

# 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 Council:

## **FAMILIES WITH COMPLEX NEEDS & THE INTERSECTION OF THE FAMILY LAW AND CHILD PROTECTION SYSTEMS**

**May 2015**

## Introduction

The National Aboriginal Family Violence Prevention Legal Services Forum (National Forum) welcomes the opportunity to provide input into the Family Law Council reference on Families with Complex Needs and the intersection of the family law and child protection systems.

Aboriginal and Torres Strait Islander people face significant and well-documented levels of marginalisation in comparison with the mainstream population. This includes increased risk of family violence, incarceration, poverty, homelessness, poor mental and physical health and wellbeing, racism and discrimination<sup>1</sup> and child removal.<sup>2</sup>

Aboriginal and Torres Strait Islander women in particular have been found to be the most legally disadvantaged group in Australia.<sup>3</sup> In comparison with other Australian women, Aboriginal women are 34 times more likely to be hospitalised as a result of family violence<sup>4</sup> and 10 times more likely to be killed as a result of violent assault.<sup>5</sup>

Family violence is the leading driver of child protection intervention and child removal in Aboriginal and Torres Strait Islander families.<sup>6</sup> Family violence is also a significant catalyst of family law proceedings involving Aboriginal and Torres Strait Islander children.

The National Forum made a submission to the 2014 Senate Inquiry into Out of Home Care and refers the Committee to this submission, along with its submission to the 2014 Senate Inquiry into Domestic Violence in Australia.<sup>7</sup> The National Forum also participated in public hearings for both inquiries and refers the Committee to the Hansard records of those hearings.

In terms of child protection, Aboriginal and Torres Strait Islander children are significantly over-represented in child protection systems across the country. Nationally, Aboriginal and Torres Strait Islander children are ten times more likely to be on care and protection orders and

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<sup>1</sup> The Australian Productivity Commission, *Overcoming Indigenous Disadvantage - Key Indicators 2014*, Overview, page 2-61 available at <http://www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014/key-indicators-2014-report.pdf>.

<sup>2</sup> *Koorie Kids: Growing Strong in their Culture: Five year Plan for Aboriginal Children in Out of Home Care* – October 2014 Update, a joint submission from the Commissioner for Aboriginal Children and Young People and Victorian Aboriginal Community Controlled Organisations and Community Service Organisations, p 3; and Commission for Aboriginal Children and Young People - Papers submitted to Aboriginal Justice Forum October 2014.

<sup>3</sup> Senate Report on Legal Aid and Access to Justice, 2004.

<sup>4</sup> 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>.

<sup>5</sup> 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>

<sup>6</sup> Commission for Children and Young People, *Annual Report 2013-14*, Victorian Government, Sept 2014, page 36 available at <http://www.ccp.vic.gov.au/downloads/annual-reports/ccyp-annual-report-2014.pdf>

<sup>7</sup> 2014 Senate Inquiry into Domestic Violence in Australia, FVPLS Victoria submission, available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Finance\\_and\\_Public\\_Administration/Domestic\\_Violence/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Domestic_Violence/Submissions)

almost eleven times more likely to be in out-of-home care than non-Aboriginal children.<sup>8</sup> Family violence is the key driver of Aboriginal children and young people into out-of-home care.<sup>9</sup>

The over-representation of Aboriginal and Torres Strait Islander children in the child protection system including out-of-home care cannot be separated from past policies of forced removals and intergenerational trauma. The *Bringing Them Home* report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families in 1997 clearly identified the legacy of past policies of forced removal and cultural assimilation, including intergenerational trauma, as underlying causes of the current situation.<sup>10</sup>

The unique and complex causes of Aboriginal children's over-representation in out-of-home care necessitate long-term, intensive responses that are specifically tailored to the unique needs and barriers to access to justice of Aboriginal and Torres Strait Islander communities. Sustainable and adequate funding is critical for support services to address demand and produce effective long-term outcomes for children, families and communities.

Aboriginal and Torres Strait Islander families, communities and organisations must be supported and empowered to provide for the safety of Aboriginal and Torres Strait Islander children.

### About the National FVPLS Forum

The National Forum was established in May 2012. The goal of the National Forum is to work in collaboration across various Family Violence Prevention Legal Services (FVPLSs) to increase access to justice for Aboriginal and Torres Strait Islander victims/survivors of family violence. The National Forum has its own Charter, is led by an elected National Convenor and supported by a Secretariat. Members are represented by their CEO/Coordinator (or delegates) and have worked together to develop tools for capacity building, good governance, training and evaluation and data collection.

At the time of writing this submission National Forum members are:

- Aboriginal Family Violence Prevention and Legal Service Victoria (Melbourne HO, Mildura, Gippsland, Barwon South West)
- 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)

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<sup>8</sup> Australian Institute of Health and Welfare, *Child Protection Australia 2012-3*, 43 and 55.

<sup>9</sup> *Koorie Kids: Growing Strong in their Culture: Five year Plan for Aboriginal Children in Out of Home Care – October 2014 Update*, a joint submission from the Commissioner for Aboriginal Children and Young People and Victorian Aboriginal Community Controlled Organisations and Community Service

<sup>10</sup> National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing them Home*, 1997 available at [http://www.humanrights.gov.au/sites/default/files/content/pdf/social\\_justice/bringing\\_them\\_home\\_report.pdf](http://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf)

- Queensland Indigenous Family Violence Legal Service (Cairns HO, Townsville, Rockhampton, Mount Isa, Brisbane)
- Southern Aboriginal Corporation Family Violence Prevention Legal Service (Albany)
- Thiyama-li Family Violence Service Inc. NSW (Moree HO, Bourke, Walgett)
- Warra-Warra Family Violence Prevention Legal Service (Broken Hill)
- Western Australia Family Violence Legal Service (Perth HO, Broome, Carnarvon, Kununnura, Geraldton, Kalgoorlie, Port Hedland)

## 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 victim/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 victim/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 and child protection system, representing the needs and interests of clients to child protection agencies and in the courts. FVPLSs are uniquely placed to support child protection agencies, Magistrates, Judges and opposing parties to understand their statutory obligations towards Aboriginal and Torres Strait Islander children.

Both jurisdictions have legislation which sets out specific provisions and principles targeted to Aboriginal and Torres Strait Islander children which aim to ensure that Aboriginal and Torres Strait Islander children's right to maintain, enjoy and connect with their culture is protected and promoted. Sadly, FVPLSs see many instances where cultural rights are treated superficially or where statutory obligations towards Aboriginal and Torres Strait Islander children are not complied with. For example, without FVPLS representation many clients in the family law system may not be able to produce admissible and compelling evidence of a child's cultural needs and culture may be ignored or dealt with only superficially in family reports and parenting orders. In child protection proceedings, without FVPLS representation many families may not be able to successfully advocate for compliance with the Aboriginal Child Placement Principle or procedures for ensuring Aboriginal and Torres Strait Islander family members can have meaningful input into decisions around a child's placement and ongoing cultural and care needs. This may include for example, helping to identify what is needed for reunification with a parent, identifying and facilitating the assessment of appropriate kinship care placements and/or implementing other strategies to ensure Aboriginal and Torres Strait Islander children have opportunities to maintain connections with their communities and culture. Adequate resourcing for culturally safe and specialist legal assistance services, such as FVPLSs and other vital support services, is essential to enable these services to provide effective, preventative advice and intensive support.

FVPLSs are important, experienced and specialist legal assistance service providers delivering critical services to highly disadvantaged Australians with complex, multiple legal and socio-legal needs.

### Indigenous Advancement Strategy

In the 2014-15 Federal Budget, it was announced that more than one hundred and fifty Indigenous programs under the responsibility of the Department of Prime Minister and Cabinet (PM&C) would be 'rationalised' into five high level program streams under the Prime Minister's *Indigenous Advancement Strategy*. Under the strategy, \$534.4 million will be cut from Indigenous Affairs over the next five years.

The National FVPLS Program was one of the programs collapsed into the *Indigenous Advancement Strategy*. This resulted from a decision in December 2013, to shift responsibility for the National FVPLS Program from the Attorney General's Department (AGD) to the PM&C. The three other legal assistance services, Legal Aid, Community Legal Centres and Aboriginal and Torres Strait Islander Legal Services, all remained in AGD. No rationale was given for the shift, creating uncertainty as to whether FVPLSs would continue to be recognised by Government as frontline legal services and as a national program.

The new funding Guidelines for the *Indigenous Advancement Strategy* were released on 8 August 2014. The Guidelines provided for the majority of funding to be available through 'open competitive grant rounds' which closed on 17 October 2014.

The National FVPLS Program sought a direct allocation or a direct tender process, as permitted by discretion under the guidelines, but this request was refused. Instead, each individual FVPLS was required to make their own application for funding as one of many potential activities under one of five programs under the *Indigenous Advancement Strategy*, such as the 'Safety and Wellbeing Programme'. The 'Safety and Wellbeing Programme' allows for funding of activities

that aim to prevent family violence or support victims of family violence. This meant each individual FVPLS, including small operators with less than five staff, were forced to compete with over one hundred and fifty former programs for funding as well as new competitors including large care organisations, territory and state governments and programs for family violence perpetrators.

As a result of this denial of a direct allocation, FVPLSs are no longer regarded by Government as a standalone program.

Without Commonwealth funding, FVPLSs around the country would have been forced to shut down or significantly reduce staff and services in July 2015.

Fortunately, following announcements in March 2015 all FVPLSs were successful in their application under the *Indigenous Advancement Strategy* and retained at least one further year of funding. However, there remain a number of a number of significant and highly concerning gaps. These include:

- The National FVPLS Program was effectively defunded under the *Indigenous Advancement Strategy* and continues to have no direct allocation. This means there is no transparency or guarantee of funding for the program into the future, nor national recognition of the value of this model;
- The majority of FVPLSs initially received only one year of additional funding, extending significant funding uncertainty and its distressing impacts on staff and victims/survivors – following further negotiation the National Forum has been advised that such funding will be extended to two years;
- No Forum members received an increase in funding, despite a significant rise in the hospitalisation rates of Aboriginal and Torres Strait Islander women and a wealth of other evidence<sup>11</sup> to support increased funding for culturally safe, specialist legal services; and
- FVPLSs and their frontline services remain at high risk through future tendering under the *Indigenous Advancement Strategy*;

The introduction and outcomes of the *Indigenous Advancement Strategy* run counter to a growing body of compelling evidence concerning the value and increased funding needs of FVPLSs. For example, the final report of the Productivity Commission's Inquiry into Access to Justice Arrangements, released in 2014, found that there was a significant need for increased resourcing for legal assistance services including FVPLSs and called for an immediate funding boost of \$200million.<sup>12</sup> The Productivity Commission also found that specialised legal assistance services for Aboriginal and Torres Strait Islander people remain justified.<sup>13</sup>

The National FVPLS Forum is making a submission to the Senate Inquiry into the *Indigenous Advancement Strategy* and we refer the Committee to that submission for further detail.

The National FVPLS Forum maintains that adequate, long-term resourcing must be provided. We continue to call on the Government to treat FVPLS as a standalone program with a direct allocation of funding. Crucially, the evidence<sup>14</sup> is clear that impacts on the provision of support

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<sup>11</sup> See for example: Productivity Commission, Final Report, Access to Legal Assistance Services Inquiry, 2014; Senate Finance and Public Administration Committees, Interim Report, *Domestic Violence in Australia*, March 2015; Judith Stubbs and Associates, 'Economic Cost Benefit Analysis of Community Legal Centres', June 2012..

<sup>12</sup> Productivity Commission, Final Report, Access to Legal Assistance Services Inquiry, 2014, p 703.

<sup>13</sup> Productivity Commission, Final Report, Access to Legal Assistance Services Inquiry, 2014, p. 767.

<sup>14</sup> Personal correspondence. See also *Koorie Kids: Growing Strong in their Culture: Five year Plan for Aboriginal Children in Out of Home Care* – October 2014 Update, a joint submission from the

to Aboriginal and Torres Strait Islander victims/survivors of family violence can be expected to have flow on impacts on the rates of Aboriginal and Torres Strait Islander children in out of home care and the level of unmet family law need among Aboriginal and Torres Strait Islander communities. Given historical and contemporary experiences of the removal of Aboriginal and Torres Strait Islander children from their families, this situation is nothing less than devastating for individuals, families and communities and for the nation as a whole.

It is absolutely imperative that these impacts are not only prevented in the future, but that action is taken to ensure that existing impacts are addressed and reversed as far as possible

Our response to each of the terms of reference are provided below:

**1. What are the experiences of children & families who are involved in both child protection and family law proceedings? How might these experiences be improved?**

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### Aboriginal and Torres Strait Islander involvement in child protection and family law proceedings

While Aboriginal and Torres Strait Islander families are disproportionately over-represented in the child protection jurisdiction, there is a marked reluctance by Aboriginal and Torres Strait Islander clients to access the Commonwealth Family Law system. However, FVPLS do assist a number of clients who are involved in both child protection and family law proceedings.

Where family law disputes related to Aboriginal and Torres Strait Islander children do reach the Courts, and especially where family violence is a factor, these matters are generally complex, lengthy and always involve cultural considerations.

Statistics from both the Family Court and the Federal Circuit Court indicate the numbers of Aboriginal and Torres Strait Islander people accessing the courts are low.<sup>15</sup> A history of poor experiences with the justice system in Aboriginal and Torres Strait Islander communities generally, coupled with a lack of trust in the courts to be culturally understanding, creates significant barriers to access to justice. The formality of the courts is often intimidating for Aboriginal and Torres Strait Islander people and the historic association between the family courts and 'welfare' raises fears that children will be removed as a result of engaging with court processes. Current disproportionate and escalating rates of child protection intervention and removal in Aboriginal and Torres Strait Islander communities continue to contribute to this fear. Indeed, the conflation of family law and child protection proceedings in many clients' minds is understandable given the filing of a 'Form 4 Notice of Risk' (required in Family Law matters involving allegations or risk of family violence and child abuse) automatically triggers a notification to child protection authorities.

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Commissioner for Aboriginal Children and Young People and Victorian Aboriginal Community Controlled Organisations and Community Service Organisations, p 3; and Commission for Aboriginal Children and Young People - Papers submitted to Aboriginal Justice Forum October 2014.

<sup>15</sup> *National Alternative Dispute Resolution Advisory Council, Indigenous Dispute Resolution and Conflict Management, January 2006, page 9. See also Indigenous Australians and Family Law Litigations, Indigenous perspectives on access to justice, p51*

<http://www.familycourt.gov.au/wps/wcm/resources/file/eb22474afbf5598/IndigenousAustraliansFamilyLaw.pdf>

In the experience of our clients, the Family Court and Federal Circuit Court are often perceived as non-Aboriginal and Torres Strait Islander friendly environments with minimal respect for Aboriginal and Torres Strait Islander culture.<sup>16</sup> To fix these issues, FVPLSs have consistently recommended Aboriginal Liaison Officers and increased cultural awareness training within courts.<sup>17</sup> For further detail, we refer the Committee to a series of policy papers published by FVPLS Victoria in 2010 which are available online.<sup>18</sup>

FVPLSs also recommend that legislation should mandate child protection authorities to immediately notify FVPLSs when an Aboriginal and Torres Strait Islander person has been referred to them or at the very least, advise clients to seek legal advice. This would be similar to the Custody Notification Service in criminal law matters, which mandates that when an Aboriginal and Torres Strait Islander person is arrested, the local Aboriginal and Torres Strait Islander legal service is informed.<sup>19</sup> If Aboriginal and Torres Strait Islander people were advised to seek legal advice at their first interaction with child protection authorities, this would likely mean more Aboriginal and Torres Strait Islander people would seek early and/or ongoing legal assistance which may prevent issues from escalating unnecessarily and assist to address the high levels of out-of-home care among Aboriginal and Torres Strait Islander children.

### Experiences of Aboriginal and Torres Strait Islander Clients Involved in Both Family Law and Child Protection Proceedings

Court proceedings can be intimidating and traumatising for Aboriginal and Torres Strait Islander victims/survivors of family violence. This is especially so when a violent ex-partner is one of the opposing parties. Family law matters in particular can be a site of further violence and control. Having to deal with two separate courts, legal frameworks and court personnel can be doubly stressful. Holistic, specialist, culturally safe legal representation is crucial for assisting Aboriginal and Torres Strait Islander victims/survivors to not only navigate the court systems but understand the different purposes and requirements of each.

Given that child protection orders take precedence over family law orders, family law proceedings are typically suspended upon the commencement of child protection litigation. However, there can be complex 'limbo' periods prior to the making of a child protection order in which legal processes are ensuing within both jurisdictions.

For example, our practitioners see cases where family court proceedings have commenced and a child protection notification is subsequently made. This can result in a stand-still where child protection authorities are reluctant to get involved as they are under-resourced and believe the matter should be dealt with in the Family Court but the Family Court, conversely, believes the matter justifies child protection litigation or want to be assured that the child protection matter has been duly investigated and concluded before making orders. This can result in delays and adjournments during which time clients are required to attend multiple court hearings and neither court is prepared to make an order. This can be highly confusing for clients. A lack of court order clarifying the care of the child can escalate conflict between parties and place victims/survivors and children at heightened risk.

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<sup>16</sup> FVPLS Victoria Submission to the Family Law Council, *Family Violence: Improving the Family Law System for All*, 2011.

<sup>17</sup> See recommendations in the 2011 FVPLS Victoria Submission to the Family Law Council, *Family Violence: Improving the Family Law System for All*, 2011.

<sup>18</sup> <http://www.fvpls.org/Policy-and-Law-Reform.php#PolicyPapersSubmissions>

<sup>19</sup> *Aboriginal Legal Service NSW/ACT*, Custody Notification, 2015 available at <http://www.alsnswact.org.au/pages/custody-notification>

In addition, instances may arise where a mother has children to different fathers and child protection authorities are investigating the child or children of one father at the same time as the other father has initiated family law proceedings. Complying with the expectations of both court systems simultaneously can be very difficult. This is especially so when the level of sensitivity to culture, violence and trauma differs between jurisdictions.

## Areas for Improvement

The experiences of Aboriginal and Torres Strait Islander victims/survivors of family violence involved in both child protection and family court proceedings could be improved through:

- Additional resourcing and expansion of culturally safe and specialised frontline legal assistance for Aboriginal and Torres Strait Islander people, including through FVPLSs; Under current Commonwealth funding arrangements, FVPLSs are resourced to service only certain, specified regional and rural locations which do not cover all high-need populations and locations. While, some FVPLSs have successfully leveraged other funding sources to provide additional services in metropolitan areas this funding is often short-term and uncertain and there remain significant service gaps and areas of unmet need in both regional and metropolitan regions across Australia. These areas include, for example, Shepparton in Victoria, Halls Creek in Western Australia and the Anangu Pitjantjatjara communities in South Australia.

In addition, under the recent *Indigenous Advancement Strategy* FVPLS Forum members have received no increase in funding despite significant increased need. For example, in Victoria police reports of family violence have tripled in less than a decade<sup>20</sup> and, nationally, the number of Aboriginal children removed from their families and placed in out of home care increased by 98% between 2006-07 and 2013-14.<sup>21</sup>

- Greater resourcing for culturally safe and specialist community legal education and early intervention for Aboriginal and Torres Strait Islander communities, especially victims/survivors of family violence;

This would enable victims/survivors to have a better understanding of their legal rights and the role of the family law system. This is crucial to ensure Aboriginal and Torres Strait Islander victims/survivors can access the family law system proactively in order to safely separate from violent relationships and resolve parenting disputes in a child-focused and safe way that avoids issues escalating to the point of child protection intervention.

- A requirement for Aboriginal and Torres Strait Islander clients to be offered a referral to a suitably specialised Aboriginal legal service provider prior to family dispute resolution screening;
- Comprehensive, regular and in-depth cultural awareness training for child protection workers and Magistrates, Judges and legal practitioners across each jurisdiction, including Independent Children's Lawyers;

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<sup>20</sup> October 2014 Update to *Koorie Kids: Growing Strong in their Culture: Five year Plan for Aboriginal Children in Out of Home Care*, a joint submission from Victorian Aboriginal Community Controlled Organisations and Community Service Organisations, page 3 Relevant weblink at <http://www.cyp.vic.gov.au/downloads/submissions/submission-koorie-kids-growing-strong-in-their-culture-oct2014.pdf>

<sup>21</sup> Productivity Commission, *Report on government services: Volume F Community Services*, 2014,, Table 15A.19 available at [http://www.pc.gov.au/data/assets/pdf\\_file/0017/132362/rogs-2014-volumef-community-services.pdf](http://www.pc.gov.au/data/assets/pdf_file/0017/132362/rogs-2014-volumef-community-services.pdf)

- Implement ongoing cultural awareness and family violence training for all family consultants (internal and external to the family law courts);
- Improved cultural and family violence sensitivity within child protection departments to transform punitive attitudes towards victims/survivors into approaches which prioritise providing early and intensive support to victims/survivors so they can safely care for their children;
- Better training, resourcing and culturally safe referral pathways within child protection departments so they can more adequately and promptly support clients; and
- The employment of Aboriginal and Torres Strait Islander liaison officers within Children's Courts and Family Law Courts in order to provide culturally appropriate support, referral pathways and act as a conduit for communication in a cultural sensitive manner;
- The establishment of Aboriginal and Torres Strait Islander hearing days;

## **2. What problems do practitioners and services face in supporting clients who are involved in both child protection and family law proceedings? How might these problems be addressed?**

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### Problems

Problems experienced by FVPLS practitioners and services in supporting clients who are involved in both child protection and family law proceedings include:

- Ensuring legal practitioners have sufficient training and expertise in both jurisdictions; Increased, long-term and sustainable resourcing would assist services to employ and retain solicitors who are suitably skilled and experienced across these complex legal areas.
- Appearing at multiple court dates across two jurisdictions can be taxing on resources and reduces the number of clients a service can assist without negatively impacting on the quality of client service provided;
- Adapting to different procedural requirements, thresholds and legislative frameworks across jurisdictions can be practically and strategically complex;
- Progress achieved through a lengthy, contested child protection matter can be undermined if a disgruntled party subsequently applies to the family court; This can put clients in the position of having to essentially start all over again. It also allows perpetrators of family violence additional avenues to intimidate and exert control over victims/survivors through the court system; and
- Difficulty maintaining client trust and engagement in court systems when multiple and onerous proceedings are commenced.

### Potential Solutions

Any potential solutions to the problems outlined above require careful consideration and community consultation. This is especially important to ensure that proposed solutions do not streamline systems to such an extent that the seriousness of family violence issues are diluted or damage the capacity to prioritise the safety of victims/survivors impaired, nor remove opportunities for referral to culturally safe supports for victims/survivors including both holistic legal and therapeutic supports.

The National Forum urges consideration of the incorporation into family law and child protection legislation of a requirement that, where self-represented, victims/survivors of family violence and their alleged perpetrators must be provided with legal aid or otherwise compelled to obtain legal representation for the purpose of cross-examination. This is to ensure that self-represented parties are not being cross-examined by their abuser and the court system not used as another site for violence and intimidation. Further, if forced to self-represent many victims/survivors of family violence will be too afraid of further victimisation and harm to cross-examine the perpetrator – or indeed to participate in legal proceedings at all.

**3. What are the possible benefits for families of enabling Children's Courts to make parenting orders under Part VII of the Family Law Act? In what circumstances would this power be useful? What would be the likely challenges for practice that might be created by this change?**

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### Possible Benefits

Possible benefits of enabling Children's Courts to make Family Law parenting orders may include:

- Less court dates for parties;
- More options for early resolution of proceedings by agreement; and
- Greater clarity and compliance when only one set of proceedings and orders are involved.

However, in practice, these benefits may be outweighed by a range of challenges.

### Likely Challenges

From the perspective of FVPLSs, challenges that may arise from such an arrangement include:

- Ensuring Children's Court Magistrates and staff have sufficient expertise in family law;
- Ensuring child protection agencies and workers have sufficient understanding of family law principles and the family law framework;
- Child protection or departmental attitudes and frameworks being erroneously carried over into determinations of family law matters;
- Children's Courts not being provided with sufficient evidence to have regard to all the factors required under Part VII of the Family Law Act prior to making a family law parenting order; and
- Principles of evidence, admissibility and procedural fairness where a Judicial officer moves from acting in a Children's Court Magistrate capacity to a Family Law Magistrate.

**4. What are the possible benefits for families of enabling the family courts to make Children's Court orders? In what circumstances would this power be useful? What challenges for practice might be created by this change?**

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### Possible Benefits

A number of practical benefits may arise if family courts were empowered to make Children's Court orders. Such benefits may include:

- Less court dates for parties;
- Greater clarity and compliance when only one set of proceedings and orders are involved;
- Greater capacity to compel the production of evidence and reports by child protection departments;
- Greater capacity to compel appearance by child protection departments in family law matters;

- Less delay in determining the appropriate jurisdiction for a matter; and
- Potentially a greater focus on maintaining the relationship and time spent between parent and child than in the Children’s Court where a more punitive approach may be taken.

### Likely Challenges

Technical jurisdictional challenges may arise from such an arrangement however. This might include for example:

- Principles of evidence, admissibility and procedural fairness where a Judicial officer moves from acting in a Children’s Court Judge capacity to a Family Law Judge.

In some States and Territories, FVPLSs expressed the view that it would be preferable for family courts to exercise Children’s Court power rather than Children’s Courts exercising Family Court powers. This is due to a perceived increased legal complexity within family law matters, capacity for more fulsome evidence (especially from families) within family law matters and potentially increased seniority and expertise among family law judicial officers. In addition, the two-tier family court system with its specialist Magellan and other lists and recent incorporation of new areas of law such as de facto property matters may indicate that the family law system is more readily adaptable to embracing new jurisdictions than the Children’s Court in which lists are frequently filled to capacity and matters dealt with very quickly.

### **5. Are there any legislative or practice changes that would help to minimise the duplication of reports involved when families move between the family courts and Children’s Courts?**

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Strengthened accountability mechanisms to compel evidence and compliance from child protection agencies within both the Children’s Court and family law systems would be of assistance.

Given the pace at which child protection matters often proceed and limited knowledge within Aboriginal and Torres Strait Islander communities about legal rights and how to access legal assistance for child protection matters, many matters proceed without a detailed interrogation of the evidence put forward by child protection agencies and without families having the opportunity to properly understand or respond to the detail of allegations made nor mount their own evidence. This means Children’s Courts make orders or families feel pressured to settle child protection matters in circumstances where the full picture of the case and the full range of child-focused and culturally appropriate options are not available to the Court for consideration.

In this context, the reproduction of children’s court reports without due scrutiny in the family courts must be avoided.

In addition, Aboriginal and Torres Strait Islander families engaged in child protection systems can face significant difficulty ascertaining information from child protection agencies, for example in relation to the grounds for child protective services’ rejection of a proposed kinship carer.

Legislative or practice changes that increase accountability of child protective services and strengthen Court scrutiny are crucial to ensure appropriate and culturally safe legal outcomes for Aboriginal and Torres Strait Islander children and families alike.

Sadly, however, in some jurisdictions the capacity of Children's Courts to scrutinise and monitor compliance by child protection agencies is being eroded rather than strengthened. For example, recent legislative changes in Victoria pursuant to the *Children, Youth and Families (Permanent Care and Other Matters) Act 2014*. This legislation was modelled closely on recent reforms within NSW and purportedly seeks to increase stability of placement for children. However, it does so in a way which imposes inappropriately rigid timeframes that will likely see an escalation of Aboriginal and Torres Strait Islander children placed in permanent out-of-home care whilst reducing court scrutiny to ensure appropriate care and protection of the cultural rights of those children. (This issue is discussed in further detail in the separate submission to this inquiry made by our Victorian member, the Aboriginal Family Violence Prevention and Legal Service Victoria, 'FVPLS Victoria'.)

## **6. How could the sharing of information and collaborative relationships between the family courts and child protection agencies be improved?**

Without sufficient improvements to the cultural sensitivity and approach of child protection agencies, there is a danger that increased information-sharing between family courts and child protection agencies could have the unintended and harmful consequence of increasing child protection scrutiny and intervention in Aboriginal and Torres Strait Islander families. This would likely contribute to the high and escalating rates of child removal within Aboriginal and Torres Strait Islander communities.

Given these concerns some options for improving information sharing and collaboration between family law courts and child protection agencies which could be of benefit to Aboriginal and Torres Strait Islander families include:

- Greater powers for family law courts to compel the production of documents by child protection agencies;
- Greater powers for family law courts to compel child protection agencies to be joined as parties to family law proceedings;
- Aboriginal liaison officers within family law courts whose role is to provide cultural information within courts and assist to establish and maintain clear pathways for Aboriginal and Torres Strait Islander families moving between both jurisdictions;
- Strengthened training and accountability within child protection agencies around cultural awareness and the cultural rights of Aboriginal and Torres Strait Islander children; and
- Increased training and understanding within child protection agencies of the role, principles and legal frameworks within the family law system.

The Australian Law Reform Commission has previously recommended that:<sup>22</sup>

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<sup>22</sup> Family Violence - A National Legal Response (ALRC 114 Summary) 11 November 2010, recommendation 19-3. <<https://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-114-summary>>

“Where a child protection agency investigates child abuse, locates a viable and protective carer and refers that carer to a family court to apply for a parenting order, the agency should, in appropriate cases: (a) provide written information to a family court about the reasons for the referral; (b) provide reports and other evidence; or (c) intervene in the proceedings.”

An enforceable and streamlined process such as this could assist in ensuring that parties do not have to re-litigate issues previously resolved through child protection processes once family law proceedings are commenced. If implemented in a culturally sensitive manner in which Aboriginal and Torres Strait Islander parties have access to specialised, culturally safe legal representation this could assist in reducing the trauma, time and imposition of a second lengthy court process.