Ms Sarah Henderson MP
Chair
Standing Committee on Social Policy and Legal Affairs
By email: fvlawreform@aph.gov.au

Australian Women Against Violence Alliance

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

03 May 2017

Thank-you for the opportunity to contribute a submission to the Parliamentary Inquiry into a better family law system to support and protect those affected by family violence.

About the Australian Women Against Violence Alliance (AWAVA)

AWAVA is one of the five National Women’s Alliances funded by the Australian Government to bring together women’s organisations and individuals across Australia to share information, identify issues and contribute to solutions. AWAVA’s focus is on responding to and preventing violence against women and their children. AWAVA’s role is to ensure that women’s voices and particularly marginalised women’s voices are heard by Government, and to amplify the work of its member organisations and Friends and Supporters. AWAVA’s members include organisations from every state and territory in Australia, representing domestic and family violence services, sexual assault services, and women’s legal services, as well as organisations representing Aboriginal and Torres Strait Islander women, young women, women educators, women in the sex industry and other groups.

Summary

AWAVA supports the intention of the parliamentary inquiry to contribute to improvements in the family law system to ensure safety and better protection of people subjected to family violence. While we understand that people of any gender may be either victims/survivors or perpetrators of family and domestic violence, AWAVA focuses particularly on women, given that evidence suggests that domestic and family violence is disproportionately inflicted upon women by men. The most recent Australian Bureau of Statistics Personal Safety Survey shows that on average one women a week in this country is murdered by a current or former partner, one in four women (28%) have experienced physical and sexual violence and/or emotional abuse, one in four women (25%) have experienced emotional abuse and one in six women (17%) have experienced physical or sexual violence.¹ Thus, we

¹ Australian Bureau of Statistics (ABS), Personal safety survey Australia 2012, cat. no. 4906.0, ABS, Canberra, 2013, accessed 29 April 2014
recommend that the inquiry place a particular focus on how women subjected to family violence are supported to navigate the family law system and on ensuring they are treated in a way that is fair and maximises their safety.

While research has found that only approximately 7% will require the use of mediation in the Family Court upon separation\(^2\), when there is family violence this raises serious concerns for the safety of litigants in particular women and their children. The family law system is one of the major institutions that has to be navigated by people (often by themselves without any legal representation) who are living in violence and are trying to build safer lives for themselves and their children. Following the reform of the Family Law Act and the increasing engagement with families in crisis\(^3\), it is imperative that the main responsibility of the family law system is to ensure safety for women and their children, mitigate any risks of their further re-traumatisation and remove barriers to access to justice for women affected by violence\(^4\).

Women who have had violence perpetrated against them become particularly vulnerable within the family law system for a number of reasons: the ability of an alleged perpetrator to undertake cross-examination in cases when a perpetrator is self-represented\(^5\), lack of consideration of family violence and its impact on the ability of a woman to equally participate financially and acquire property\(^6\), the impacts of trauma, the complexity of the legal system and the lack of fully funded specialist women’s services and community legal centres able to provide women with the necessary information and legal representation.

Women’s Legal Service Australia (WLSA) has provided a detailed analysis of the required reforms in the areas of the family law system that would ensure access to justice for women on a number of levels\(^7\). AWAVA supports and endorses WLSA’s submission to this inquiry, particularly in the area of early risk assessment, namely the development of a national risk assessment framework for use by the family courts and, relatedly, the availability of trained and fully funded support services and workers. AWAVA also supports and endorses Domestic Violence NSW’s submission drawing on responses to its survey of practitioners working with victims/survivors in the family law system.

The Third Action Plan 2016-2019 of the National Plan to Reduce Violence against Women and their Children\(^8\) also lists the enhancement of services in the family law system for families experiencing, or at risk of experiencing violence as one of its focus action priorities.

**Summary of Recommendations:**

**Recommendation 1:** That the Australian Government commit to developing a process for determining sustainable long-term funding contributions to specialist women’s services and legal assistance services.

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\(^2\) Lixia Qu, et al, ‘Post-Separation Parenting, Property and Relationship Dynamics After Five Years’ (Report, Australian Institute of Family Studies, Attorney-General’s Department, 2014)


\(^6\) Ibid.

\(^7\) Women’s Legal Service Australia Submission to parliamentary inquiry into a better family law system to support and protect those affected by family violence. May 2017

\(^8\) Third Action Plan 2016-2019 of the National Plan to Reduce Violence against Women and their Children, Section 3.10
Recommendation 2: That the Australian Government incorporates specialist women’s services into the family law systems, and adequately funds these services, by:

- funding specialist women’s services that provide embedded services in state and territory courts to continue to support clients with family violence issues when they move to the family law system to seek parenting or other orders;
- embedded workers from specialist women’s services in the family courts and Family Relationship Centres; and
- creating a dedicated family safety service within the family law system.

Recommendation 3: That the Australian Government make at least $200 million of additional annual funding available to all legal assistance services, comprised of: community legal centres, including specialist women’s legal services and programs; Family Violence Prevention & Legal Services; Aboriginal and Torres Strait Islander Legal Services; and Legal Aid Commissions.

Recommendation 4: That the Australian Government increase funding to community legal centres and Legal Aid Commissions specifically in the area of family law.

Recommendation 5: That the Australian Government encourage Legal Aid Commissions to amend their funding guidelines in family law to promote greater access to legal aid for women who are victims of family violence.

Recommendation 6: That the Australian Government funds, and together with the Judicial College of Australia develops, a continuing joint professional development program for judicial officers from the family courts and state and territory courts in which judicial officers preside over matters involving family violence.

Recommendation 7: That the Australian Government funds and develops a professional development program for all court staff from the family courts and state and territory courts in which judicial officers preside over matters involving family violence, on family violence, cultural competency and working with victims of trauma.

Recommendation 8: That the Australian Government fund and coordinate the development of a national, comprehensive family violence training program for family law legal professionals (including Independent Children’s Lawyers (ICLs) and Family Dispute Resolution (FDR) practitioners) and work with state and territory law institutes and bar associations to roll out the training.

Recommendation 9: That the Australian Government take immediate steps to prohibit personal cross-examination in cases where family violence has been alleged, by implementing the model proposed by Women’s Legal Services Australia (WLSA) in Safety First in Family Law - Five Steps to creating a family law system that keeps women and children safe and in WLSA’s submission to this inquiry. Such protections should be entrenched within the Family Law Act 1975 (Cth).

The role of specialist women’s service in the family law system

AWAVA continues to advocate for substantial increases in funding and greater safeguards for the role of the specialist women’s services, which are at the forefront of the efforts to respond to and eliminate
violence against women.9 The work of specialist women’s services, including women’s legal services, is underpinned by a gendered understanding of violence10. It is focused on women’s and children’s safety11, provides gender and cultural safety, works from a client-centred, trauma-based, empowering framework12, supports women to navigate the complex systems, recognises children as clients in their own right, and works towards greater gender equality recognising the complexity of intersectionality and that women are best qualified to decide their pathway to recovery from violence and trauma13.

**Recommendation 1:** That the Australian Government commit to developing a process for determining sustainable long-term funding contributions to specialist women’s services and legal assistance services.

Across the full range of services responding to violence against women, there is increasing demand, in part because of increased community awareness and condemnation of this violence.14 While immediate increases to services is required, the international and Australian evidence is clear that not just ‘any old service’ will do: ill-equipped services that lack well-trained staff discourage help-seeking, prevent disclosure of abuse and may inadvertently increase the risks for victims/survivors or lead them to return to abusive situations15.

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Lack of funding available to specialist women’s services and community legal services creates additional barriers for women subjected to violence. Women often have a limited capacity to obtain access to justice because of financial barriers, and are often unable to access legal information, advice and/or representation due to the high cost of private legal representation\textsuperscript{16}. Domestic Violence NSW’s Practitioners’ Survey indicates that often, women who are working casually or part-time, and where there is property to the relationship, do not meet financial eligibility criteria to access free legal assistance from Legal Aid\textsuperscript{17}. It is also difficult for women to obtain pro bono assistance, as it is not a particularly attractive area for lawyers working in family law\textsuperscript{18}. Given the lack of access to free specialist and/or legal service, when self-representing in family courts, women are at risk of unsuccessful settlements as well as further re-traumatisation and abuse.

Women’s legal services and specialist Aboriginal and Torres Strait Islander legal services have the skills and knowledge to work effectively with victims/survivors, but need to be resourced to scale up their work in response to demand. This scaling-up needs to occur in the context of broader funding and capacity increases across the legal assistance sector and specialist domestic and family violence services sector, together with other related services (such as sexual assault services) that support victims/survivors in the family law system.

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\textsuperscript{16} Women’s Legal Services Victoria Submission Domestic Violence in Australia pg 5, Productivity Commission, Access to Justice Arrangements – inquiry report No. 72, 3 December 2014

\textsuperscript{17} Domestic Violence NSW Practitioner Survey Respondent – Parliamentary inquiry into a better family law system.

\textsuperscript{18} National Pro Bono Resource Centre, Pro bono legal services in family law and family violence, Understanding the limitations and opportunities (Final Report) October 2013
Judicial training on the intersection of family law and violence and cultural competence

Given the complexity of the family law system and the diversity of people interacting with it, there needs to be an emphasis on early decision making, triaging and case management of domestic violence cases in the family courts. The Family Law Court has found that Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds face a range of additional barriers when accessing legal, counselling and FDR services. The Third Action Plan of the National Plan to Reduce Violence against Women and their Children has also indicated a commitment to improving the quality and accessibility of services for women from culturally and linguistically diverse backgrounds and Aboriginal and Torres Strait Islander women. In the family law system, there is a need to extend this commitment to people who identify as LGBTIQ as well.

Thus, there should be a particular focus placed on training programs developed and delivered for judicial officers, court staff and family lawyers including Independent Children Lawyers (ICLs) and Family Dispute Resolution (FDR) practitioners in the areas of intersection of family law and family violence, cultural competency in relation to working with Aboriginal and Torres Strait Islander clients, clients of a culturally and linguistically diverse background (including working with interpreters), working with vulnerable clients, trauma-informed practices and working with clients from LGBTIQ communities.

Results from the DVNSW Practitioners’ Survey indicated that in many cases there is lack of acknowledgement of domestic or family violence history. One of the respondents suggested:

Rulings are made based on an assumption of equal power between the parties rather than the fixed imbalance of power that pre-dates and persists through the court process. This leaves victims further vulnerable to system abuse by wealthy and highly educated perpetrators. Victims are judged on their emotional presentation at court, ignorant of the impact of domestic violence.

The same applies to property settlement matters, where often the history of domestic violence is not taken into account as a major factor influencing woman’s ability to equally participate and acquire property. Where DV is ignored, as an aspect in property matters, women may be forced into settlements regarding property that will leave them at a significant disadvantage, compared to the offender.

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21 Domestic Violence NSW Practitioner Survey Respondent – Parliamentary inquiry into a better family law system.

22 Ibid.
All participants in court processes, judges, lawyers and court staff should have a thorough understanding of the nature and dynamics of domestic and family violence\(^{23}\), such as an understanding of the tactics a perpetrator may utilise within the court system to ‘perpetuate a pattern of dominance and control’\(^{24}\). Increased knowledge regarding gender bias and the nature of family violence amongst staff in the judicial system can assist in holding perpetrators to account, and ensure that victims are treated in a consistent manner\(^{25}\).

**Recommendation 6**: That the Australian Government funds, and together with the Judicial College of Australia develops, a continuing joint professional development program for judicial officers from the family courts and state and territory courts in which judicial officers preside over matters involving family violence.

**Recommendation 7**: That the Australian Government funds and develops a professional development program for all court staff from the family courts and state and territory courts in which judicial officers preside over matters involving family violence, on family violence, cultural competency and working with victims of trauma.

**Recommendation 8**: That the Australian Government fund and coordinate the development of a national, comprehensive family violence training program for family law legal professionals (including ICLs and FDR practitioners) and work with state and territory law institutes and bar associations to roll out the training.

**Ensuring the safety of women in courts**

Legislation protecting vulnerable witnesses from direct cross-examination by the alleged perpetrator in sexual offence trials has been passed in every state and territory jurisdiction within Australia\(^{26}\). However, family law proceedings lack a protection against the direct cross-examination by alleged perpetrators and do not adequately protect victims/survivors from being required to directly cross-examine an alleged perpetrator. This means that if an alleged abuser elects to (or has no alternative to) self-represent at trial and has the option to directly cross-examine, victims/survivors may find themselves in a position of being directly cross-examined by their abuser. This has the effect of continuing the violence through a court sanctioned process and is recognised as court sanctioned abuse\(^{27}\). The experience may result in victim/survivors being re-traumatised. It can also lead to them choosing to settle their matters prior to trial on unfavourable and inequitable terms, which may not

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\(^{23}\) The publication of the *Australian Standards of Practice for Family Assessments and Reporting* by the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia in 2014, which provides guidance on the expected levels of knowledge and understanding of family violence for family assessors is noted.

\(^{24}\) Ibid.


\(^{26}\) Criminal Procedure Act 1986 (NSW) s 294A; Criminal Procedure Act 2009 (Vic) ss 356-357; Evidence Act 1977 (Qld) s 21N; Evidence Act 1906 (WA) s106G; Evidence Act 1929 (SA) s 13B; Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 380; Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 5; Evidence (Children and Special Witnesses) Act 2001 (Tas) s 8A.

be in the best interests of the children, to avoid being cross-examined by – or having to cross-examine – their abuser. This can potentially place them and their children at risk. It can also increase the risk of poverty if the settled terms are financially inequitable. Likewise, the experience can lead to victims/survivors providing compromised evidence to courts, which can affect safe and effective court orders, and can allow the perpetrator to use court proceedings to control and dominate the victims.

There has been a number of reports noting significant problems with direct cross-examination. The Family Law Council has acknowledged the risk of cross-examination that perpetuates the abuse and the provision of incomplete or poor quality evidence to the court in cases with unrepresented litigants, and has recommended that the Australian Government explore the viability of piloting a Counsel Assisting model (acknowledging the resource implications in response). While this is one option, we believe the need to prevent direct cross-examination warrants urgent attention and resourcing.

**Recommendation 10:** That the Australian Government take immediate steps to prohibit personal cross-examination in cases where family violence has been alleged, by implementing the model proposed by Women’s Legal Services Australia (WLSA) in Safety First in Family Law - Five Steps to creating a family law system that keeps women and children safe and in WLSA’s submission to this inquiry. Such protections should be entrenched within the Family Law Act 1975 (Cth).

There is a general concern over women’s safety in courts when they may potentially be in the same room with an alleged perpetrator waiting for a court hearing. To provide better safety and support to women in courts, separate safe rooms, and safe entrances and exits, could be made available to them to minimise the risk of further re-traumatisation and improve the quality of court processes.

**Other areas of concern**

AWAVA is concerned that the Northern Territory jurisdiction still prohibits same-sex couples from legally adopting children, including those already in their care. Despite the fact that the Northern Territory extended a presumption of parentage to lesbian partners in 2003 with its Status of Children Act 2003, the lack of recognition of same sex families raises concerns in family law matters when family violence is involved, in particular in relation to decision making about what is considered the best for the child.

AWAVA is concerned that an Apprehended Violence Order (AVO) filed prior to a parenting order under state/territory jurisdictions may be overruled when a matter is in the Family Court. This may potentially expose women to further abuse and re-traumatisation. More consideration by courts should be given to conditions listed in pre-existing AVOs before making parenting orders.

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31 Millbank, Jenni (2 April 2008). "One state, one mother". SX News
We note that AWAVA provided a submission on the Family Law Amendment (Financial Agreements and Other Measures) Bill 201532 and was a witness at the associated Senate Committee hearing in February 201633. AWAVA also provided a submission to the Senate Inquiry into Domestic Violence in Australia34 and to the inquiry on Domestic Violence and Gender Inequality35. In 2017 AWAVA also made a submission in response to the exposure draft of the Family Law Amendment (Family Violence and other Measures) Bill 2017 (Cth) and corresponding Public Consultation Paper36. We ask that these submissions and the relevant inquiry reports also be considered in the context of the current inquiry.

Thank-you once again for the opportunity to contribute a submission to the Parliamentary Inquiry into a better family law system to support and protect those affected by family violence. We welcome the opportunity to discuss the issues further. For further information or to discuss the content of this submission, please contact Merrindahl Andrew using the details below.

Yours faithfully,

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32 Australian Women Against Violence Alliance (AWAVA) Submission on Family Law Amendment (Financial Agreements and Other Measures) Bill 2015

33 http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/a6054ad8-388b-41ae-9c04-50500d839c4a/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2016_02_12_4163_Official.pdf;fileType=application%2Fpdf#search=%22committees/commsen/a6054ad8-388b-41ae-9c04-50500d839c4a/0000%22

34 AWAVA’s Submission to the Senate Inquiry into Domestic Violence in Australia

35 Australian Women Against Violence Alliance Submission to the Finance and Public Administration References Committee inquiry on Domestic Violence and Gender Inequality 14 April 2016

36 Australian Women Against Violence Alliance Submission in response to the exposure draft of the Family Law Amendment (Family Violence and other Measures) Bill 2017 (Cth) and corresponding Public Consultation Paper 3 Feb 2017