

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

Thank-you for the opportunity to respond to the exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017 (Exposure Draft) and its accompanying Consultation Paper.

About the Australian Women Against Violence Alliance (AWAVA)

AWAVA is one of the five National Women's Alliances funded by the Australian Government to bring together women's organisations and individuals across Australia. AWAVA works to share information, identify issues and their solutions, to respond to and prevent violence against women and their children. AWAVA's role is to ensure that women's voices and particularly marginalised women's voices are heard by Government, amplifying the work of its member organisations and Friends and Supporters.

AWAVA works towards this by harnessing the expertise of its members, consisting of specialist women's services from the responding to violence against women sector, and working closely with government. Its members include organisations from every state and territory in Australia and represent organisations working on diverse issues including domestic and family violence, sexual assault, feminist pedagogy and women with disabilities.

Summary

AWAVA supports the intention of the draft Bill to strengthen the Family Law Act, and particularly the intention of enabling family law systems to better respond to and offer protection to victims/survivors of domestic, family and sexual violence.

We agree there is value in the expansion of state and territory family law jurisdictions to enable family law matters to be resolved by state and territory courts as appropriate; however, we have reservations about the practical application of these amendments without state and territory courts receiving sufficient additional resourcing and training to be able to meet the increased caseload and exercise the requisite expertise to deal with complex family law matters, particularly those that involve domestic family and sexual violence.

Likewise, we acknowledge the benefits of preventing systems abuse and enabling family courts to dismiss an application where there is an abuse of process by perpetrators of family, domestic and sexual violence in the family court system. However, we have serious concerns that the implementation of the summary dismissal amendments (item 12-13 and 24) in its current form may have possible unforeseen ramifications for survivors / victims of violence, which would instead contradict the intention of the amendments. We therefore do not support these amendments and caution against strengthening the capacity for summary dismissals in the absence of extra measures to support victim survivors to obtain the legal assistance they need.

More generally, we have reservations about whether the proposed amendments will achieve the purpose of offering better protection to victim / survivors of domestic, family and sexual violence. Much more extensive change is needed in order to make the safety of women and children central in the operation of the family law system.

Family law and violence against women

The shockingly high rates of domestic, family and sexual violence in Australia have recently become more widely known. The most recent Australian Bureau of Statistics Personal Safety Survey shows that on average one woman a week in this country is murdered by a current or former partner, one in four women (28%) have experienced physical and sexual violence and/or emotional abuse, one in four women (25%) have experienced emotional abuse and one in six women (17%) have experienced physical or sexual violence.¹ Thousands more are injured or made to live in fear, and more than half a million women report that their children have seen or heard partner violence.² The social, health and economic consequences of violence against women and their children are enormous, with annual economic costs estimated at \$22 billion for Australia in 2015-16.³ This is expected to rise without appropriate action. While domestic, family and sexual violence can be perpetrated by anyone, it is most commonly perpetrated by males against females.⁴ It is important that efforts to better respond to survivors / victims of this violence recognise and incorporate a solid understanding of the dynamics of violence at all steps of the process, which means recognising the lived reality of women.

The family law system is one of the major institutions that has to be navigated by people who are living in violence and are trying to build safer lives for themselves and their children. Over recent years steps have been taken to give safety a higher priority within family law and AWAVA supports Australian Governments' efforts to end violence against women in Australia, recognising gender inequality as a cause and consequence of this violence. However, the system continues to fall short. Efforts to make the system safe and trustworthy for victims/survivors of domestic, family and sexual violence must incorporate a solid understanding of the dynamics of violence at all steps of the process. The proposed amendments need further work to meet this standard.

We note that AWAVA provided a submission on the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015⁵ and was a witness at the associated Senate Committee hearing in February 2016.⁶ AWAVA also provided a submission to the Senate Inquiry into Domestic Violence in

¹ Australian Bureau of Statistics (ABS), *Personal safety survey Australia 2012*, cat. no. 4906.0, ABS, Canberra, 2013, accessed 29 April 2014

² Australian Bureau of Statistics (ABS), *Personal safety survey Australia 2012*, cat. no. 4906.0, ABS, Canberra, 2013, accessed 29 April 2014

³ KPMG, *The cost of violence against women and their children in Australia*, May 2016, https://www.dss.gov.au/sites/default/files/documents/08_2016/the_cost_of_violence_against_women_and_their_children_in_australia_-_summary_report_may_2016.pdf

⁴ UN. 1979. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); United Nations General Assembly. 2007. Intensification of efforts to eliminate all forms of violence against women (61/143)

⁵ Australian Women Against Violence Alliance (AWAVA) Submission on Family Law Amendment (Financial Agreements and Other Measures) Bill 2015 <http://awava.org.au/wp-content/uploads/2016/04/Sub10-Family-Law-Amendment-Financial-Agreements-and-Other-Measures-Bill-2015.pdf>

⁶ http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/a6054ad8-388b-41ae-9c04-50500d839c4a/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2016_02_12

Australia⁷ and to the inquiry on Domestic Violence and Gender Inequality⁸ and was one of many organisations that called on the Government to make changes to the family law system to protect vulnerable witnesses and to strengthen the legal system's treatment of domestic violence matters, such as, for example, by implementing Women's Legal Services Australia's Five Step Plan to put safety first in the family law system. These documents provide detailed steps the government could take to strengthen the legal systems treatment of domestic, family and sexual violence matters and are relevant to this submission. We ask that they be considered.

Family law matters to be resolved by state and territory courts as appropriate

AWAVA acknowledges the challenges and confusion that may result from having to navigate multiple courts, laws and jurisdictions, particularly for those who have experienced or are at risk of experiencing domestic, family and sexual violence. We recognise that this can give rise to unsafe situations and can also make it difficult and in some cases impossible to appropriately resolve legal disputes, particularly those arising out of violence. As such, AWAVA, in principle, sees value in expanding state and territory family law jurisdictions to enable family law matters to be resolved by state and territory courts as appropriate. However, in practice, we are concerned that without state and territory courts receiving sufficient additional resourcing and training they will not be able to meet the increased caseload and requisite expertise to deal with complex family law matters, particularly those that involve domestic family and sexual violence, that will result from the implementation of the proposed amendments, which are likely to increase demand for legal services, particularly community legal services at the state and territory level.

Increased demand for legal services

Legal assistance services, particularly community legal centres, 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 representation. They also often lack the financial means to engage a lawyer. This particularly affects women who on average have lower incomes, fewer assets and more dependants⁹. 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 law¹⁰. Recognising these gendered dynamics of violence, it is unsurprising that there is a large proportion of litigants with family law issues, particularly those experiencing violence (usually women), who are vulnerable and disadvantaged and will require legal assistance services. In this context, the proposed amendments will likely see an increased demand for legal assistance services at state and territory levels.

_4163_Official.pdf;fileType=application%2Fpdf#search=%22committees/commsen/a6054ad8-388b-41ae-9c04-50500d839c4a/0000%22

⁷ AWAVA's Submission to the Senate Inquiry into Domestic Violence in Australia

<http://awava.org.au/wp-content/uploads/2014/11/AWAVA-Submission-to-the-Senate-Inquiry-into-Domestic-Violence-in-Australia.pdf>

⁸ Australian Women Against Violence Alliance Submission to the Finance and Public Administration References Committee inquiry on Domestic Violence and Gender Inequality 14 April 2016

http://awava.org.au/wp-content/uploads/2016/04/Final_AWAVA-submission-into-Domestic-violence-and-gender-inequality.pdf

⁹ 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

¹⁰ National Pro Bono Resource Centre, Pro bono legal services in family law and family violence, Understanding the limitations and opportunities (Final Report) October 2013

This comes in the context of increased community awareness and condemnation of domestic and family violence and sexual abuse, which has increased the demand for a justice system response to this violence; it also comes in the face of inadequate funding for community legal services to meet the already excessive demand for their services and forthcoming funding cuts to legal assistance services:

- 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%.¹¹
- 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.
 - In March 2016, Victorian Legal Aid reported that family violence and family law duty lawyers in Victoria were severely stretched and unable to meet the excessive demand for their services.
 - Community Legal Centres, where a third of the work is related to family violence, are having to turn away 150,000 people a year¹², while Family Violence Prevention Legal Services, which provide a culturally appropriate service for Aboriginal women, are not adequately funded to meet demand.¹³
- Australian community legal centres (CLCs), including women's legal services face significant Australian Government funding cuts while at the same time having to respond to a growing demand for their services. And while there have been some new funding commitments to these services in the last few months, the new commitments do not match the impending cuts or the further investment that is required to meet the needs of women and children subjected to violence. As such, this will lead to reduction in services provided.
 - Commencing 1 July 2017, Community Legal Centres will face a 30% reduction in Commonwealth funding nationally, which will reduce funding by \$34.83 million between July 2017 and June 2020; and reduce service capacity by a third.¹⁴
 - The National Association of Community Legal Centres (NACLC) further states that CLC funding through the National Partnership Agreement for Legal Assistance (NPA), under the Attorney General Portfolio Budget papers, has not received any additional funding to address growing demand.
 - Aboriginal and Torres Strait Islander Legal Services have also had cuts to their funding. These cuts amount to over \$6 million.¹⁵
- This increase is further underlined by the recent Productivity Commission report on Access to Justice Arrangements¹⁶ and the report of the Council of Australian Governments Advisory

¹¹ Crime Statistics Agency, Year ending September 2015, Family Incidents,

<http://www.crimestatistics.vic.gov.au/home/crime+statistics/year+ending+september+2015/family+incidents>

¹² Coumarelos et al. Legal Australia-Wide Survey: legal need in Victoria, Law and Justice Foundation of NSW, 2012, xiv.

¹³ 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

¹⁴ For an analysis, see

http://www.nacalc.org.au/cb_pages/news/MediaReleaseBudgetcutstolegalassistanceserviceshitvulnerablehardest.php

¹⁵ For analysis see [http://www.natsils.org.au/portals/natsils/MEDIA%20RELEASE%20-%20post-budget%20-%20030516%20\(002\).pdf?ver=2016-05-04-102339-127](http://www.natsils.org.au/portals/natsils/MEDIA%20RELEASE%20-%20post-budget%20-%20030516%20(002).pdf?ver=2016-05-04-102339-127)

Panel on Reducing Violence against Women and their Children¹⁷, both of which highlight 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 domestic, family and sexual violence, the consequences of not meeting this demand can be profound, particularly for safety and protection of victims / survivors of this violence. As such, these amendments will result in an increased need for additional funding for legal assistance services, particularly women's legal services, which provide services almost exclusively to family violence victim survivors, in the areas of domestic and family violence law, family law, children's matters and victims of crime compensation.

For the proposed amendments to function in the way that is intended, it would be necessary for there first to be a significant injection of funding and resources to community legal centres and legal aid commissions, and a reversal of the impending cuts to these services.

Training to ensure requisite expertise

The proposed amendments will result in state and territory courts staff and judicial officers engaging and responding to more family law matters. As such, it is important that they have the requisite experience and expertise to deal to appropriately and effectively realise the objectives of these legislative amendment. For instance, all participants in court processes, judges, lawyers and court staff should have a thorough understanding of the nature and dynamics of domestic and family violence,¹⁸ such as an understanding of the tactics a perpetrator may utilise within the court system to 'perpetuate a pattern of dominance and control'.¹⁹ 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.²⁰ The expansion of the state and territory family law jurisdictions will require them to quickly gain the requisite family law expertise, and expertise that is currently held by the federal courts; without a significant increase in of resources, including in family law and in the gendered dynamics of violence, we are concerned that this will result.

In addition, state and territory courts also lack access to the services and systems currently available to assist decision-makers in family courts. For example, family court services includes family consultants (Family Report Writers and Independent Single Experts), which may be appointed in family law proceedings to provide reports and assessments about families, identify key issues and make recommendations about arrangements for children. These assessments play a critical role in the decision-making process of the court²¹ and can play a determining role in cases involving

¹⁶ Productivity Commission report on Access to Justice Arrangements, Final Report. 2014. See: <http://www.pc.gov.au/inquiries/completed/access-justice/report>

¹⁷ 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>

¹⁸ 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.

¹⁹ Ibid.

²⁰ 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 (see footnote 155 of the COAG advisory panel report below)

²¹ WLSA submission to senate inquiry – Domestic Violence and gender inequality 12 April 2016, p. 19-20

allegations of abuse, where there may not be any other independent evidence or verification of allegations in dispute. Currently these services are not available to judicial officers in their state and territory family law jurisdiction. Without state and territory courts receiving sufficient additional resourcing we have reservations about whether the proposed amendments will function as intended. Instead, the proposed changes could not only fail to reduce the complexity of cases but actually undermine the safe, timely and fair resolution of matters.

Assisting the courts to exercise family law jurisdiction

AWAVA recognises that these changes would be accompanied by non-legislative measures to support state and territory courts to exercise jurisdiction under the Family Law Act. We welcome the Family Violence Bench Book²² and acknowledge it 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 needs to reach judges and all staff in the legal system. In accordance with the COAG Advisory Panel's Final Report on Reducing Violence Against Women and their Children²³ 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'²⁴. 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 women and women from cultural and linguistically diverse backgrounds who 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 the dynamics of family violence within Aboriginal and Torres Strait Islander communities²⁵. Similarly a second report prepared by JCCD identified that women from cultural and linguistically diverse backgrounds who experience family violence may have different experiences compared with other women, which requires comprehensive cultural competency training for court staff who interact with them, for example instances of dowry-related violence, forced marriage and female genital mutilation.²⁶

Without knowing the detail of the judicial family law training referred to in the Consultation paper, we cannot comment on whether it would be sufficient. AWAVA supports Women's Legal Services Australia's advocacy and encourages the Federal Government to consider whether the specialisation of Magistrates in family law would assist state and territory courts would be more effective in meeting an increased family law caseload.

²² <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/SecondQuarter/9-June-2015-National-Family-Violence-Bench-Book.aspx>

²³ 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>

²⁴ Ibid Recommendation 1.4, page 38.

²⁵ Judicial Council of Cultural Diversity. 2016. The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts., page p 41

²⁶ Judicial Council of Cultural Diversity. 2016. The Path to Justice: Migrant and Refugee Women's Experience of the Courts., p 31

Recommendations:

- AWAVA supports the proposed amendments (items 1-5 and 8-11), which would expand state and territory court's family law jurisdiction, on the condition that state and territory courts receive sufficient additional resourcing and training to be able to meet their increase family law case load and knowledge requirements.
- AWAVA encourages the Australian Government to consider whether the specialisation of Magistrates in family law would assist state and territory courts, and would be more effective in meeting an increased family law caseload.
- AWAVA recommends making additional resources available to state and territory courts, including by way of training for court staff and judicial officers, in order to ensure these courts can provide a high quality service to litigants and meet increased family law demand. This should be in addition to:
 - Reversing the national funding cuts to Community Legal Centres (CLCs) under the National Partnership Agreement;
 - Immediately injecting \$200 million per year into the legal assistance sector, consistent with the recommendation made by the Productivity Commission, including at a minimum \$14.4m per year to Community Legal Centres and appropriate amount amounts for Family Violence Prevention Legal Services, Aboriginal and Torres Strait Islander Legal Services and Legal Aid Commissions²⁷;
 - Committing to developing a process for determining sustainable long-term funding contributions to the legal assistance sector.
- We also support WLSA's recommendation and ask that there be further consideration about how jurisdictions will interrelate, and suggest that the Australian Government form a cross-sectoral consultative committee to advise it on inter-jurisdictional family law practice issues.

Strengthening court powers to protect survivor / victims of family violence

As mentioned, we acknowledge the benefits of preventing systems abuse and enabling family courts to dismiss an application where there is an abuse of process by perpetrators of family, domestic and sexual violence in the family court system, especially in a situation of limited resources. For example, we support amendments to the family court system that stops perpetrators from directly cross-examining their victims in court. However, we do not support the proposed summary dismissal amendments (items 12-13 and 24) as we have serious concerns that the implementation of these, in the current form, will have possible unforeseen ramifications for survivor / victims of violence.

AWAVA is concerned that strengthening the capacity for summary dismissals in the absence of extra measures to support / victim survivors may undermine, rather than support, the amendments intention of diminishing systems abuse. AWAVA's concerns were most recently highlighted by AWAVA's program manager, Merrindahl Andrew during her witness statement during the Senate Committee hearing (2016) on the Family Law Amendment (Financial Agreements and Other Measures) Bill 2015:

In relation to summary dismissals, we again acknowledge the benefits of excluding unmeritorious cases from the courts especially in a situation of limited resources. However, an increasing number of people appearing before the family law courts are self-represented, because they lack the financial means to engage a lawyer. This particularly affects women who on average have lower incomes, fewer assets and more dependants.

²⁷ See rec 21.4 of the Productivity Commission : <http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>

Being self-represented can increase the likelihood of a claim being seen as unmeritorious, especially for victim survivors of domestic and family violence who may be less able to fully identify or disclose their experience of violence compared with a woman who has legal representation. We therefore caution against strengthening the capacity for summary dismissals in the absence of extra measures to support victim survivors to obtain the legal assistance they need.²⁸

Furthermore, it is also necessary to highlight the lived reality of domestic, family and sexual violence and the trauma that often permeates throughout every aspect of a survivor / victim's life, especially in cases where someone is trying to take steps to extricate themselves from a control and abuse situation. For example, concentration can be impaired, and they survivor / victims of violence can be distracted by, for example, homelessness or being unable to secure a safe environment for a person and their children. As highlighted by WLSA, this can, for example, make it increasingly difficult for survivors / victims to prepare high-quality paperwork, or can undermine their ability to present in a sufficient way in court or at conference. This is exacerbated by having to face their perpetrator in courts and further by appearing before the family law courts self-represented, due to the lack of financial means to access representation, as highlighted previously. All of these factors can increase the likelihood of a claim being seen as unmeritorious. As such, there are many cases in which survivor / victim's applications would be seen as unmeritorious for reasons other than the substance of the case, especially where family violence may be involved.

As previously mentioned, we welcome the Bench Book and recognise it as a step in the right direction to supporting judges to identify the distinction between systems abuse and situations of domestic, family and sexual violence; however we believe that much more needs to be done to support judiciary to be able to identify the difference between an litigant experiencing the effects of trauma and a purely unmeritorious claim.

As such, we do not support the summary dismissals but instead support the recommendations made by WLSA and the Family Law Council (Recommendation 19 of the *Family Law Council's Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*) as follows:

- That the Federal Government implement Recommendation 19 of the FLC Final Report regarding commissioning research on what family law systems abuse occurs and how it can be prevented
- The Federal Government commission research that would support an understanding of how and to what extent the intentional and unintentional misuse of legal processes, such as the request for subpoenas, and other agencies and services relevant to family breakdown (family law services and courts, the child support system, child protection systems and civil family violence protection order systems) occurs and how this may be prevented.
- The Federal Government commission research that would support an understanding of the extent, experience and dynamics of self-representation in family law matters involving families with complex needs, including matters where there are family violence and mental health issues.

In addition, we support WLSA's submission, as follows:

²⁸ http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/a6054ad8-388b-41ae-9c04-50500d839c4a/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2016_02_12_4163_Official.pdf;fileType=application%2Fpdf#search=%22committees/commsen/a6054ad8-388b-41ae-9c04-50500d839c4a/0000%22

- Support for the proposed amendments that criminalise breaches of personal safety injunctions made under the *Family Law Act*.
- A recommendation that the Federal Government fund training for state and territory police officers on family law and family violence to ensure there is a consistent understanding of the proposed injunction amendments and their enforceability nationwide. Training should include the formation of a national response framework that can be used by police when responding to alleged breaches of injunctions. Such a framework could, for example, draw upon the Common Risk Assessment Framework (CRAF) used by Victorian police.
- A recommendation that the Federal Government work through COAG to encourage all state and territory police to introduce and enact a *Code of Practice for the Investigation of Family Violence*, as in Victoria.

Removal of 21 day time limit on state or territory courts' power to vary, discharge or suspend an order (Items 18–20)

AWAVA supports the removal of the 21 Day limit on state or territory courts' power to vary, discharge or suspend an order (Items 18–20).

Other Amendments

AWAVA supports the amendment that proposes to repeal obligation to perform marital services (Item 15), which orders relieving a party of the obligation to perform marital services.

Thank-you once again for the opportunity to respond to the exposure draft of the Family Law Amendment (Family Violence and other Measures) Bill 2017 (Cth) and the corresponding Public Consultation Paper. We welcome the opportunity to discuss the issues further. For further information or to discuss the content of this submission, please contact Merrindahl Andrew using the details below.

Yours faithfully,

Australian Women Against Violence Alliance (AWAVA)

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