

Access to justice for women and children living with or at risk of violence

Australian Women Against Violence Alliance

Policy Brief

2016

Introduction

Gender inequality and the unequal power dynamics between women and men results in women facing a range of social and economic discrimination. Women's access to justice is impacted by gender inequality and the social and economic disadvantages experienced by women. Women have less access to information about their rights, have more difficulty obtaining legal services, and are more likely to experience financial insecurity, which impacts on their access to legal support and leads to difficulty in navigating court systems. Women living with violence often face increased social and economic marginalisation. This results in them facing additional barriers in accessing legal services, thereby restricting their ability to use the legal system to seek protection or to uphold their rights and re-establish their lives after having left a violent relationship.

While significant steps have been undertaken to improve the legal system's responsiveness and establish stronger safeguards for women and children experiencing and at risk of experiencing violence, it still does not deal well with some aspects of violence against women and children. In many instances, women and children still face significant barriers in accessing justice, and shortcomings of the justice system often continue to fail them. As a result, they are often re-traumatised and placed at a heightened risk of further violence or death. In addition, important services that work to remove these barriers continue to be subject to funding shortages and harsh funding cuts, further limiting women's and children's ability to access justice and often resulting in adverse outcomes.

While this brief addresses sexual violence to some extent, it is focused predominantly on domestic and family violence and intimate partner violence. This reflects a broader imbalance in which policy-making, public debate and research are increasingly addressing domestic and family violence, while issues of sexual violence remain marginalised. We acknowledge that more work needs to be done to integrate understanding of sexual violence with wider efforts to eliminate violence against women and their children, and to raise the prominence of sexual violence within the national debate.

Access to justice

Access to justice is not simply about having access to legal systems, such as lawyers and courts, but also encompasses greater efforts to enable the environment necessary for access to justice to exist.¹ For women and children who have been subjected to violence this means that all aspects of the legal process must be accessible and responsive to their ongoing needs; it should be fair, simple, affordable and easy to understand, enter and navigate.² It should account for the necessary political, economic, social and cultural contexts and conditions which enable and empower women to access justice in cases of violence. Likewise, it should work to remove barriers that lead to injustice and provide pathways for early intervention to prevent further disadvantage.³

It is important to note that while most victims/survivors want justice, the vision of justice that is embodied by the legal system is often very different in nature from victims'/survivors' perspectives. This policy brief is therefore just a starting point in articulating what it would take to develop a path to justice for victim/survivors; much more work remains to be done.

The importance of access to justice in addressing violence against women

The justice system is often a crucial part of women's and children's journey out of violence. Having timely and adequate access to justice can prevent violence against women from occurring, provide safety from it, investigate acts of VAW, hold perpetrators of violence to account and prevent violence from occurring in the first place.⁴ It can help resolve problems before they lead to entrenched

¹ Office of the United Nations High Commissioner for Human Rights (OHCHR). 2010. Understanding Women's Access to Justice: A Brief for Women's Access to Justice (Policy Brief) an excerpt from Women's Legal and Human Rights Bureau (WLB). "Mapping and Analysis of Domestic Legal Remedies to issues of Violence against Women (VAW)" retrieved from <http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessToJustice/WomensLegalAndHumanRightsBureau.pdf>; Olsen, Frances. Feminist Critique of Rights Analysis. Feminist Legal Theory: Foundations. Temple University Press. Philadelphia, 1993.

² WLSA submission to senate inquiry – Domestic Violence and gender inequality 12 April. http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201617/Legalaid

³ OHCHR, op cit., p. 2-3

⁴ United National Entity for Gender Equality and the Empowerment of Women (UN Women). 2005. Report of the expert group meeting "Violence against women: Good practices in combating and eliminating violence against women", p.4. See: <http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/FINALREPORT.goodpractices.pdf>

disadvantage, such as homelessness and poverty.⁵ Moreover, access to justice can re-affirm and re-establish the rights of survivors/victims and their families to live free of violence after having left a violent relationship.

As community awareness about violence against women increases and condemnation of domestic and family violence and sexual abuse becomes more widespread, more and more women are increasingly recognising themselves as victims/survivors of violence and seeking help. As a result, they are also having to engage more and more with the justice system:

- Reporting to police has increased. In Victoria alone, police responded to 70,000 incidents of domestic and family violence in the year ending September 2015 and represents an increase of 70% since September 2011. For the same period, the number of intervention orders increased by 82.2%.⁶
- Women's legal services and non-legal women's advocates are also seeing an increase demand for services and increasingly have to interact with the justice system relating to domestic and family violence. Community Legal Centres, where a third of the work is related to family violence, are having to turn away 150,000 people a year⁷, while Family Violence Prevention Legal Services, which provide a culturally appropriate service for Aboriginal women, are not adequately funded to meet demand.⁸
- This increase is further underlined by the recent Productivity Commission report on Access to Justice Arrangements⁹ and the report of the Council of Australian Governments Advisory Panel on Reducing Violence against Women and their Children¹⁰, both of which highlights the need for increased legal assistance for domestic violence victims/survivors and their families.

Where there is increasing demand for a justice system response to violence against women, the consequences of not meeting this demand can be profound. Such consequences include, but are not limited to, financial hardships and poverty, homelessness and housing insecurity, diminished emotional, mental and physical well-being, and further disruption to maternal/child relationships.¹¹ In

⁵ UN Women. 2010. Handbook for National Action Plans on Violence against Women, p.45

⁶ Crime Statistics Agency, Year ending September 2015, Family Incidents, <http://www.crimestatistics.vic.gov.au/home/crime+statistics/year+ending+september+2015/family+incident+s>

⁷ Coumarelos et al. Legal Australia-Wide Survey: legal need in Victoria, Law and Justice Foundation of NSW, 2012, xiv.

⁸ National Aboriginal and Torres Strait Islander Legal Services (NATSILS) submission to the Productivity Commission's Access to Justice Inquiry, 4 November 2013. See:

<http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test2/submission-counter/subdr256-access-justice.pdf> ; Access to Justice Taskforce Commonwealth Attorney-General's

Department, A Strategic Framework for Access to Justice in the Federal Civil Justice System (2009) 143-144

⁹ Productivity Commission report on Access to Justice Arrangements, Final Report. 2014. See:

<http://www.pc.gov.au/inquiries/completed/access-justice/report>

¹⁰ Council of Australian Governments Advisory Panel on Reducing Violence against Women and their Children (COAG Advisory Panel), Final Report. 2016 See:

<https://www.coag.gov.au/sites/default/files/files/COAGAdvisoryPanelonReducingViolenceagainstWomenandtheirChildren-FinalReport.pdf>

¹¹ Emma Smallwood, Stepping Stones: Legal Barriers to economic equality after family violence, Women's Legal Service Victoria (September 2015); Australian Institute of Health and Welfare, 'Domestic and family violence and homelessness 2011-12 to 2013-14' <http://www.aihw.gov.au/homelessness/domestic-violence->

addition, and potentially the most significant consequence, is the increased risk of further violence and/or death.

Barriers against access to justice are further heightened where women also experience other forms of oppression, such as racism and the marginalisation of people with disability. The limitations of the justice system in relation to violence thereby have the effect of compounding these diverse forms of marginalisation and disempowerment across the society as a whole.

It is also notable that it is not only legal services that are called upon to assist women and children who have lived with violence in court matters. For example, sexual assault support services along with specialist domestic violence services also work on preparing for court cases, call-outs to police and preparing statements, applications for violence orders, support during court cases, affidavits and reports on criminal injuries. Because clients of these services are traumatised, a high level of advocacy is required to navigate the legal and other systems, especially as other service providers including lawyers are typically not trauma experts.

Access to justice for marginalised groups of women

As mentioned above, multiple and intersecting forms of discrimination and marginalisation restrict many women's access to justice, reducing the effectiveness of the justice system in preventing and providing redress for violence. This in turn has the compounding effect of further entrenching discrimination and marginalisation for groups including but not limited to Aboriginal and Torres Strait Islander women, women subjected to racism on the basis of their cultural or linguistic background, women with disability, women living in poverty and/or with mental illness, women in prison, women asylum seekers and refugees, LGBTIQ communities, women in regional, rural and remote areas, older women and younger women. The distinct needs and situations of these diverse groups of women and others should be considered when addressing all of the key issues discussed below.

As a starting point, and at a minimum, the recent recommendations of the Judicial Council of Cultural Diversity regarding improving access to courts for Aboriginal and Torres Strait Islander women¹² and migrant and refugee women¹³ should be implemented.

Women's Legal Services Australia's Five-Step Plan to put Safety First in Family Law also recommends a comprehensive audit of barriers in family law for women with disability, women in regional, rural and remote areas and women in prison. This should also extend to LGBTIQ communities.

and-homelessness; Christine Coumarelos et al., 'Legal Australia-Wide Survey: legal need in Australia', Report, Vol. 7, Access to Justice and Legal Needs, Law and Justice Foundation of NSW, August 2012.

¹² Judicial Council of Cultural Diversity. 2016. The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts., page p 38-41

¹³ Judicial Council of Cultural Diversity. 2016. The Path to Justice: Migrant and Refugee Women's Experience of the Courts., p 52-55

In addition, the Senate Community Affairs Committee recommended in November 2015 that a Royal Commission be established to investigate violence, abuse and neglect against people with disability, and that the Australian Government consider the establishment of a national system for reporting, investigating and eliminating violence, abuse and neglect of people with a disability.¹⁴ These recommendations were welcomed by the Australian Cross-Disability Alliance and should be implemented.¹⁵

In the case of women seeking asylum, AWAVA calls for the closure of offshore detention centres, as the offshore detention system has demonstrably failed to keep asylum seekers safe from violence and abuse, and since access to justice is not possible for asylum seekers in this system.¹⁶

Key issues restricting access to justice for women and children living with or at risk of violence

Legal Assistance Services

Legal assistance services encompass all legal service providers, including Aboriginal and Torres Strait Islander Legal Services, Community Legal Centres, including specialist women's legal services, Family Violence Prevention Legal Services and Legal Aid Commissions. Legal assistance services are an important resource for women and children experiencing violence. Without access to free legal services they may not have any capacity to obtain access to justice. In cases of violence, women are often unable to access legal information and representation due to the high cost of private legal representation¹⁷. It is also difficult for them to obtain pro bono assistance, as it is not a particularly attractive area for pro bono lawyers working in family law¹⁸. A 2015 study by the Australian Institute of Family Studies found that 60% of separated families involved in family law matters reported a history of emotional abuse and/or physical violence before or during separation.¹⁹

¹⁴ Senate Community Affairs Committee. 2015 "Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability" See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report

¹⁵ Media Release: Australian Cross Disability Alliance Applauds Senate's call for Royal Commission into Violence Against People with Disability, November 26, 2015, <http://wwda.org.au/media-release-australian-cross-disability-alliance-applauds-senates-call-for-royal-commission-into-violence-against-people-with-disability/>

¹⁶ AWAVA Media Release, AWAVA Condemns Sexual Violence in Offshore Detention, 8 October 2015. <http://awava.org.au/2015/10/08/media-release/awava-condemns-sexual-violence-in-offshore-detention>

¹⁷ 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

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

¹⁹ Australian Institute of Family Studies, Evaluation of the 2012 family violence amendments, Synthesis report, Evaluation of the 2012 Family Violence Amendments – October 2015 See: <https://aifs.gov.au/publications/evaluation-2012-family-violence-amendments/acknowledgements>

Further, an increasing number of people appearing before the family law courts are self-represented because they lack the financial means to engage a lawyer and do not qualify for legal aid. Being self-represented can increase the likelihood of a claim being seen as unmeritorious, especially for women victims/survivors of violence, who may be less able to fully identify or disclose their experience of violence than a woman who has legal representation. This particularly affects women who on average have lower incomes, fewer assets and more dependants. This is occurring in the face of funding cuts to legal assistance services and the underfunding of legal assistance services more generally.²⁰

It is important that all legal assistance service providers are adequately funded, including Aboriginal and Torres Strait Islander Legal Services; Community Legal Centres, including specialist women's legal services; Family Violence Prevention Legal Services; and Legal Aid Commissions. In the context of family law and family violence it is particularly important that Aboriginal and Torres Strait Islander community controlled organisations and specialist women's legal services and programs are adequately funded. In addition to reversing funding cuts, the Commonwealth Government should implement the 2014 recommendation of the Productivity Commission to immediately invest \$200 million annually in legal assistance services for civil law services. The Commonwealth government is responsible for 60% of this funding with states/territories providing 40%.²¹

Gender bias in legal aid

There are significant structural barriers in the legal system that make it difficult for women to access legal aid from legal aid commissions.²² When viewed as a whole, funding allocated to legal assistance services favours criminal law matters.²³ As males have significantly higher rates of being charged with criminal offences that could result in imprisonment, they are more likely than women to seek assistance in criminal law matters and, as a result, there are more male legal aid applicants.²⁴ In 2013, a study found 75% of the highest users of Legal Aid in NSW were men and all participants in the study had accessed criminal law services.²⁵ On the other hand, women are more likely to require assistance in relation to being a victim/survivor of domestic and family violence, particularly in the family law system and/or civil law system, which typically affect female legal aid applicants. And while the high number of women killed in the context of domestic violence provides a strong case that loss of liberty and life arguments apply, which can be as pertinent in family law matters as they are in criminal law matters, their gender-specific legal needs are not prioritised and are therefore not met. Unfortunately,

²⁰ National Association of Community Legal Centres, Submission to the Australian Government Federal Budget 2016-17 See: http://www.naclc.org.au/resources/NACLC_Federal_Budget_Sub_2016_17_Final_PDF.pdf ; Law Council of Australia 2016-17 Federal Budget submission See: https://www.lawcouncil.asn.au/lawcouncil/images/3105_-_Submission_Federal_Budget_2016.pdf

²² WLSA submission to senate inquiry – Domestic Violence and gender inequality 12 April 2016, pg 7

²³ Productivity Commission, Access to Justice Arrangements – Productivity Commission Draft Report, April 2014, pg 627.

²⁴ Ibid.

²⁵ Cited in Productivity Commission (2014). Access to Justice Arrangements – Productivity Commission Draft Report

this means that the 1994 finding of the Attorney General's department that "a female applicant has less chance of getting legal aid than a male applicant", continues to hold true.²⁶

Challenges for women in obtaining legal aid are also evident in the application of Legal Aid Commissions' family law policies and guidelines. For example, some women's legal services have reported cases of legal aid grants being terminated if a party does not agree with the recommendations made by a family report writer who has been appointed to comment on the care, welfare and development of a child in a family law matter (covered in the following section)²⁷. In addition, the provision of legal aid is dependent on the stringent guidelines of each state and territory that may fail to take into account the nuances of a woman in cases of violence. For example the provision of legal aid is often based upon a client meeting a requisite means test²⁸, precluding women who have a small level of financial support from family members or charities from receiving legal aid.

There should be a separate and additional specialised domestic violence pathway for legal aid grants, particularly for family law and care and protection matters.

Need for a specialised legal aid grants pathway in family law for victims/survivors of family violence

The lack of a specialised legal aid grants pathway for victims/survivors of domestic violence, particularly in family law matters, is a major concern. Such a pathway could make the legal aid application process more effective and could have public interest benefits in having legal aid policies and guidelines that work best to eliminate violence against women. Currently, women's legal services and other legal services spend a considerable amount of time advising and advocating for women who have been refused legal aid, including helping them to appeal such decisions.

A family violence pathway could include establishing a specialist family violence team within grants to determine grants applications. It could also include taking family violence into account when exercising discretion in the application of the merit test, for example where a victim/survivor of violence is taking protective measures to prevent their child or children being exposed to family violence and child abuse by seeking sole parental responsibility and no orders to spend time with the other parent; or where a Family Report does not adequately address issues of family violence and its impact; or where a victim of family violence is facing cross-examination by a self-represented litigant or would otherwise have to directly cross-examine the alleged perpetrator.

²⁶ Regina Graycar and Jenny Morgan. 1995. Disabling Citizenship: Civil Death for Women in the late 1990s 17 Adel LR 49-76., p53.

²⁷ WLSA submission to the Productivity Commission's Access to Justice Inquiry, 4 November 2013, p.18.

²⁸ Legal Aid New South Wales. Criminal Law Matters: when legal aid is available: Apprehended Domestic Violence Orders: <http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/4.-criminal-law-matters-when-legal-aid-is-available/4.4.-apprehended-domestic-violence-orders#4.4.1%20Applicants%20in%20Apprehended%20Domestic%20Violence%20Orders>

Develop a specialist pathway for domestic violence cases in family courts

Further to the issues raised above more broadly there need to be better mechanisms for early identification of violence, risk assessment and support in family law matters, including placing specialists in family court registries.²⁹

Additionally, there needs to be an emphasis on early decision making, triaging and case management of domestic violence cases in the family courts.³⁰

Vulnerable witnesses

Cross-examination by an abuser can have a devastating impact on vulnerable witnesses, particularly victims/survivors of violence. 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 Australia³¹. In five of the eight state and territory jurisdictions, specific protections are also included in legislation to prevent a vulnerable witness from being directly cross-examined by an unrepresented alleged perpetrator of violence. However, family law proceedings lack such 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 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 a recognised court sanctioned abuse³². 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 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 risk³³. 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

²⁹ WLSA. 2016. Safety First in family law: Five steps to creating a family law system that keeps women and children safe 1a (Policy flier). See: http://www.womenslegal.org.au/files/file/SAFETY%20FIRST%20POLICY%20PLATFORM.MAY%202016_FINAL.pdf See also Family Court of Australia and Federal Circuit Court of Australia, Family law system needs more resources to deal with an increasing number of cases involving family violence, 20 June 2016 at: http://www.federalcircuitcourt.gov.au/wps/wcm/connect/84136241-45e6-4cbe-8e48-9274daa0c2d3/mr200616.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-84136241-45e6-4cbe-8e48-9274daa0c2d3-lmuDF38

³⁰ Ibid 1b.

³¹ 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 38D; Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 5; Evidence (Children and Special Witnesses) Act 2001 (Tas) s 8A.

³² Legal Aid NSW submission to the Productivity Commission's Access to Justice Arrangements Inquiry, 10 October 2013, p 53. See: <http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub068-access-justice.pdf>

³³ WLSA submission to the Productivity Commission's Access to Justice Inquiry, 4 November 2013, p13. See: <http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub029-access-justice.pdf>

to courts, which can affect safe and effective orders, and can allow the perpetrator to use court proceedings to control and dominate the victims³⁴.

There is a need for improved legislative protection both from direct cross-examination as well as a victim having to directly cross-examine the alleged perpetrator. This is one of the key asks in the Women's Legal Services Australia's Five-Step Roadmap to put Safety First in Family Law. Such protections should be entrenched within the *Family Law Act 1975* (Cth).

Removal of the presumption of equal shared parental responsibility

The 2011 amendments to the Family Law Act, including the expansion of the definition of family violence and the prioritising of safety over a meaningful relationship with both parents were necessary and positive steps in effective legal responses to family violence. However, the presumption of equal shared parental responsibility remains and The *Family Law Act 1975* (Cth) states that when making a Parenting Order, the Court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child³⁵. This means that parents must consult with each other and share responsibility for decisions about major long term issues in regard to the children. Although the presumption is not meant to apply in cases of abuse, women and children are still negatively impacted by the presumption because it is often hard to identify or prove abuse to the standard required by the Courts. This is problematic particularly in situations where domestic and/or family violence may not be properly identified, for example where a victim of violence is unrepresented.

As each family is unique, rather than focusing on presumptions, decisions about children should be made on a case-by case basis in the best interest of the child. Consequently, the wording of the presumption should be considered for alteration³⁶.

Accreditation of Family Report Writers and Independent Single experts

A family report writer may be appointed in family law proceedings to provide a report about the family, key issues and make recommendations about arrangements for the children. These reports are written by family consultants who are qualified social workers or psychologists; family reports can also be commissioned privately. These assessments play a critical role in the decision-making process of the court³⁷ and can influence whether or not legal aid funding for a parent should be continued³⁸.

Although only one piece of evidence, family reports are influential and can be determinative in cases involving allegations of abuse, where there may not be any other independent evidence or verification of allegations in dispute. While family consultants are qualified social workers or psychologists, there

³⁴ WLSA Protecting vulnerable witnesses in family law (Policy Brief). 2016. <http://www.wlsnsw.org.au/wp-content/uploads/Loughman-Vulnerable-Witnesses-LSJ-Feb-2016.pdf>

³⁵ Family Law Act 1975 (Cth) s 61DA

³⁶ WLSA. 2016. Safety First in family law: Five steps to creating a family law system that keeps women and children safe 1d

³⁷ WLSA submission to senate inquiry – Domestic Violence and gender inequality 12 April 2016, p. 19-20

³⁸ Ibid

is no requirement for clinical experience in or a thorough understanding of the nature and dynamics of domestic and family violence³⁹. Poor practices have resulted, for example, in joint interviews with child victims and perpetrators of domestic violence⁴⁰. A lack of expertise in the nature and understanding of domestic and family violence can lead to the making of unsafe decisions by the report writer and misunderstandings of the concerns raised by victims of past domestic violence.⁴¹ This may also have devastating implications for court outcomes, putting women and children at unnecessary risk.

As recommended by the final report of the 2015 Senate Inquiry into Domestic Violence in Australia⁴² and in the final report of the COAG Advisory Panel on Reducing Violence against Women and their Children,⁴³ the introduction of a formal accreditation scheme, equipping family report writers with appropriate, mandatory training would help support report writers to better understand and work with victims of violence and trauma, ensuring decisions are better informed, safer and more appropriate⁴⁴.

Accreditation for single experts in family law proceedings commissioned privately is also required. In addition to accreditation with respect to a thorough understanding of the nature and dynamics of domestic and family violence, both family report writers and single experts should be accredited with respect to cultural competency in working with Aboriginal and Torres Strait Islander families, refugee and migrant families and LGBTIQ families.

The establishment of national domestic and family violence death review mechanisms

Organisations working to prevent and respond to violence against women continue to advocate for robust domestic violence death review mechanisms in every State and Territory. It is now well-recognised that domestic violence related fatalities are a gendered phenomenon, with women disproportionately killed. Although women comprise only 41% of the total number of homicide victims in Australia, they make up the majority of domestic homicide victims, at around 60%. In addition, 78% of victims of domestic homicide are women killed by an intimate partner.⁴⁵ Aboriginal and Torres Strait Islander women face an even higher risk of domestic homicide.⁴⁶

³⁹ 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.

⁴⁰ Note 38

⁴¹ Ibid

⁴² Senate Standing Committees in Finance and Public Administration, *Domestic Violence in Australia*, 20 August 2015, Recommendation 17.

⁴³ Council of Australian Governments Advisory Panel on Reducing Violence against Women and their Children (COAG Advisory Panel), *Final Report*. 2016. Recommendation 1.4 See: <https://www.coag.gov.au/sites/default/files/files/COAGAdvisoryPanelonReducingViolenceagainstWomenandtheirChildren-FinalReport.pdf>

⁴⁴ Ibid

⁴⁵ Domestic homicides are defined as being incidents “involving the death of a family member or other person from a domestic relationship”. See Marie Virueda and Jason Pain *Homicide in Australia: 2007-2008 National Homicide Monitoring Program Annual Report*, (Australian Institute of Criminology, Canberra, 2010).

⁴⁶ Ibid

The Second Action Plan of the National Plan to Reduce Violence against Women and their Children acknowledges that 'Domestic homicide reviews identify the sequence of events leading to domestic violence related deaths. The learnings from these reviews can be used to identify possible gaps in system responses to develop more effective interventions.' The Action Plan also refers to the Australian Domestic and Family Violence Death Review Network.

As recommended in the 2014 NGO report on Australia's obligations under the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), all State and Territory Governments need to urgently adopt a statutorily established and securely funded specialist domestic and family violence death review unit; or ensure that current units are statutorily based, securely funded and comply with best practice principles, including mandating agency responses to and public monitoring of implementation of review recommendations.

Additional and emerging Issues

National apprehended violence orders

Interventions such as violence orders can often be critical to aid safe decision-making and safety. They can also reaffirm that violence against women and children will not be tolerated and consequences ensue for those who perpetrate this violence. In its meeting in April 2015, the Council of Australian Governments agreed to progress the development of a national apprehended violence order scheme throughout 2015-16, with the aim of making the scheme operational in April 2016. The development of a national scheme means an order for a person in need of protection will automatically be enforceable anywhere within Australia without the person in need of protection being required to take an additional step of registering the order should they move to another state or territory, which is currently the case and often creates significant inconsistencies in their implementation across states and territories⁴⁷.

The Council of Australian Governments National Domestic Violence Order Scheme Working Group is developing model legislation for a National Domestic Violence Order Scheme to enable the recognition and enforcement of domestic violence orders across jurisdictions, and Tasmania is the lead jurisdiction for this piece of work.

Property Settlements

In the determination of a property settlement under the *Family Law Act 1975* the court must take into account each party's net assets and the financial and non-financial contributions of each party to the

⁴⁷ Speech: *Hon Diana Bryant AO*, Chief Justice of the Family Court of Australia at the judicial Conference of Australia Colloquium. "THE FAMILY COURTS AND FAMILY VIOLENCE". 9–11 October, 2015. See: http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/speeches-conference-papers/2015/speech-bryant-familyviolence#_ftn1; Media Release: Domestic violence offenders use child custody orders to abuse ex-partners. January 4 2016. See: <http://www.canberratimes.com.au/act-news/domestic-violence-offenders-use-child-custody-orders-to-abuse-expartners-20151202-gldh15.html>

asset pool⁴⁸. Future needs are also considered by the Court in their awards. Women are currently disadvantaged in three key ways in obtaining a fair property settlement.

Firstly, the family law system is lengthy, legalistic and exposing for women with low income or assets – particularly where they have been victims of family violence. This results in many women walking away from a property settlement entirely. This contributes to the financial hardship that disproportionately impacts women following relationship breakdown.

Secondly, the impacts of family violence are not adequately taken into account in property settlements. Family violence is not specifically identified as a relevant consideration in property matters in the *Family Law Act*. While case law exists, this is not always considered in determining the adjustment in a negotiation – which is the way most matters are finalised. As a result, women who have been subjected to domestic violence may have their actual contributions reflected unfairly. The court must take into account additional factors based on the future needs of the parties, including their age, health, income, property, financial resources, and capacity for gainful employment and having care of children. There should be a legislative requirement for the court to consider the impact of family violence when determining a property division as consistent with the Family Law Council's 2001 advice to the Attorney General.⁴⁹

Thirdly, abusive men are frequently reported as engaging in protracted litigation and in some cases vexatious or abusive behaviour. An example of this type of systems abuse is failure to disclose relevant financial documents during the discovery stages of family law proceedings. The *Family Law Rules 2004*⁵⁰ require parties to make full and frank disclosure of their financial circumstances. However perpetrators frequently engage in deceitful and controlling behaviours, avoiding disclosure obligations. For example, a common behaviour reported by women is an ex-partner hiding their income due to their self-employment⁵¹ or withholding other financial information in order to lessen the property settlement or spousal maintenance their ex-partner would otherwise be entitled to.⁵²

Alternative Dispute Resolution (ADR) and Coordinated Family Dispute Resolution (CFDR)

Alternative Dispute Resolution (ADR) is generally required in family law proceedings before taking a matter to court. There are exceptions, including due to family violence or if the matter is urgent. In many circumstances, ADR can be affordable and accessible and for some less stressful as compared to court. However, for women who have been subjected to violence, safety issues and the risk of being pressured into unequitable agreements continue to be relevant concerns. Women who have been

⁴⁸ Family Law Act 1975 s79(4)

⁴⁹ WLSA. 2016. Safety First in family law: Five steps to creating a family law system that keeps women and children safe 4b.

⁵⁰ Family law Rules 2004 Rule 13.04. See:

http://www.austlii.edu.au/au/legis/cth/consol_reg/flr2004163/s13.04.html

⁵¹ Women's Legal Services Australia (WLSA) Submission to House of Representatives Standing Committee on Social Policy and Legal Affairs on Child Support. 2014, p 12. See: http://www.wlsa.org.au/uploads/submission-resources/WLSA_Child_Support_Submission.pdf

⁵² Ibid page 10

subjected to violence should not be automatically excluded from ADR processes; rather, a safety-focused, family violence informed model of Family Dispute Resolution (FDR) as an alternative to litigation could be invaluable to women who have been subjected to violence.

In July 2009, the Federal Government announced funding for a pilot program to provide assistance to parents, including FDR to manage post-separation parenting disputes where there was a history of violence, known as the Coordinated Family Dispute Resolution (CFDR) Pilot Program.⁵³ CFDR is applied in a multi-agency, multidisciplinary setting and involves specialised risk assessment and management in an attempt to provide safe, non-adversarial and child-sensitive resolutions to parenting disputes.⁵⁴

The pilot program developed by the Women's Legal Service in Brisbane operated in five sites around Australia. It incorporated the discussion of a risk assessment performed by a domestic violence professional, by a group of professionals in order to collectively determine whether CFDR was a viable alternative to court.⁵⁵ Data from the program demonstrated that where mediation sessions were carefully managed parents were able to establish workable arrangements and an improved capacity to communicate with their former partners.⁵⁶ Further, children who participated in the program were less likely to be in arrangements that involved shared care, or changeover arrangements that involved contact between the two parents.⁵⁷ It also reduced the risk of re-traumatisation. Women's Legal Services Australia's Five-Step Plan for Safety First in Family Law recommends the roll out of a mediation model with specialist domestic violence lawyers and social workers based on this highly effective CFDR pilot.

Judicial training

Australia is a party to two human rights treaties that express obligations for freedom from gender-based stereotyping, this extends to the justice system⁵⁸. However, within the legal system judicial stereotyping can act as barrier to justice for women subjected to violence⁵⁹. In such instances gender-

⁵³ Rae Kaspiewetal, Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases (Dec2012).

⁵⁴ Australian Institute of Family Studies. 2012. Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases Final report. P. ix
<https://www.ag.gov.au/Publications/Documents/ArchivedFamilyLawPublications/CFDR%20Evaluation%20Final%20Report%20December%202012.PDF>

⁵⁵ WLSA submission to the Productivity Commission's Access to Justice Inquiry, 4 November 2013, p17. See: <http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub029-access-justice.pdf>

⁵⁶ Australian Institute of Family Studies. 2012. Evaluation of a pilot of legally assisted and supported family dispute resolution in family violence cases Final report. P. xii
<https://www.ag.gov.au/Publications/Documents/ArchivedFamilyLawPublications/CFDR%20Evaluation%20Final%20Report%20December%202012.PDF>

⁵⁷ Ibid

⁵⁸ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) (CEDAW).

Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) (CRPD).

⁵⁹ Committee on the Elimination of Discrimination against Women (CEDAW Committee), *Draft General Recommendation on Women's Access to Justice* (1 April 2014), para. 1.

stereotyping can distort a judges' perception of the facts, understanding of who is culpable for violence and their assessment of the credibility of witnesses, ultimately compromising the intended impartiality of the justice system⁶⁰.

Family violence education for judicial officers is necessary to support victims of domestic violence and to ensure a minimisation of adverse outcomes for women. There is currently no compulsory, comprehensive professional development on the dynamics and nature of domestic violence for a judicial officer prior to them making a decision on a matter involving family violence.⁶¹ Further, all participants in court processes, judges, lawyers and court staff should have an understanding of the tactics a perpetrator may utilise within the court system to 'perpetuate a pattern of dominance and control'.⁶² 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.⁶³

The 2015 announced Family Violence Bench Book⁶⁴ is acknowledged as a step in the right direction towards promoting best practice and consistency amongst judicial officers where family violence is involved, however, it is reiterated that understanding and training in managing cases of domestic violence need to permeate judges, to all staff in the legal system. In accordance with the COAG Advisory Panel's Final Report on Reducing Violence Against Women and their Children⁶⁵ it is recommended that compulsory training modules should be implemented for all 'professionals likely to come into contact with victims and perpetrators of violence, so that they can identify and respond appropriately to violence against women and their children, and understand the impacts of gender and social inequality'⁶⁶. This is also consistent with the Women's Legal Services Australia Five-Step Plan for Safety First in Family Law.

Further, the training of staff within the judicial system should account for the specific needs of Aboriginal and Torres Strait Islander and CALD women that have been subjected to domestic violence. A consultation report prepared by the Judicial Council on Cultural Diversity (JCCD) identified a need for cultural competency training for staff whom interact with Aboriginal and Torres Strait Islander women that have been subjected to domestic violence, in order to improve their understanding of

⁶⁰ Eliminating judicial stereotyping, equal access to justice for women in gender-based violence cases, Simone Cusack (2014) page 20

⁶¹ Women's Legal Service NSW, Supplementary submission to the Family Law Council Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection System (16 October 2015) <http://www.wlsnsw.org.au/law-reform/submissions/> (accessed 9 June 2016)

⁶² Ibid.

⁶³ Wakefield S & Taylor A. 2015. Judicial education for domestic and family violence. ANROWS Landscapes 02/2015. At: anrows.org.au/publications/landscapes/judicial-education-for-domestic-and-family-violence-state-knowledge-paper (THIS IS FROM footnote 155 of the COAG advisory panel report below)

⁶⁴ <https://www.attorneygeneral.gov.au/MediaReleases/Pages/2015/SecondQuarter/9-June-2015-National-Family-Violence-Bench-Book.aspx>

⁶⁵ COAG Advisory Panel on Reducing Violence against Women and their Children – Final Report, 2016 at <https://www.coag.gov.au/sites/default/files/files/COAGAdvisoryPanelonReducingViolenceagainstWomenandtheirChildren-FinalReport.pdf>

⁶⁶ Ibid Recommendation 1.4, page 38.

the dynamics of family violence within Aboriginal and Torres Strait Islander communities⁶⁷. Similarly a second report prepared by JCCD identified that CALD women who experience family violence may have different experiences to non-CALD women which require comprehensive cultural competency training for court staff that interact with them, for example instances of dowry-related violence, forced marriage and female genital mutilation.⁶⁸

Technology facilitated abuse and online safety

Sexual harassment, abuse and assault are recognised as crimes, but the law has yet to catch up with developments in the online environment. Over the years, technology, such as the internet, social media, mobile phones, computers and surveillance devices, is increasingly being used against women by perpetrators as a tactic of control and abuse within a wider context of VAW. Research has found that this violence, including the non-consensual sharing of intimate images, or the threat of sharing such images, can traumatise and isolate victims and constitutes a major barrier to the full enjoyment of social life and autonomy. In terms of sexual assault, technology is another weapon with which assault is perpetrated. At Canberra Rape Crisis Centre (CRCC), for example, young women have now overtaken mature/older women as the largest group accessing services, due in large part to the impacts of trauma where sexual violence and technology violence are among the dynamics present. While the role of technology in domestic and family violence is becoming more widely understood, the kinds of cases to which CRCC responds to are not included in domestic violence statistics, since the relationships involved are often not formal or legitimised, unlike 'domestic' relationships.

It is important that legislation be both amended to reflect the realities of technology-facilitated violence and also respond to the misuse and abuse of new and emerging forms of technology. It is also important that the justice system is appropriately trained to respond to and address technology facilitated violence. In 2016 The Senate Standing Committees on Legal and Constitutional Affairs provided recommendations for the Commonwealth, state and territory government. These included, but are not limited to, legislating offences for knowingly or recklessly recording and/or sharing an intimate image(s) without consent; and as well as threatening to take and/or share an intimate images without consent, irrespective of whether or not those images exist; empowering an agency to take down these images; and training for police.⁶⁹

This is further stressed in the COAG Advisory Panel report referred to above, which acknowledges the need to address technology-facilitated stalking and abuse (also referred to as technology-facilitated domestic violence). The Panel also acknowledges the important role police can play in collecting digital evidence and that this requires training and it is important that police can access such training. The

⁶⁷ Judicial Council of Cultural Diversity. 2016. The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts., page p 41

⁶⁸ Judicial Council of Cultural Diversity. 2016. The Path to Justice: Migrant and Refugee Women's Experience of the Courts., p 31

⁶⁹ Senate Community Affairs Committee. 2015. Senate Standing Committees on Legal and Constitutional Affairs inquiry into Phenomenon colloquially referred to as 'revenge porn', which involves sharing private sexual images and recordings of a person without their consent, with the intention to cause that person harm. "Final Report recommendations". See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Revenge_porn/Report/b01

Panel also acknowledges the role of technology in supporting victims/survivors of violence. The implementation of such recommendations would help to provide safety and protection from violence both online and off-line and also make sure that perpetrators of violence are not rewarded while women and girls are further marginalised by being restricted from engaging with the online environment. New developments in the area of technology safety and training, such as that undertaken by the Women's Services Network (WESNET) and the e-Safety Children's Commissioner provide insight into ways technology can be used as a positive measure to support such recommendations and initiatives. Policy-makers should ensure that the safety of victims/survivors is placed at the centre of all decisions and developments in this area.

Sexual violence within and as a form of domestic and family violence

Sexual violence occurs in a range of settings and types of relationship, among which are intimate partner and/or domestic partner relationships. A recent report from Sexual Assault Support Service (Tasmania) highlights that 40-45% of women who experience physical abuse from an intimate partner are also forced into sexual activities by them, while 5-12% of women in Australia have sexual violence inflicted upon them by a partner within their lifetime.⁷⁰ Women living with the effects of childhood sexual abuse are both more likely to be subjected to domestic violence and more likely to have sexual violence inflicted upon them by an intimate partner in later life.⁷¹

Where sexual violence is perpetrated within a domestic violence relationship, it increases the likelihood that more severe physical violence, including lethal violence, is also inflicted. Victims/survivors of intimate partner sexual violence experience more negative impacts, such as decreased self-esteem and coping skills, compared with victim/survivors who have lived in family violence situations in which they did not have sexual violence inflicted upon them.⁷² Sexual violence as a form of domestic and family violence is therefore a significant issue and needs to be clearly identified and addressed within efforts to eliminate violence against women generally.

Across Australia, all legal definitions of family and domestic violence include sexual violence perpetrated by a partner. However, sexual violence within intimate partner relationships is still largely a hidden problem, with low levels of reporting, even where a victim/survivor discloses other forms of abuse. The SASS report points out that where intimate partner sexual abuse is reported, it is less likely to result in prosecutions and convictions than assault by a stranger.

SASS made a number of recommendations directed at improving service responses and shifting community attitudes about sexual violence in partner relationships. Alongside these recommendations are some with direct application for justice systems:

- Improve court processes (including prosecution responses and witness support),

⁷⁰ Sexual Assault Support Service (SASS Tas), Brief - Intimate Partner Sexual Assault and Family Violence, 2015.

⁷¹ Peta Cox, Sexual assault and domestic violence in the context of co-occurrence and re-victimisation: State of knowledge paper, Australia's National Research Organisation for Women's Safety, 2015, <http://anrows.org.au/publications/landscapes/co-occurrence-and-re-victimisation>

⁷² Ibid.

- Ensure that offender programs directed at intervention or prevention in the context of intimate partner violence include a focus on sexual violence, and
- Train and encourage police to include questions about sexual violence when responding to family violence.⁷³

AWAVA supports SASS's advocacy in this area and acknowledges that more work needs to be done to integrate understanding of sexual violence into domestic and family violence prevention and response, including access to justice. This would include training and encouraging domestic violence support workers to include questions about sexual violence when working with survivors of domestic violence.

Sexual assault and harassment at university

The National Union of Students Women's Department recently published the results of a major survey of women and non-binary identifying students at tertiary education institutions⁷⁴, finding among other results that nearly three quarters had experienced some form of sexual harassment or assault during their time at university. Of these respondents, fewer than six per cent had reported the incident(s) to somebody in an official role at their university or to police. Among those few who did report the incident(s), less than one third were satisfied with the outcome.

The NUS Women's Department made several recommendations based on the survey results, two of which relate directly to access to justice:

- Universities should create or clarify reporting procedures for incidents of assault and harassment as a matter of priority. These should be widely publicised as part of student orientation and should be easily accessible from the university website. Information about how to obtain support in the reporting process should also be readily available.
- All residential colleges and halls, whether private or owned by the university, should be made to adhere to the university's broader policy on harassment and sexual assault and required to report to the university the number of incidents reported under their care and how these incidents were dealt with once reported.

AWAVA supports these recommendations and will continue working with the NUS Women's Department and others to advocate for changes to universities' policies and procedures, to improve access to justice for women assaulted or harassed while at university.

Restorative justice

We note that efforts are currently under way in various jurisdictions to develop models of restorative justice for cases of violence against women. While these models are potentially useful, we believe

⁷³ Ibid.

⁷⁴ National Union of Students Women's Department, *Talk About It Report 2015*, https://d3n8a8pro7vhmx.cloudfront.net/nus/pages/144/attachments/original/1454369041/Talk_about_it_Survey_Report.pdf?1454369041

they need a great deal of careful development. Most importantly, they must maintain the safety of women and their children as the highest priority, and must not function in a way that restricts access to justice for victims/survivors.