

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

The National Family Violence Prevention Legal
Services Forum

**SUBMISSION IN RESPONSE TO THE
FAMILY COURT RESTRUCTURE BILLS**

November 2018

About the National FVPLS Forum

The National FVPLS Forum is comprised of 14 Family Violence Prevention Legal Service ('FVPLS') member organisations across the country that provide culturally safe and specialist legal assistance and support to Aboriginal and Torres Strait Islander victim/survivors of family violence – predominantly women and children. FVPLSs also design and deliver essential community legal education and early intervention and prevention activities.

The National FVPLS Forum was established in May 2012 and works in collaboration across its member FVPLSs to increase access to justice for Aboriginal and Torres Strait Islander victims/survivors of family violence.

National Forum members are:

- 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)
- Djirra – formerly Aboriginal Family Violence Prevention and Legal Service Victoria (Melbourne HO, Mildura, Gippsland, Barwon South West, Bendigo and shortly also Echuca-Shepparton, La Trobe Valley and Ballarat)
- 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 to Aboriginal and Torres Strait Islander victims/survivors of family violence. FVPLSs were established 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 deliver high quality, culturally safe legal services while recognising and addressing the multitude of interrelated non-legal issues that our clients face. FVPLSs' frontline work includes legal assistance, casework, counselling

and wrap-around support to Aboriginal and Torres Strait Islander adults and children who are victims/survivors of family violence. FVPLSs services are tailor their to address the complex socio-economic issues underlying our clients' legal issues and experiences of family violence. FVPLSs service diverse communities and each FVPLS tailors their services and programs to the unique issues facing their local community.

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

- family violence law;
- child protection;
- family law;
- victims of crime assistance ;
- other civil law problems related to family violence, such as for example debt, fines, Centrelink, Child Support, infringements, tenancy and police complaints.

FVPLSs also design and deliver innovative community engagement, community legal intervention and early intervention/prevention programs and strategies.

Nationally, approximately ninety per cent of FVPLS clients are Aboriginal and Torres Strait Islander women and their children. Family violence is complex and the issues our clients face are complex. Our clients live with intergenerational trauma, removal of children, family violence-driven homelessness, 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.

Aboriginal and Torres Strait Islander victims/survivors of family violence face a wide array of complex and compounding barriers to reporting family violence, accessing the family law system and accessing culturally safe support. Aboriginal and Torres Strait Islander legal service providers with specialist family violence expertise, such as FVPLSs, are best placed to respond to these unique and complex barriers. The barriers Aboriginal and Torres Strait Islander people – particularly women experiencing family violence – are well-documented.

In family law matters, FVPLSs provide advice, representation and associated support throughout the entirety of our clients' family law matters,. As such, FVPLSs play an important role within the family law system, as well as interconnected legal systems such as the family violence and child protection systems at the State and Territory level.

Summary of our position

The National FVPLS Forum endorses the submission from Women’s Legal Service of Australia (**‘WLSA’**) in relation to the Senate Legal and Constitutional Affairs Committee Inquiry into the Federal Circuit and Family Court of Australia Bill 2018 and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 (**‘the Bills’**).

In addition, we make the following brief submission to highlight our concerns with the Bills from the perspective of specialist and culturally safe legal assistance services working with Aboriginal and Torres Strait Islander women and their children experiencing family violence.

In summary, the National FVPLS Forum is deeply concerned about the Coalition Government’s:

- Lack of attention in the Bills to considerations of safety and the importance of specialist expertise of judicial officers and other family law professionals;
- Lack of meaningful consultation with Aboriginal and Torres Strait Islander victim-survivors of family violence and their representative organisations; and
- Attempts to rush through these draft Bills prior to the release of the ALRC Family Law Review Final Report

Recommendations

The National FVPLS Forum calls on the Coalition Government to:

1. Defer the Bills until after the ALRC Family Law Review report is tabled; and
2. Amend the terms of reference for the ALRC Review to include consideration of this court restructure and extend the time for submissions so there can be proper consultation about alternative court structures and associated court practice and procedure.

Our concerns

There are a number of concerning aspects of the draft Bills which may ultimately increase the risk of unjust and unsafe outcomes for Aboriginal and Torres Strait Islander women and their children experiencing family violence.

Rushed timeframe

It is proposed that the new court will commence at the beginning of April 2019. This does not allow sufficient time to consult on, develop and implement the necessary court rules, practices and procedures and training of professionals prior to implement these significant structural changes. There is simply not enough time to ensure that family court users fully understand how these changes will affect them and to put the necessary safeguards in place to ensure those at risk of family violence do not fall through the gaps.

We also voice strong concern regarding the lack of alignment between the government’s proposed timeframe for the court restructure and the Australian Law Reform Commission’s current review of the Family Law System. This has been described by the Federal Government as the first comprehensive review of the family law system since the commencement of the *Family Law Act* in

1976; it is in the final stages of wide-ranging consultation with experts and court-users, and the Final Report is due at the end of March 2019. The National FVPLS Forum is of the view that it is short-sighted to rush through the Draft Bills without opportunity for the proposed changes to be informed by the findings of the ALRC Family Law Review.

Inadequate funding

Merging the courts will not alleviate the current problems with the family law system, many of which stem from a chronically underfunded and over-stretched legal assistance sector. Any proposed restructure to the family court system must be accompanied by a commitment to increased resourcing for the legal assistance sector to ensure that family violence victim/survivors and other vulnerable court users have the support they need to access safety and justice through the family law system.

In 2014, the Productivity Commission recommended that the legal assistance sector – comprised of FVPLSs, Community Legal Centres, ATSILSs and Legal Aid Commissions – receive an annual \$200 million increase in funding for civil law, including family law¹. This recommendation has not been implemented. In August 2018, the Law Council of Australia recommended in its *Justice Project Final Report* that a minimum, additional \$390 million per annum be invested by Commonwealth, State and Territory governments in FVPLSs, ATSILSs, Legal Aid Commissions and Community Legal Centres to address critical civil and criminal legal assistance service gaps.²

The National NFVPLS Forum calls upon the Australian Government, working together with the state and territory governments, to urgently increase legal assistance funding, including to FVPLSs, in accordance with the recommendations of the Productivity Commission and Law Council of Australia. This increase in funding would allow for vitally needed, increased capacity for FVPLSs to assist in funding for family law matters and would strengthen the efficiency, effectiveness and safety of the broader family law system, alongside other important measures such as extra judges to enable matters to be heard in a more timely manner.

We refer to the important recognition by the Productivity Commission that reducing funding to legal assistance services, including FVPLSs, is likely to lead to greater expenditure elsewhere in the long run:

“Advocating for increases in funding (however modest) in a time of fiscal tightening is challenging. However, not providing legal assistance in these instances can be a false economy as the costs of unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection.”³

Increased funding must also ensure national coverage for FVPLSs, as all Aboriginal and Torres Strait victim/survivors of family violence have the right to access specialised, holistic and culturally safe legal and non-legal support, regardless of their geographic location. The National NFVPLS Forum recommends increased, long-term and secure resourcing of FVPLSs to enable FVPLSs to meet increasing demand and effectively address the multitude of barriers faced by Aboriginal and Torres Strait Islander women and children experiencing or at risk of family violence in accessing and engaging with the family law system.

¹ Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report - Overview*, 2014, p. 63, Recommendation 21.4.

² Law Council of Australia (2018) *The Justice Project Final Report: Recommendations and Group Priorities*, p.4.

³ *Ibid*, p. 30.

Lack of focus on safety

At least 50% of matters in the family law courts involve family violence.⁴ Despite this, the proposed reforms are being rushed through Parliament without proper consultation with organisations and peak bodies with specialist expertise in family violence, such as FVPLSs and the National FVPLS Forum.

As discussed in WLSA's submission at page 4, the draft Bills appear to be motivated by cost-efficiencies rather than increasing safety and reducing risk – which is not only dangerous but, as noted by the Productivity Commission, represents a false economy. In determining the best court structure for Australian families, the National FVPLS Forum insists that priority must at all times be given to the safety of family violence victim-survivors and their children.

We take this opportunity to note the vital importance of broader measures to increase the safety of family courts – regardless of court structure – for vulnerable women and children, such as increased access to safe rooms and remote witness facilities. We refer you to our submission to the ALRC Family Law Review Issues Paper for more detail.

Loss of specialisation

Specialisation in family law and family violence is essential for the safety of victim-survivors and their children – and in turn for the proper and efficient functioning of the family law courts. The National FVPLS Forum is of the view that we need to be *increasing*, not decreasing, specialisation in responses to family law and family violence. Instead, the proposed reforms will result in the adoption of a generalist court structure and the loss of specialist features of the current family law court system.

The draft Bills mean there will no longer be a free-standing federal court that specialises solely in family law (let alone family violence), which will result in a more generalist court structure and the loss of that specialist expertise and knowledge developed over the past 40 years. We note with particular concern that the proposed criteria for appointing Division 1 judges does not include expertise or experience in family violence matters, and the criteria for appointing Division 2 judges does not include expertise or experience in family law or family violence matters. This is despite over half of family law matters involving family violence, as mentioned above. We also refer to Proposal 10-8 of the ALRC Family Law Review Discussion Paper that all future federal judges exercising family law jurisdiction have this expertise⁵.

Where to from here?

The National FVPLS Forum agrees that the current family court system needs reform. However, the current Bills are *not* the solution. We see the restructure of the family law courts as an invaluable opportunity to co-design from the ground up a family law system that is informed by the lived experiences of those who experience significant barriers to accessing just, fair and safe outcomes through the current family court system, including Aboriginal and Torres Strait Islander women and children experiencing family violence.

We recommend the Bills to be delayed until there has been proper consideration of the impact of the proposed reforms on the safety of family violence victim-survivors, including Aboriginal and Torres Strait Islander women and their children. One essential way to do this would be to enable the

⁴ Rae Kaspiew et al, 'Evaluation of the 2012 Family Violence Amendments: Synthesis Report' (Australian Institute of Family Studies, 2015) 16.

⁵ Australian Law Reform Commission, Review of the Family Law System: Discussion Paper 86, October 2018, page 251

Australian Law Reform Commission's review of the Family Law System to include consideration of court structural reform, and ensure the Bills are informed by the findings of that review.

There needs to be further and more detailed consultation and co-design about alternative court structures and related processes and concerns, including:

1. Proper funding of the court system and the legal assistance service sector, including FVPLSs;
2. The criteria and process for appointing judges to ensure diversity and appropriate specialisation in family law and family violence;
3. Increased specialisation and accreditation of all professionals in the family law system in family law and family violence, cultural competency and trauma informed practice;
4. The impacts on access to justice for Aboriginal and Torres Strait Islander women and children experiencing family violence, as discussed below.

Access to Justice for Aboriginal and Torres Strait Islander women and children experiencing family violence

Any new court structure must include initiatives to improve access to the family law system for Aboriginal and Torres Strait Islander women and their children experiencing family violence.

Any family law reforms directly impacting Aboriginal and Torres Strait Islander people must be developed in genuine partnership and consultation with Aboriginal and Torres Strait Islander communities and their representative organisations, including recognition of the unique expertise of Aboriginal and Torres Strait Islander community controlled organisations that specialise in supporting victim/survivors of family violence, such as such as FVPLSs and the National FVPLS Forum. These initiatives could include measures such as:

- Ensuring all Aboriginal and Torres Strait Islander victim/survivors of family violence have access to ongoing culturally safe legal representation, from specialist and adequately funded Aboriginal and Torres Strait Islander legal service providers with family violence expertise throughout their engagement with the family law system;
- Comprehensive, in-depth and mandatory cultural competency training for all judicial officers, court staff and other family law professionals, including specific content on the unique experiences and needs of Aboriginal and Torres Strait Islander victim/survivors of family violence and the particular barriers faced by Aboriginal and Torres Strait Islander women in accessing justice through the family law system;
- The expansion of separate and specialist Indigenous Lists for family law matters involving Aboriginal and Torres Strait Islander children; and
- Aboriginal and Torres Strait Islander identified positions for judicial officers and other court staff, including the employment of Aboriginal and Torres Strait Islander Family Consultants and Aboriginal and Torres Strait Islander Liaison Officers within Family Law Courts.

We refer you to our submission to the ALRC Family Law Review Issues Paper for further detail on our positions:

http://www.nationalfvpls.org/images/files/NFVPLS_Submission_to_ALRC_Family_Law_Review_May_2018_FINAL.pdf

Should you have any queries in relation to this submission please contact