts similar to those in the local court could assist in creating more welcoming and ‘friendlier’ Court environments for Aboriginal people.
- Provision of a designated “safe room” at the Indigenous List (and all other family court registries) as in Local Courts when the parties are waiting to go into court should be mandatory. It is an issue where there is a history of family violence between parties. Due to the extended nature of many Aboriginal families, the safe rooms need to be large enough to accommodate the family members who are supporting a client at Court.
- There is a need to review the Independent Children’s Lawyer program with a view to increasing the number of Aboriginal ICLs who have a strong understanding of Aboriginal ways of life in order to facilitate greater outcomes around:
 - Challenges in multi-racial relationships where one parent is non-Aboriginal. How is Aboriginality or Aboriginal culture seen as a strength and not a weakness/risk?
 - Cultural competence of those professionals involved in decision-making or making recommendations to the court (including the judiciary);
 - Deploy strategies addressing systemic racism, discrimination and sexism that can occur during proceedings between parties.

3. Costs and Affordability in the family law system

This section relates to question 10 in the Issues paper.

- **Divorce and reduced filing fees**

The divorce “reduced” filing fees which are currently \$290 are high and often unaffordable for a party who lives on a Centrelink payment or even on a very low income. While we acknowledge that the reduced filing fee is significantly less than the full filing fee of \$865, for a person who is financially disadvantaged, including many Aboriginal women whom we assist, this filing fee is just out of reach.

We have had a number of clients who wish to apply for a divorce from their husband but are unable to afford to pay the reduced fee. This is particularly disturbing when there has been a history of violence and the party is desperate to end the marriage to the perpetrator.

Case Study 1: *We assisted an Aboriginal woman in custody who had been trying to obtain a divorce from her husband for 6 years. Her husband was the step-father of her daughter from a previous relationship. The husband separated from our client and commenced an intimate relationship with his step-daughter, our client's daughter. Her husband and daughter later had children together. Obviously this situation was extremely hurtful and embarrassing to our client. She was desperate to divorce her husband but she could not afford the filing fee to do so. We were able to act for her for free in the divorce but our Centre is not funded to pay filing fees and other costs of litigation (eg. service fees). Her divorce has been put on hold until she is able to save up for the filing fee.*

Case study 2: *In another case, a child of the marriage witnessed violence inflicted by her father to her mother and became traumatised. She became terrified of all men and at school she could not be placed in a class with a male teacher. The mother was desperate to end her marriage to the perpetrator but as she was on a single parenting payment she did not have funds to pay for the divorce filing fee. However our client's local Member of Parliament did manage to arrange for payment of the divorce filing fee*

For most other applications in the family court the filing may be waived if the applicant is in receipt of a Centrelink payment, is receiving Legal Aid or assisted by a Community Legal Centre, under 18 years of age or in prison.

We recommend that the divorce reduced filing fee may be waived by the court if:

- the Applicant has experienced family violence and a final Apprehended Domestic Violence Order was made; or
 - the Applicant is represented by Legal Aid or an approved Community Legal Centre.
- **Expert reports and other reports for court**

Expert Reports and other relevant reports are very costly with limited guarantee of favourable client outcomes. Looking at sliding scales for fees would be beneficial. Please see below two case studies regarding expert reports.

Case study: Expert Report: Aboriginal vs non-Aboriginal family

In one recent complex case, we assisted an Aboriginal mother, where both she and her extended family (the maternal family) sought contact with the child. The Expert Report writer accepted some allegations of family violence against the maternal family made by the non-Aboriginal father, with whom the child lives. Accepting those allegations may have influenced the Expert Report writer's recommendations, which were that the

maternal family have very limited contact about 4 times per year. After the Expert Report was released, members of the maternal family filed strong evidence disputing those allegations of violence. As the matter resolved by consent, the Expert Report remains untested.

The Consent Orders noted that while they deviated significantly from the recommendations in the Expert Report the court was satisfied that the orders were in the best interest of the child.

Those Consent Orders included the engagement of a family therapist to provide family therapy directed to the relationship between the child and her mother, and the child and the maternal family. All parties were to comply with the recommendations made by the family therapist. The effect of the Consent Orders was to transfer responsibility of assessing the maternal family and their capacity for on-going contact with the child from the judge to a family therapist. Any benefit of the costly and lengthy Expert Report was questionable in this case. Perhaps the use of a family therapist to work with the family is a better option although it would also be costly.

Case study: Getting around the high costs of reports

We have observed in Court, two self-represented parents both requested the Judge to order that the other parent undertake a psychological assessment about their parenting capacity, to be produced to the Court. The Judge ascertained that neither party was able to afford such a psychological report. The Judge then referred the parties back to their own General Practitioner to ask for them to be placed on a “Mental Health Plan” and referred to a psychologist for treatment.

We understood that the parties’ psychological records could then be subpoenaed by the Court to assist the Judge in determining the party’s parenting capacity. This is a long and convoluted way of obtaining reliable material about a party’s parenting capacity.

• Cost and shortage of Children’s Supervised Contact Places

The complex nature of many of the cases in the family law system has led to a high demand for supervised contact services which is not being met. In many cases where there is a risk of harm to a child, the initial contact arrangement between the “risky” parent and the child is supervised contact. This could be for many reasons eg. family violence, drug or alcohol abuse, mental health problems etc. The supervised contact sessions are also very useful if the matter goes to court, as the supervisor of the contact closely observes the parent-child interaction at the contact sessions and records their observations. This is useful evidence in trying to assess the safety of the child and also parent-child relationship.

However there is a serious shortage of subsidised supervised contact places which has created long waiting lists. Recently our Centre contacted three supervised contact services and we were told that the wait list for the ‘subsidised’ services for supervised contact is 9-12 months. This usually means that during this waiting period the parent will not have any contact at all with a child. These

long-waiting lists can create a chasm in the parent-child relationship as there will often be no contact between the parent and child in the waiting period.

Case study: Costs of Private Supervised Contact

The Pricelist 2017 for Phoenix Rising, a private supervised contact agency are:

Saturday (3 hr min)-\$80/hr + GST- \$264

Sunday (3 hr min)-\$90/hr + GST- \$297

There are additional charges for initial intake (\$75), reports (\$50-\$100 +GST) and court attendances (\$132 per hr +GST).

Other private agencies charge similar fees to above.

Even in a Children's Supervised Contact Centre run by a NGO, the unsubsidised services which they provide to families (to allow them to jump the waiting list) would be unaffordable for many families. For example, the Initial Intake fee for the unsubsidised service is \$400 and 2 hours supervised contact on Sunday is \$380 per visit. The waiting list time for this unsubsidised service is reduced to only 1 month. The service is run on alternate Sundays but each family may only use it once per month.

One alternative to using the subsidised contact Centres due to unreasonable waiting lists is to opt to go private but the fees are extremely high.

- **Costs for drug and alcohol tests**

Where there is an issue of drug or alcohol addiction, the party who is alleged to be abusing the substance often has to undergo drug and alcohol test eg. urinalysis or hair follicle tests. We were recently informed that the cost of each urinalysis test is \$120. If the party is on Legal Aid this cost would be covered. Otherwise the party themselves may have to foot the bill. If they are on Centrelink benefits or even in low paid employment the costs are prohibitive.

- **Transportation to Court**

For Aboriginal people living in rural and remote areas the costs of travelling to the nearest family or local court for their case is often unaffordable. If they are on a low income or Centrelink payments they are often unable to afford petrol, train or bus tickets. This may also apply to accessing legal advice. If an overnight stay is required, they may not be able to afford to pay for accommodation in the town. Lack of transport is a basic way of denying accessibility to the family law system.

We recommend that a fund be set up to assist clients who need to travel a long distance to attend court to assist them with travelling costs. Occasionally this problem may be avoided by them attending via telephone but that is not always

possible especially in hearings. This transport fund could be administered by either the courts or Legal Aid NSW, but would need to be a simple procedure.

4. Family Dispute Resolution in the family law system

This section relates to Questions 20-30

In our experience, Legally-assisted Family Dispute Resolution is having some success in assisting parents to reach an agreement around time spent with a child and other issues. We submit that it would be beneficial to see an expansion of this model in general as well as the establishment of a specific program for Aboriginal people.

Family Dispute Resolution (FDR), is a relatively quick and affordable method of assisting parties to reach an agreement about their children. By far the greatest advantage of FDR is that it enable parents to reach an agreement that is acceptable to both of them. This means that the parents themselves have nussed out the agreement rather than having an agreement imposed on them by the Court. This in itself is empowering and may also be the beginning of the parents co-parenting their children after separation. At FDR neither party is likely to achieve their ideal agreement as it should be a compromised yet practical agreement that both parties can live with.

Lawyer-assisted Family Dispute Resolution is used in cases where both parties wish to engage in FDR, however usually there is a power imbalance between the parties or a complex issue necessitating further support for the parties.

Our family law solicitor was involved in many Lawyer-assisted mediations (LAMs) at a number of Family Relationship Centres across Sydney over 7 years. Aboriginal people were not a party in these LAMS. Most of the matters considered suitable for LAMS were complex matters which involved at least one and often more of the following issues: family violence, mental health issues, child safety issues, young parents, difficult legal issue eg relocation, parents with some other disability and drug or alcohol addiction.

In the experience of our family law solicitor women supported by informed mediators and lawyers have often been able to reach a fair settlement at LAMS. Our family law solicitor has assisted at some LAMS where there has been a current AVO in place.

In LAMS family violence and safety issues, a practice was established which prioritised that issue when setting the mediation agenda for discussion. This was very important to ensure the progression of the FDR with a suitable agreement about safety in place. Both parties had to be prepared to acknowledge that there were real safety concerns for a family member, whether a child or a parent. In matters where DV was identified as an issue, it was also made a practice for the

two lawyers to discuss that issue beforehand to see if both parties were prepared to accept suitable arrangements.

Our family law solicitor participated in many LAMS where there were allegations of either family violence and/or safety issues for a child. For example, in some cases there were allegations that the father had been violent towards the mother and the child had been exposed to domestic violence. Sometimes in these cases the mother did not feel safe being in the same room as the father and so we would do shuttle FDR. It was much more difficult to reach a settlement when the parties were in separate rooms. If it is safe, it is usually better for parties to communicate face to face, especially for Aboriginal people. Where the mediators are the “middle-men” between parties something becomes “lost in translation”.

In these cases the lawyer would advise the mother about keeping the child (and mother) safe while spending time with their father. This would often include supervised contact either at a Children’s Contact Centre or on some occasions contact was supervised by another family member while changeovers were supervised and at a public place. Usually an agreement would commence with a party spending short periods of supervised time with a child and trialling that agreement for about 3 months. The parties would then return to the LAM again to review the situation. If changeover, supervised time and everything was working well, the length of contact could then be increased. The goal in most cases was for the contact parent to progress to unsupervised time with the child, always bearing safety in mind.

Generally, our Centre supports legally-assisted mediation processes playing a greater role in the resolution of disputes involving family violence or abuse, providing that the FDR is conducted in a safe and controlled way. Parents may agree that an offending parent have supervised contact with a child but the best interest of and views of the child must also be considered. This is where there would be a huge benefit in having a clinician assess the perpetrator’s parenting capacity. There is little point in a parent having supervised contact with a child unless it will be a positive relationship for the child.

Within the FDR process, it is in our experience often very helpful to include a child inclusive conference. This is when a trained Child consultant will speak to the children privately about how they are feeling post-separation. This will bring the voice of the child into the FDR process. Both parents must consent for the children to participate in this process. The Child consultant then meets with both parents together and report back to them about their child and what their needs are. This conference can have a huge impact on bringing parents together to reach agreement to benefit their child. Again, it would be beneficial to have an Aboriginal Child consultant involved in this process.

One of the obstacles in reaching an agreement at FDR or LAMs, is being unable

to obtain an independent assessment of a party's parenting capacity either at the time or on an on-going basis. Parenting capacity is significant in most of the complex matters listed above. For example, in cases where a party has a diagnosed mental illness, it is usually the case that the parent is capable of having a child in their care while they are properly medicated and under psychological treatment. While the parties were living together, one parent was often able to "monitor" the other parent to ensure that they were maintaining their treatment and were aware if the party with mental health issues was having "an episode." However after separation, this method of monitoring the other party's mental health generally disappears. It can be frightening for a parent to hand over their child to another parent and not know if the contact parent is mentally stable that day. Our family law solicitor has had a few cases where a parent who is receiving mental health treatment has agreed at a legally-assisted mediation to allow the other parent to regularly communicate with their therapist or be provided with reports about the other parents' mental stability. Being able to check in with a therapist, really increases the safety of a child and the confidence of the other parent in this circumstance. However many parents with mental health issues are not prepared to waive their privacy around their mental health unless a Court Order is made.

This independent assessment of a parties parenting capacity by a professional person is often crucial to being able to reach an agreement at FDR. If a party will not agree to an independent assessment of their condition being made it can prevent any agreement being reached at FDR. Eg. If an allegedly alcoholic parent refuses to have tests to assess their alcohol use, then either no agreement can be reached or an agreement can only be reached on the assumption that they are an alcoholic. Supervised contact and an undertaking not to consume alcohol while the child is their care would be imposed.

Consideration should be given to whether the family court could benefit from similar In-house (but independent) services as the NSW Children's Court Clinic. For example, there could be clinical psychologists or drug and alcohol counsellors available which are able to provide an assessment of a parent's parenting capacity. This could be a free or means tested service but would be an improvement on using independent therapists as many parties are unable to afford expensive assessment reports and even when they are obtained often they are not that relevant or useful. They could work with a client's existing therapist too, if available.

Recommendation:

Increased FDR and in particular LAMs, to increase Aboriginal people's participation and involvement in decision-making around their children and family. This leads to empowerment of Aboriginal families over their own lives and families.

We recommend establishment of a specialist Aboriginal Mediation Unit. If this is not possible due to funding issues then mediators, lawyers and others involved in FDR should all be culturally aware of the Aboriginal way of life and trauma-informed. There is a need for a pool of Aboriginal trained mediators to be available within the Family Relationship Centres and also within Legal Aid for their Legal Conferences. This would improve legal accessibility to Aboriginal parties by increasing the cultural appropriateness in the LAM or FDR process. FDR should be run by Aboriginal workers for Aboriginal families.

Family group conferencing (FGC) or Aboriginal family led decision making models – although in their infancy to some respect in NSW – have proven to be useful for some families along the continuum of care, namely those in a position prior to discussion of removal or placement stability has occurred. There is the need to promote respected models. Services need to be aware of the ADR options available in order to promote them to families. Some ADR services charge large fees which is untenable for many families. FACS might financially support FGC but will tend to only do this if there is an ‘open and allocated’ case file.

The experience of FGC at Forbes has been regarded as an inefficient use of resources in that community, although it is theoretically a good model to operate on. It comes down to the facilitator themselves and the capacity for them to effectively engage the parties as well as facilitate outcomes.

In relation to the context of family law, further research needs to be done on how and when FGC/AFLDM may be deemed more appropriate than mediation or lawyer-assisted FDR in family law settings. When is it preferable to use FGC as opposed to FDR?

It should be noted that FDR in any form will not work for some families and in some circumstances (eg. where there are allegations of child abuse by a parent) so alternatives should always be kept open and explored. In some cases the only suitable avenue is the Court.

5. Other Observations

Over the years that we have worked with Aboriginal women, we many of our clients have told us that when they have had contact with the police (usually while reporting an incident of family violence) the police have given them “advice” or information about family law. Often this information has been incorrect and sometimes it has been used by police to deter a woman from seeking an ADVO so that they will not need to apply. Here is a recent case study which we have had.

Case study: Allora and John have been separated for a few years. They have young children together. They have informal parenting arrangements in place that the children live with Allora during the week and stay with John from Friday until Sunday each week.

One weekend, the children stayed with John over the weekend. Allora was unable to collect the children on Sunday evening as agreed. Allora asked John if he could take care of the children on Sunday evening and take the children to school on Monday. John refused to take the children to school on Monday and stopped answering Allora's phone calls.

On Monday evening, there was a dispute about John returning the children. John called Allora more than 15 times. Allora's mother, Michelle, went to collect the children from John's house but John and the children were not there. John's brother answered the door and had a conversation with Michelle where he told her the kids were not there and then made a serious threat to hurt her, Allora and one of the children.

John had in fact driven the children to Allora's home. John verbally abused Allora outside of her home. Allora asked him to leave, which he did.

Shortly after, Allora called 000 to report the incident of violence to police. Two police officers then arrived at Allora's home. Allora explained the events of that day. Allora then told police about unreported domestic violence perpetrated by John over many years. Michelle also told the police that John's brother had made a serious threat to hurt her, Allora and one of the children.

The police told Michelle that because that incident had occurred outside of their local area command, she would need to report the incident to the police station in that area, rather than to them. The police told Allora that she could not get an AVO and that this was a family law matter regarding children and to go to the Family Court. The police then left.

That evening, John and his brother sent numerous abusive and threatening text messages to Allora.

After Allora contacted our Centre we spoke to the police DVLO about how the police had dealt with the matter and also that the police had not assessed Allora with the DV Safety Assessment Tool. The police took a statement from Allora and applied for an ADVO for the protection of her and her family.

Recommendation:

That the Commonwealth and State governments ensure that the State police force (who are often the first point of contact for victims of family violence) are fully trained in appropriate responses to family violence and identifying different types of family violence. Police should also have training in the intersection between family violence and family law. Police need to understand that they cannot give family law advice.