

NATIONAL FAMILY VIOLENCE PREVENTION LEGAL SERVICES

WORKING TO ACHIEVE IMPROVED JUSTICE OUTCOMES FOR ABORIGINAL AND TORRES STRAIT ISLANDER
VICTIMS/SURVIVORS OF FAMILY VIOLENCE AND SEXUAL ASSAULT

National Family Violence Prevention Legal Services Forum submission
to the Family Law Branch of the Attorney-General's Department:

AMENDMENTS TO THE *FAMILY LAW ACT 1975* TO RESPOND TO FAMILY VIOLENCE

February 2017

TABLE OF CONTENTS

INTRODUCTION 3

ABOUT THE NATIONAL FVPLS FORUM 5

ABOUT THE FAMILY VIOLENCE PREVENTION LEGAL SERVICES (FVPLS) PROGRAM 5

FAMILY LAW MATTERS TO BE RESOLVED BY STATE AND TERRITORY COURTS 7

ASSISTING THE COURTS TO EXERCISE FAMILY LAW JURISDICTION 12

STRENGTHENING THE POWERS OF THE COURTS TO PROTECT VICTIMS OF FAMILY VIOLENCE 14

CRIMINALISING BREACHES OF PERSONAL PROTECTION INJUNCTIONS..... 14

INCREASING THE POWER OF THE COURT TO DISMISS UNMERITORIOUS CLAIMS 17

STRENGTHENING ORDERS ISSUED BY STATE AND TERRITORY COURTS..... 18

ENABLING THE COURT TO EXPLAIN ORDERS IN A MANNER THAT SUPPORTS THE BEST INTERESTS OF THE CHILD 18

REPEAL OBLIGATION TO PERFORM MARITAL SERVICES 19

Introduction

The National Aboriginal Family Violence Prevention Legal Services Forum (**'National FVPLS Forum'**) welcomes the opportunity to respond to the exposure draft of the *Family Law Amendment (Family Violence and Other Measures) Bill 2017* (**'the Bill'**) and its accompanying Public Consultation Paper (**'the Consultation Paper'**).

Aboriginal and Torres Strait Islander people experience family violence at significantly higher rates than other Australians and are disproportionately over-represented in the Australian legal system. Aboriginal and Torres Strait Islander women, in particular, have been found to be the most legally disadvantaged group in Australia.¹ In comparison with other Australian women, Aboriginal women are 34 times more likely to be hospitalised as a result of family violence² and 10 times more likely to be killed as a result of violent assault.³

Family Violence Prevention Legal Services (**'FVPLSs'**) provide culturally safe and specialised legal assistance to Aboriginal and Torres Strait Islander victims/survivors of family violence through our holistic, wrap-around service model. Family law is one of the core practice areas of FVPLSs, along with family violence and child protection law. Almost all FVPLS family law clients are engaged in parenting or child related matters, including parenting plans, residency (or "lives with" orders), contact (or "time spent") orders and child support. For our clients, these cases arise against a backdrop of family violence and more than 90% of our clients are women.

Western Australian FVPLSs have a unique interaction with the Family law system. A state-based Family Court operates in Western Australia which seeks to deliver a "unified jurisdiction"⁴ under the operation of both the federal legislation of the *Family Law Act 1975* as well as the state *Family Court Act 1997*.

The following submission does not attempt to respond to every element of the proposed amendments. Instead, this submission urges the Attorney-General's Department to consider a number of key issues of importance to Aboriginal and Torres Strait Islander victims/survivors of family violence, predominantly women and their children. In summary, those issues are:

- Concerns about the proposed expansion of family law jurisdiction to state and territory courts. This includes: challenges for Magistrates and Children's Court Judges in exercising family law powers, particularly with the added complexities and legislative requirements of a case involving Aboriginal and/or Torres Strait Islander children and families; and unintended adverse impacts on the safety and wellbeing of Aboriginal victims/survivors of family violence and the best interests of their children;
- The critical importance of access to culturally safe family law advice, assistance and community legal education for Aboriginal and Torres Strait Islander victims/survivors of family violence to ensure they can understand and access their legal rights and achieve safety;

¹ Senate Report on Legal Aid and Access to Justice, 2004. Aboriginal and Torres Strait Islander Commission (ATSIC), Submission to the Senate Legal and Constitutional References Committee Inquiry into Legal Aid and Access to Justice, ATSIC Canberra, 13 November 2003, page 4.

² The Australian Productivity Commission, *Overcoming Indigenous Disadvantage - Key Indicators 2014*, 2014, page 4.93, table 4A.11.22 available at <http://www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014/key-indicators-2014-report.pdf>.

³ Australian Institute of Health and Welfare, *Family Violence among Aboriginal and Torres Strait Islander people*, 2006, page 66 available at <http://www.aihw.gov.au/publication-detail/?id=6442467912>.

⁴ Peel, S and Croucher, R.F. (2011) Mind(ing) the Gap: Law reform recommendations responding to child protection in a federal system, *Family Matters*, No.89, page 23.

- The need for judicial training accompanying these amendments to include cultural competency training and specific training concerning the needs, experiences and barriers faced by Aboriginal victims/survivors of family violence in accessing the family law system;
- The need for improved training and systems to address current poor police responses to the enforcement of court orders relating to family violence against Aboriginal and Torres Strait Islander people, predominantly women and children;
- The need to remove all avenues available in the family law system for perpetrators of family violence to commit further abuse against their victims;
- The need to equalise the enforcement of the proposed new family law personal protection injunctions and state and territory family violence orders and clarify their interaction in light of the pending national DVO scheme; and
- The chronic under-funding and funding uncertainty of FVPLSs and the need for additional resourcing to meet the increased demand for culturally safe family law assistance that will result from these amendments.

In response to these issues the National FVPLS Forum makes a number of recommendations, which are detailed at the end of each section of this submission.

Finally, in addition to the comments and recommendations contained within this submission, the National FVPLS Forum refers the Attorney-General's Department to the National FVPLS Forum's submission to the 2015 Family Law Council reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems.⁵

⁵ Available at:

http://www.nationalfvpls.org/images/files/Submission_National_Forum_Family_Law_Council_Reference__FINAL.pdf

About the National FVPLS Forum

The National FVPLS Forum is comprised of 14 Family Violence Prevention Legal Services (FVPLSs) member organisations across the country that provide culturally safe legal assistance and support to Aboriginal and Torres Strait Islander victim/survivors of family violence – predominantly women and children. They also deliver essential community legal education and early intervention and prevention activities. The Forum was established in May 2012 and aims to work in collaboration across its member FVPLS services to increase access to justice for Aboriginal and Torres Strait Islander victims/survivors of family violence.

National Forum members are:

- Aboriginal Family Violence Prevention and Legal Service Victoria (Melbourne HO, Mildura, Gippsland, Barwon South West)
- Aboriginal Family Law Service Western Australia (Perth HO, Broome, Carnarvon, Kununnura, Geraldton, Kalgoorlie, Port Hedland)
- Aboriginal Family Legal Service Southern Queensland (Roma)
- Binaal Billa Family Violence Prevention Legal Service (Forbes)
- Central Australian Aboriginal Family Legal Unit Aboriginal Corporation (Alice Springs HO, Tennant Creek)
- Family Violence Legal Service Aboriginal Corporation (Port Augusta HO, Ceduna, Pt Lincoln)
- Many Rivers Family Violence Prevention Legal Service (Kempsey)
- Marninwarnitkura Family Violence Prevention Unit WA (Fitzroy Crossing)
- Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service (Alice Springs, NPY Tri-state Region)
- Queensland Indigenous Family Violence Legal Service (Cairns HO, Townsville, Rockhampton, Mount Isa, Brisbane)
- Southern Aboriginal Corporation Family Violence Prevention Legal Service (Albany, WA)
- Thiyama-li Family Violence Service Inc. NSW (Moree HO, Bourke, Walgett)
- Warra-Warra Family Violence Prevention Legal Service (Broken Hill)
- North Australian Aboriginal Family Legal Service (Darwin HO, Katherine)

About the Family Violence Prevention Legal Services (FVPLS) Program

FVPLSs provide frontline legal assistance services, early intervention/prevention and community legal education activities to Aboriginal and Torres Strait Islander victims/survivors of family violence.

FVPLSs were established over 16 years ago, in recognition of:

- the gap in access to legal services for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault;
- the high number of legal conflicts within Aboriginal and Torres Strait Islander Legal Services (ATSILS); and
- high rates of family violence in Aboriginal and Torres Strait Islander communities.

FVPLSs have adopted holistic, wrap-around service delivery models that prioritise legal service delivery while recognising and addressing the multitude of interrelated issues that our clients face. The primary function of FVPLSs is to provide legal assistance, casework, counselling and court support to Aboriginal and Torres Strait Islander adults and children who are victims/survivors of family violence.

FVPLS lawyers provide legal assistance in the four core areas of:

- family violence law;
- child protection;
- family law; and
- victims of crime assistance.

FVPLSs also provide culturally safe community legal education and early intervention/prevention activities. Where resources permit, some FVPLS units also provide additional assistance in other civil law issues arising from family violence such as Centrelink, Child Support, infringements and police complaints.

Ninety per cent of FVPLS clients are Aboriginal and Torres Strait Islander women and children. Family violence is complex and the issues our clients face are complex. As well as family violence driven homelessness, our clients live with intergenerational trauma, removal of children, discrimination, poverty, mental health issues, disability, lower levels of literacy and numeracy, as well as a range of other cultural, legal and non-legal issues.

FVPLSs play an important role within the family law system and within family violence and child protection systems at the State and Territory level. FVPLSs provide vital, culturally safe legal representation and associated support to Aboriginal and Torres Strait Islander clients throughout the life of their legal matter and frequently assist clients to identify their multiple legal issues and navigate the corresponding multiple jurisdictions (such as family violence matters in Magistrates Courts, child protection matters in the Children’s Court and Family Law parenting or other matters in the Family Law Courts).

Aboriginal and Torres Strait Islander victims/survivors of family violence face a wide array of complex and compounding barriers to reporting family violence and accessing culturally safe support. There is both limited understanding on the part of many Aboriginal victims/survivors of family violence of their legal rights and the available supports, and a lack of cultural competency across much of the mainstream support sector which creates mistrust and fear of indirect discrimination for Aboriginal victims/survivors. FVPLSs are best placed to address these barriers. The abilities of FVPLSs to “generate trusting relationships with communities”⁶ and to provide culturally safe services have been identified as “primary success factors for legal services.”⁷

⁶ The Allen Consulting Group (2012), *Review of Family Violence Prevention Legal Services: Final Report* (Report to the Australian Government Attorney-General’s Department).

⁷ The Allen Consulting Group (2012), *Review of Family Violence Prevention Legal Services: Final Report* (Report to the Australian Government Attorney-General’s Department).

Family law matters to be resolved by state and territory courts

The National FVPLS Forum recognises the burden on victims/survivors of family violence having to deal with multiple jurisdictions and court forums. However, we have a number of concerns about the proposed amendments to extend the jurisdiction of state and territory courts to exercise family law powers.

Concerns regarding Court (and legal service) capacity and impacts

Family law is a complex and specialist area. The capacity of Magistrates to exercise the proposed powers, such as empowering a state court to make a family law order to complement a family violence or child protection order, in already under-resourced and over-burdened courts with ever-increasing lists may result in certain complexities not receiving adequate time and consideration. This is especially relevant with the added complexities of a case involving Aboriginal and/or Torres Strait Islander children and families, where there are unique cultural and social factors that the Court is obligated to consider. In rural and remote areas, where Magistrates Courts traditionally sit on a circuit basis, the high volume of matters that Magistrates are required to address during a short period of time may result in a lack of capacity to pay proper consideration to even basic family law matters.

The Family Law Act contains specific legislative provisions aimed at protecting the cultural rights of Aboriginal children.⁸ Magistrates would need to be confident in applying these particular provisions and the relevant case law to adequately meet the needs of Aboriginal families and make orders in the best interests of Aboriginal children as mandated by the Act. As a critical prerequisite to these proposed reforms, the National FVPLS Forum recommends that all Magistrates exercising these powers receive tailored training in relation to these issues, together with cultural competency training and specific training concerning the needs, experiences and barriers faced by Aboriginal victims/survivors of family violence in accessing the family law system. To this end, it may be most appropriate to establish specialist Magistrates to hear these matters.

Currently in certain jurisdictions serviced by our members, such as the Northern Territory, local courts are equipped with the power to hear basic family law matters. However, the National FVPLS Forum understands that there is a reluctance by local courts to utilise these powers due to lack of resources within the courts, and lack of specialised training on the part of judges to make decisions in family law matters. There is concern from FVPLS member organisations that the proposal to invest further power in state courts to hear family law matters may be met with a similar reluctance. Nevertheless, in some jurisdictions such as the Northern Territory, the proposed amendments will provide the opportunity for a more stable presence for family law in regional areas like Alice Springs, given that the Family Court does not currently have a permanent presence in Alice Springs.

With regard to Children's Courts taking on expanded family law powers, it is important to note that the Children's Court and the Family Court have distinct purposes and legislative approaches to applying principles relating to the best interests of the child. While the Children's Court is mandated to make a judgement which addresses "protection from harm" as its primary role (and only in circumstances where a threshold need for protection has been met to permit an application to the Court), the Family Court is guided by the "the best interests" of the child as "the

⁸ See *Family Law Act 1975* (Cth), ss 61F, 60B(2)(e), 60B(3), 60CC(3)(h), 60CC(6).

paramount concern". The issues and fundamental principles which underlie these considerations are distinct, and the National FVPLS Forum maintains they should remain distinct.

However, the FVPLS Forum does support collaborative approaches between Magistrates, Children's and Family Law Courts. For example, our FVPLS member organisation in Western Australia reports that a practice direction was issued⁹ relating to the Western Australian Children's Court ('CCWA') and the Western Australian Family Court ('FCWA') which allowed for the proper and efficient exchange of documentation between the FCWA and the CCWA. This has ensured that care and protection matters are being dealt with within these courts concurrently. At present there is a Department for Child Protection and Family Support (DCPFS) worker situated at the FCWA who provides ongoing support within the Court. This co-location of services within the FCWA enables the sharing of information in highly complex cases. This example of jurisdictional good practice highlights alternative approaches to expanding the jurisdiction of state and territory courts.

Similarly, as part of the implementation of the recommendations of the Special Taskforce on Domestic and Family Violence's *Not Now, Not Ever* Report, Queensland is currently establishing a Specialist Domestic and Family Violence Court in Southport. This specialist court, in dealing with applications for domestic and family violence orders, also exercises limited family law jurisdiction to vary, suspend or revoke Family Court orders.

If, despite our concerns, these proposed amendments are to go ahead, the National FVPLS Forum shares the position expressed by Women's Legal Services Australia ('WLSA'), that an expansion in state and territory family law jurisdiction ought to be contingent on the Federal Government committing to provide additional resources and funding to state and territory courts to ensure they are in a position to take on an increased caseload in this new and complex area of law. Without a significant increase in the resources available to state and territory courts, the National FVPLS Forum and WLSA are concerned that the practical operation of the proposed expansion in these courts' family law jurisdiction will be met with a reluctance by judicial officers, or will ultimately fail to reduce the complexity and delay currently associated with family law proceedings.

As discussed further below, this funding should be complemented by additional resourcing for legal assistance services, including most critically FVPLSs, to meet the increased demand for family law advice and assistance that will flow from these reforms. Access to family law advice and assistance must be an intrinsic part of the implementation of these reforms to ensure that they do not operate to the detriment of vulnerable clients such as Aboriginal and Torres Strait Islander victims/survivors of family violence.

Concerns regarding adverse impacts on Aboriginal and Torres Strait Islander victims/survivors of family violence

The National FVPLS Forum is concerned that the proposed amendments may place inappropriate pressure on victim/survivors of family violence to agree to Family Law Orders which are not in her or her children's best interests, if these orders are being sought as part of a family violence or child protection matter otherwise before a local court. FVPLS staff hear regularly from our clients of the pressure and stress they experience when attending court. Our clients' attendance at court is typically precipitated by crisis, such as a family violence incident or removal of a child, from which they are still recovering. This stress is further compounded in circumstances where

⁹ Practice Direction, 1 of 2015 of the Family Court of Western Australia.

Aboriginal and Torres Strait Islander victims/survivors of family violence are unrepresented or do not have access to culturally safe legal assistance from services such as FVPLSs (for example, in circumstances where they must rely on brief interactions with a duty lawyer or representation from a mainstream legal service which is unable to address or understand their needs as an Aboriginal person). In a submission to the Productivity Commission's 2013 Inquiry into Access to Justice, the National Forum noted that many Aboriginal and Torres Strait Islander clients find the adversarial process of the court system intimidating and perceive the Family Court, and similar courts, to be generally unfriendly environments with minimal respect and understanding for Aboriginal and Torres Strait Islander culture.¹⁰ In this context, culturally safe legal representation from services such as FVPLSs is especially critical.

These amendments create a risk that Aboriginal and Torres Strait Islander clients may make, or be required to make, submissions in relation to family law matters without receiving culturally safe and specialist legal advice from services like FVPLSs. This is particularly relevant where there is a police-initiated application for a Family Violence Order and the victims/survivor has not been referred to a culturally safe service such as an FVPLS for support and legal advocacy.

The National FVPLS Forum, therefore, recommends that measures be adopted to strengthen referrals to FVPLSs in order to provide vital support that is both culturally safe and specialised to Aboriginal and Torres Strait Islander victim/survivors of family violence prior to and throughout their family violence, child protection and family law matters. This includes establishing and/or strengthening referral protocols within Magistrates Courts, Specialist Children's Courts, child protection agencies, police, and mainstream legal and support systems who engage with Aboriginal victims/survivors of family violence.

FVPLSs must be adequately resourced to receive referrals. FVPLSs are already at capacity in many locations around the country and will require additional funding to absorb the increased demand associated with these reforms. With the current funding for FVPLSs set to end in June 2018 and FVPLSs no longer having the benefit of a stand-alone national family violence prevention legal services program within federal government, FVPLSs remain in a state of uncertainty. It is essential that the Federal Government commits to providing long-term secure funding to allow FVPLSs to address the current level of need and meet the anticipated increased demand for culturally safe family law legal assistance resulting from these proposed amendments.

The National FVPLS Forum also supports recommendation 6 from WLSA's submission to this inquiry, as an alternative reform to provide effective protection to victims/survivors of family violence. WLSA and the National FVPLS Forum recommend that the Federal Government introduce legislative protections to prevent victims of family violence from being directly cross-examined by their abusers in all family law proceedings.¹¹

Cultural Competency Framework for State and Territory Courts' Exercise of Family Law Powers

The National FVPLS Forum recommends consideration be given to the need for a cultural competency framework to be adopted by State and Territory Courts exercising a proposed expanded family law jurisdiction,¹² especially given that Aboriginal and Torres Strait Islander

¹⁰ National FVPLS Forum submission to the Productivity Commission Inquiry into Access to Justice, 2013, page 11.

¹¹ Women's Legal Services Australia, 'Submission in response to the exposure draft of the *Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Cth)*', January 2017, page 11.

¹² See Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, February 2012, recommendation 2.

families and their children are significantly overrepresented within the Child Protection and family violence systems.

If the family law jurisdiction of State and Territory Courts is increased (as foreshadowed by the proposed amendments), the Federal Government will need to give consideration to providing funding for positions for Indigenous Family Consultants and Indigenous Family Liaison Officers (identified positions) to assist the Magistrates Courts in the States and Territories with their increased exercise of family law powers to improve outcomes for Aboriginal and Torres Strait Islander families.¹³

Additionally, consideration should be given to the creation of culturally safe family law processes for Aboriginal and Torres Strait Islander clients within an expanded Magistrates Court.¹⁴ This is particularly important in improving the delivery of family law services to Aboriginal and Torres Strait Islander clients seeking to resolve disputes about the care of children especially in the context of safety concerns for those children.

Another issue to be considered in the context of a proposed expansion of the jurisdiction of State and Territory Magistrates Courts, and the subsequent participation of Aboriginal and Torres Strait Islander people, is the role of Community Justice Groups or Elders/other respected persons. Community Justice Groups and Elders/other respected persons can provide cultural advice to the court in family law cases relating to an Aboriginal or Torres Strait Islander child.¹⁵ This consideration is consistent with recommendations made in Queensland's *Not Now, Not Ever* Report (specifically recommendation 92), as well as the Family Law Council's *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* Final Report (specifically recommendation 16). However, if Community Justice Groups or Elders/other respected persons become involved under the proposed model, proper resourcing and training is required to ensure that they can effectively engage with the court.

Recommendations:

If the proposed amendments are to proceed despite the concerns raised above, the National FVPLS Forum recommends:

1. Prior to implementing these reforms, all Magistrates and Children's Court judges exercising family law powers undertake training in relation to family law (including legislative provisions and case law specific to Aboriginal and Torres Strait Islander children), together with cultural competency training and specific training concerning the needs, experiences and barriers faced by Aboriginal victims/survivors of family violence in accessing the family law system.
2. Referral protocols and pathways be strengthened to ensure Aboriginal victims/survivors of family violence are referred to FVPLSs, or other culturally competent legal assistance services as required, for family law advice and assistance at the earliest opportunity.
3. The Federal Government provide additional funding to FVPLSs to meet increased demand for culturally safe family law legal assistance resulting from these proposed amendments.

¹³ Ibid, recommendation 6.

¹⁴ Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report*, June 2016.

¹⁵ Ibid, recommendation 16.

4. The Federal Government adjust funding cycles and practices to ensure that FVPLSs receive secure, long-term (five year) funding and reinstate a reinvigorated, stand-alone National Family Violence Prevention Legal Services Program.
5. State and Territory Courts exercising family law powers be required to develop a cultural competency framework for the exercise of the proposed expanded family law jurisdiction. This should be supported by Federal, State and Territory governments and include:
 - (a) Funding for Indigenous Family Consultants and Indigenous Liaison Officers to assist State and Territory Courts in the exercise of family law powers with respect to Aboriginal and Torres Strait Islander children and families;
 - (b) The creation of culturally safe family law processes for Aboriginal and Torres Strait Islander families within an expanded Magistrates Court;
 - (c) Consideration and support for the role of Community Justice Groups or Elders/Respected Persons in providing cultural advice to the State and Territory Courts in family law matters concerning Aboriginal and Torres Strait Islander children; and
 - (d) Resourcing for interpreters for Aboriginal and Torres Strait Islander clients, as required, in State and Territory Courts exercising an expanded family law jurisdiction.

The National FVPLS Forum supports the following recommendations proposed by WLSA in their submission to this inquiry:

6. The Federal Government consider whether the specialisation of magistrates in family law would assist state and territory courts in more effectively meeting an increased family law caseload.
7. That prior to the implementation of the amendments the Federal Government make additional resourcing available to state and territory courts, including by way of training for court staff and judicial officers, in order to ensure these courts can provide a high quality service to litigants and meet increased family law demand.
8. That the Federal Government make additional 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, to enable them to better respond to anticipated increased demand for family law legal assistance flowing from the proposed jurisdictional amendments.

Assisting the courts to exercise family law jurisdiction

The National FVPLS Forum welcomes the Federal Government's commitment, as outlined in the consultation paper, to fund judicial training to complement these amendments. As noted above, we strongly recommend inclusion of cultural awareness training as part of any broader package of training delivered to the judiciary, along with specific training in relation to Aboriginal peoples' interaction with the family law system and the unique needs and barriers faced by Aboriginal victims/survivors of family violence. Incorporating these elements into judicial training packages is essential not only to ensure Magistrates understand and appropriately apply the legislative provisions and obligations towards Aboriginal children under the *Family Law Act*, but doing so would also assist the justice system to be responsive to the needs of Aboriginal and Torres Strait Islander people, especially Aboriginal and Torres Strait Islander victims/survivors of family violence. This would be a critical step in overcoming the significant alienation and mistrust of the family law system - and justice system more broadly - felt by Aboriginal and Torres Strait Islander victims/survivors of family violence and their communities.

FVPLSs are uniquely placed to assist in the design and delivery of such training. The National FVPLS Forum, through member organisation FVPLS Victoria, has a pre-existing and positive relationship with the Australian Judicial College and FVPLS Victoria has been called upon to deliver cultural awareness training to judicial officers on a number of occasions, including in the family law jurisdiction. As Aboriginal Community Controlled Organisations, FVPLSs can support the judiciary's understanding of the complex nature of family violence as it effects Aboriginal and Torres Strait Islander victims/survivors which will be critical in the context of these proposed amendments.

In addition, as part of the implementation of these amendments, we recommend the Federal Government extend resourcing for culturally safe community legal education to ensure Aboriginal and Torres Strait Islander communities are aware of the amendments, their rights in relation to them and the potential implications. We would especially encourage training targeted at Aboriginal and Torres Strait Islander women, as those most at risk of family violence. This is especially important in a context where fear of child removal and over-criminalisation are significant deterrents for Aboriginal and Torres Strait Islander victims/survivors of family violence to report family violence and access the family law and broader legal system.

In addition, training would be required for other agencies implicated in the cross-jurisdictional process contained in these reforms, such as child protection workers and police. The National FVPLS Forum has advocated in a number of forums for strengthened cultural sensitivity training and accountability systems for both child protection services and police to improve interactions and outcomes for Aboriginal victims/survivors of family violence and their children.¹⁶

Recommendations:

The National FVPLS Forum recommends:

8. Judicial training packages corresponding with these reforms include cultural awareness training and specific training in relation to the unique needs and barriers of Aboriginal victims/survivors of family violence. These elements be developed in close consultation with Aboriginal communities and Aboriginal community controlled organisations, including the National FVPLS Forum.

¹⁶ See <http://www.nationalfvpls.org/Submissions-and-Media.php>

9. The Federal Government provide additional resourcing for community legal education, including culturally safe community legal education targeting Aboriginal and Torres Strait Islander communities and those most at risk of family violence.
10. The Federal Government consider corresponding training for other key players with a duty to support victims/survivors and the judiciary in successfully implementing these reforms, such as legal assistance services, child protection agencies and police.

Strengthening the powers of the courts to protect victims of family violence

The National FVPLS Forum welcomes amendments to provide greater protection for Aboriginal and Torres Strait Islander victims/survivors against perpetrators of family violence. However, we are concerned that some of the proposed amendments need to be drafted narrowly and with proper consideration of the specific needs of Aboriginal and Torres Strait Islander victims/survivors of family violence, predominantly women and their children.

Criminalising breaches of personal protection injunctions

The proposed amendments to sections 68C and 114AA of the *Family Law Act 1975* are supported by the National FVPLS Forum in their intention to provide further protection for victims/survivors of family violence and their children, and to demonstrate that family violence is a matter of public concern. We do, however, note that the value of this new criminal offence will be reliant on the quality of its enforcement – in other words, the capacity and willingness of courts and police to act on breaches. In addition, the drafting and implementation of these amendments must carefully consider how this new offence will interact with existing family violence orders and processes under state and territory legislation, as well as the proposed national DVO scheme.

FVPLS clients accessing the family law system typically do so after exiting a violent relationship, or indeed against a backdrop of many years of violence and abuse. Our clients may therefore already have a state or territory family violence order in place that relates to the other party in their family law matter, meaning a family law personal protection injunction would not be required. However, a number of our clients would benefit from accessing a family law personal protection injunction in circumstances where they did not previously have a family violence order because, for example, they were too frightened to seek one or they had one that expired prior to family law proceedings being commenced. Family law proceedings can be a trigger for the re-emergence or escalation of family violence. For example, FVPLS clients (typically mothers in family law matters) have experienced threats, abuse and/or violent assaults during changeovers pursuant to parenting orders, as well as instances of family violence intended to intimidate them into dropping or settling their family law matters.

1. Police enforcement

With respect to police enforcement, FVPLS staff hear daily reports of our clients' experiences with police. Far too often our clients' stories illustrate serious systemic issues around poor police responses to breaches of family violence orders which expose our clients to additional trauma and risk. This includes responses from police that disbelieve, minimise or trivialise our clients' experiences of violence, discriminate against Aboriginal and Torres Strait Islander victims or fail to accord with the requisite police protocols (for example, the Koori Family Violence Police Protocols in Victoria). Such responses by police ultimately deter Aboriginal and Torres Strait Islander victims/survivors from reporting violence and seeking assistance to ensure their safety and that of their children.

Case Study¹⁷

An Aboriginal woman, Ms X, sought support from an FVPLS following an incident whereby she was kicked in the face by her ex-partner resulting in the loss of two teeth.

Immediately following the incident, she flagged down a passing police car and reported the assault. The police officer quickly scanned the area and, failing to locate the offender, accused Ms X of being drunk, of falling over and knocking her own teeth out and of lying to police. The police officer refused to take her statement.

When Ms X attended the FVPLS office the following morning, they assisted her to attend the police station to make her statement. In front of general public in the reception, the same police officer from the night before stated that he remembered Ms X, called her a liar and refused to take her statement. The FVPLS then complained to the Head of the Domestic Violence Unit who agreed to take Ms X's statement. When police finally questioned the offender about the assault, he made a full confession.

Therefore, the National FVPLS Forum maintains that in order for the proposed amendments to achieve their desired purpose, their implementation must be accompanied by sufficient training of state, territory and federal police to respond appropriately to reports of personal protection injunction breaches. Such training must include cultural competency training and specific training concerning the unique needs and barriers of Aboriginal victims/survivors of family violence.

In addition, the implementation of national, transparent and consistent police response protocols should be considered. Such protocols should include guidance for police around appropriately identifying risk (which could for example draw on the Common Risk Assessment Framework used by Victoria police) and cultural competency elements such as a code of conduct for responding to and respecting the rights of Aboriginal and Torres Strait Islander victims/survivors.

2. Increased demand for and importance of culturally safe legal assistance

Given issues with police enforcement of family violence orders outlined above, FVPLSs play a critical role in holding police to account through supporting and advocating for Aboriginal and Torres Strait Islander victims/survivors in their interactions with police. We anticipate that the creation of the new family law personal protection injunctions will create increased demand for our services and for community legal education.

It is critical that Aboriginal and Torres Strait Islander victims/survivors impacted by a breach of a personal protection injunction receive appropriate referrals from police and others to culturally safe services such as FVPLSs. This is vital to ensure that Aboriginal victims/survivors of family violence understand their rights in relation to any legal action that follows the breach. FVPLSs must be resourced to have the capacity to receive these referrals and meet demand for culturally safe legal assistance to Aboriginal victims/survivors.

¹⁷ Case studies throughout this submission are anonymised to protect our clients' confidentiality and safety, and are drawn from our member organisations located across the country.

3. Alignment with State and Territory family violence orders and national DVO scheme

To ensure that the proposed family law personal protection injunctions can achieve their stated purpose it will be important to equalise their enforceability with state and territory family violence orders. This is necessary to avoid confusion and the need for victims/survivors to commence proceedings in multiple courts to stay safe. Consideration should also be given to the existence of a previous state or territory family violence order, and the ability for information and evidence from those proceedings to be shared with the family law courts in an application for a family law personal protection injunction. Allowing such information to be shared with the family court would help prevent critical evidence of risk being missed by the family court – putting victims/survivors and their children at risk. It would also reduce the re-traumatisation of victims/survivors forced to repeatedly testify to traumatic and sensitive events.

A further consideration relates to current difficulties that exist around the enforcement and registration of Family Violence Orders when a protected person relocates to another state. If the proposal to criminalise breaches of personal protection injunctions is accepted, these barriers must also be addressed. To this end, it will be important to look at how the proposed amendments concerning family law personal protection injunctions will align with ongoing work concerning a national Domestic Violence Order ('DVO') scheme.

Recommendations:

The National FVPLS Forum recommends:

10. That the Federal Government fund training for state, territory and federal police in relation to the creation of a new criminal offence for breaching a personal protection injunction and responding appropriately to breaches. This should include comprehensive and informed cultural-competency training relating to the unique considerations that will be present in cases involving Aboriginal and Torres Strait Islander parties.
11. The Federal Government and state, territory and federal Police should work together to establish transparent and consistent police protocols and codes of conduct around responding to reports of family violence, including breaches of family violence orders and family law personal protection injunctions. This should include guidance for police around appropriately identifying and assessing risk, as well as cultural competency elements such as a code of conduct for responding to and respecting the rights of Aboriginal and Torres Strait Islander victims/survivors.
12. The Federal Government investigate methods for strengthening referral pathways between police who respond to a family violence incident involving Aboriginal and Torres Strait Islander victims/survivors, and culturally safe legal assistance services such as FVPLSs.
13. The Federal Government provide additional funding to FVPLSs to meet increased demand for culturally safe legal assistance and community education resulting from these proposed amendments.
14. The Bill be amended to clarify the interaction between the proposed criminalisation of personal protection injunctions and state and territory family violence orders, including their respective enforcement and the admissibility of evidence across jurisdictions.
15. Implementation of these amendments be aligned with on-going work concerning a national DVO scheme.

Increasing the power of the Court to dismiss unmeritorious claims

The National FVPLS Forum supports legislative amendments that seek to prevent perpetrators of family violence from abusing the family law system. Allowing for summary dismissal of unmeritorious claims will provide further protection for our clients against baseless claims made by perpetrators which are intended to further traumatise and intimidate our clients.

Case Study:

In June 2012, the Federal Magistrates Court made Final Parenting Orders concerning the children of a mother who had been a victim of family violence at the hands of the children's father.

In September 2013, Police issued a full non-contact Domestic Violence Order (DVO) against the Father naming the mother and children as protected persons.

In November 2013, the father was charged with criminal offences relating to the DVO, and interim orders were made to suspend the father's contact with the mother and children.

In April 2014, after a number of hearings in which the father was neither present nor legally represented, the Court dismissed all previous orders and granted the mother sole parental responsibility for the children and only allowed the father to spend time with the children as agreed between the parties.

In February 2016, the father filed an unmeritorious Contravention Application alleging that the mother had contravened the 2012 Orders (which were no longer in force).

Despite oral submissions made on behalf of the mother to have the application dismissed, the Federal Circuit Court Judge could not find anything in the *Family Law Act 1975* or Rules to allow for the summary dismissal of the father's application.

It was not until months later, following a hearing involving both parties, that the Judge had the power to dismiss the father's application.

The above case study highlights the current difficulty faced by judges when an unmeritorious claim is brought against a victim/survivors of family violence. It is hoped that the proposed amendments will allow for claims, like the one described above, to be dismissed prior to the mother and children having to endure the process of a hearing.

However, the drafting of this provision must be done with caution to ensure that it is framed narrowly so as not to allow the undue dismissal of valid claims by victims/survivors of family violence nor create another avenue for perpetrators of violence to silence or intimidate their victims. The National FVPLS Forum is concerned about the increased discretion to dismiss unmeritorious claims becoming an additional barrier for particularly vulnerable clients, such as Aboriginal victims/survivors of family violence, who are unable to present their case to the satisfaction of the court – for example, because of family violence-related trauma, cultural or language barriers, or where they have not received essential support and legal representation from a culturally safe service prior to attending court. Where an Aboriginal victims/survivor is unable to present their case to a sufficient standard, their matter may be mis-identified as unmeritorious.

FVPLSs frequently hear from our clients and the communities we serve of re-traumatisation through the court process. This occurs because of a range of complex factors including historic and contemporary association between family courts and child removal and our clients' fear that children will be removed from them if they engage in the court system. The traumatising effect of family court involvement is also exacerbated by the fact that self-represented perpetrators are permitted to cross-examine their victims, and many courts facilities allow perpetrators to have contact with (and thereby the ability to threaten and intimidate) their victims prior to hearings.¹⁸

In this context, we support recommendation 6 made by WLSA in their submission to this inquiry "that the federal Government introduce legislative protections to stop a victim of family violence being directly cross-examined by their abuser in all family law proceedings." We otherwise reiterate our earlier comments about the crucial need for appropriate resourcing and referral of culturally safe services and supports for Aboriginal victims/survivors with family law matters.

Recommendations:

The National FVPLS Forum recommends:

16. That the Federal Government work with family law courts and family law practitioners to establish protections to prevent victims/survivors' valid claims being mis-identified as unmeritorious. This could include amendments to the Bench Book, issuing of practice directions, commissioning research about 'systems abuse' in the family law system¹⁹ and further consideration of the precise drafting of the proposed amendment.

The National FVPLS Forum supports the following recommendation by WLSA:

17. "Recommendation 6: That the Federal Government introduce legislative protections to stop a victim of family violence being directly cross-examined by their abuser in all family law proceedings."

We otherwise reiterate recommendations 3 and 4 above concerning the need to adequately resource FVPLSs to meet demand.

Strengthening orders issued by state and territory courts

The National FVPLS Forum supports the proposed amendment to remove the 21-day time limit on a state or territory court's variation of a family law order in interim domestic violence order proceedings. This amendment better reflects the reality of waiting times for a hearing in the Family Court and will better support the safety and certainty of Aboriginal and Torres Strait Islander victims/survivors of family violence.

Enabling the Court to explain orders in a manner that supports the best interests of the child

The National FVPLS Forum welcomes efforts to improve the Family Courts and Federal Circuit Courts' capacity to communicate effectively with children in a manner that does not re-traumatise them, and supports the best interests of the child.

¹⁸ FVPLS Victoria submission to the Victorian Royal Commission into Family Violence, June 2015, page 57-58.

¹⁹ As recommended in the Family Law Council's 2016 report on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*. For further discussion, see WLSA's submission to this inquiry.

In the case of Aboriginal and Torres Strait Islander children, we emphasise that it is also critical that the Court has the capacity to communicate in a culturally competent manner and takes a culturally informed view of the best interests of the child. This is of importance for all Aboriginal and Torres Strait Islander children whether they be from metropolitan, regional or rural communities given the cultural barriers and systemic discrimination experienced by Aboriginal and Torres Strait Islander people Australia-wide. However, this is especially warranted in the case of Aboriginal and Torres Strait Islander children from remote areas with limited access to services, those for whom English is a second (or indeed third or fourth) language and those with limited literacy.

Amendments such as those proposed which have the capacity to impact Aboriginal and Torres Strait Islander children's participation in family law matters should be consistent with the *United Nations Convention on the Rights of the Child*, including provisions concerning the cultural rights of Aboriginal and Torres Strait Islander children (namely s.30). The ongoing legacy of colonisation, forced assimilation and child removal must provide a backdrop to any reforms which impact the participation, consideration and wellbeing of Aboriginal and Torres Strait Islander children and their families. With regard to this matter more broadly, the National FVPLS Forum supports the comments made by WLSA in their submission concerning these amendments.

Aboriginal and Torres Strait Islander children's capacity to understand, participate in and benefit from family law matters must also be supported through appropriate resourcing and referral to culturally safe services and supports (including, for example, through FVPLSs).

Recommendations:

The National FVPLS Forum recommends:

1. Any amendments to subsection 68P(2) should:
 - (a) Be drafted to also support improved capacity of family courts to communicate in a culturally competent manner with Aboriginal and Torres Strait Islander children; and
 - (b) be consistent with the *Convention on the Rights of the Child* including provisions concerning the cultural rights of Aboriginal and Torres Strait Islander children (namely s.30) and the *Declaration on the Rights of Indigenous Peoples*.

Repeal obligation to perform marital services

The National FVPLS Forum welcomes the repeal of subsection 114(2) of the *Family Law Act* which permits the court to make an order relieving a party to a marriage from an obligation to perform marital services or render conjugal rights. The repeal of this archaic provision will better reflect current social values and send an important message of support for gender equality and safe and respectful relationships free from violence.