Women's Legal Services Australia (WLSA)

Response to Family Law Council Discussion Paper: Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems

October 2015

INTRODUCTION

Women's Legal Services Australia (WLSA) is a national network of community legal centres specialising in areas of law that disproportionately affect women and children in accessing justice. Members of WLSA regularly provide advice, information, casework and legal education to women and service providers on a range of topics including family law, child protection, child support, family and domestic violence, personal protection orders, reproductive health rights and discrimination matters.

We have a particular interest in the intersection of violence against women and the law and ensuring that disadvantaged women, such as Aboriginal and Torres Strait Islander women, women from culturally and linguistically diverse backgrounds, women with disabilities, rural women, women from LGBTIQ[1] communities, young women, older women and women in prison are not further disadvantaged by the system.

We provide holistic, high quality and responsive legal services to women from a feminist framework, placing the individual client at the centre of our interactions and try to respond to them as a 'whole person' rather than just their 'legal problem'. Some of our services, where funding permits, employ domestic violence counsellors and other support staff to assist in this holistic response.

Throughout the lifetime of our network we have recognised the disadvantage of women living in rural, regional and remote areas to accessing legal advice and most of our services have tried to address this by the provision of a 1800 free call Statewide telephone number. Some services have specific lawyers or adopted service provision models that allows for the provision of specialised services to women who live in non-metropolitan areas of Australia.

WLSA seeks to promote a legal system that is safe, supportive, non-discriminatory and responsive to the needs of women in accessing justice.

We thank the Family Law Council for providing an opportunity to respond to this important discussion paper. However, we also note that the gaps, overlaps, inconsistencies between these systems have been identified and spoken about in the public sphere for approximately 20 years or more. WLSA would welcome outcomes from this process that provide real and practical change for the women and children escaping domestic violence who use these systems, for their and their children's protection.

We note from the Interim Report of the Family Law Council in June 2015 on this topic comprehensively summarised the levels of domestic violence in the family law system including both in the court and at family dispute resolution services. As far as WLSA is concerned, the evidence is clear. The family law courts are domestic violence courts involving families with high levels of vulnerability and safety concerns.

[1] Lesbian, gay, bi-sexual, transgender, intersex and queer.

RECOGNITION OF WLSA AND OTHER SPECIALIST GROUPS IN CONSULTATION ACTIVITIES

We note recommendations from the interim report (See Recommendation 5) specifically refer to Legal aid, the courts, child protection authorities and other stakeholders be consulted on certain issues. We note that WLSA or community legal centres are not specifically mentioned. We are aware that we would come within the general category of 'stakeholder groups'. However, our experience has been that without specific mention we can be overlooked. WLSA works with some of the most vulnerable clients who use the court, many who are not legal aid clients and are acting for themselves without legal representation. We believe it is essential that WLSA be involved in any stakeholder or working groups and be specifically named. Also, Aboriginal Women's Legal Services and Family Violence Legal Services should also be specifically consulted.

Recommendation 1:

That the Family Law Council recognise the important role of WLSA in the family law and child protection systems and when making recommendations for the establishment of working or stakeholder groups, specifically request WLSA representation and also seek representation from Aboriginal Women's Legal Services and Family Violence Legal Services.

Stakeholder groups should also include those that work with men. We believe it essential that any men's group working in this area should be working from a victim's perspective of domestic violence that prioritises the safety of women, children and men and follows international best standards of practice in working with men in this area.

Recommendation 2:

That the Family Law Council in any recommendations it makes about the involvement of men's groups on future working groups should only involve those entities that work from a victim's perspective of domestic violence, prioritises the safety of women, children and men and follow international best standards of practice in working with men in this area.

A LEGISLATIVE AMENDMENT OF THE FAMILY LAW ACT ABOUT PROTECTING VULNERABLE WITNESSES IS REQUIRED TO ENSURE FAIRNESS

Background to the issue

WLSA has advocated over many years about our concerns for women who are victims of domestic violence having to represent themselves in family law proceedings. Our advocacy has increased in the last few years in particular, around women survivors of domestic violence being subject to personal cross examination by their own perpetrator.

In family law proceedings, a perpetrator of family violence who is not legally represented can directly cross-examine a victim. Unlike other federal and State legislation, the *Family Law Act 1975* does not contain any specific protections about giving evidence regarding vulnerability for victims of family violence or other witnesses more broadly[2]. eg. Giving evidence by video link or having a support person.

This is of particular significance because:

(1) the high numbers of cases involving family violence in the family courts;
(2) the inability of many victims to obtain legal aid for legal representation in family law, despite the issue being a legal aid priority; and

[2] Section 69ZX Family Law Act http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s69zx.html

(3) the high number of court users who have mental health concerns.

Why it matters

For women who are victims of family violence, who have been raped, assaulted or psychologically abused by their ex-partner, appearing unrepresented in a family law trial is a frightening prospect. The experience of direct-cross-examination by an abusive ex-partner:

- can result in re-traumatisation of the victim;
- can compromise the quality of evidence given to the court; which can affect the court's ability to make safe and effective orders;
- allows the perpetrator to use court proceedings to exercise control and dominance over the victim;
- allows perpetrators to ask ostensibly valid questions but which can deliberately and strategically be loaded with hidden and sinister meaning or threats for the victim;
- provides an avenue for the perpetrator to ask the victim directly about incidents of violence and abuse, as this is relevant to determining the best interests of the child;
- can be viewed as system's abuse ie. the legal system is participating in the abuse/complicit in further perpetuating harm;
- can be a disincentive for victims to proceed to trial;
- can pressure some victims into consent agreements that may be unsafe or unworkable, to avoid the trial experience;

More broadly, the lack of specific protections about vulnerability in family law means that other vulnerable witnesses (eg.disability) are not specifically protected in the cross-examination process and this may also compromise the quality of their evidence.

Inconsistent public policy

Apart from the inconsistent approach across jurisdictions (for example, a woman may be protected from personal cross-examination in Victoria whilst applying for a protection order but not protected in the family law courts in relation to essentially the same issues), there is also inconsistent public policy within the family law system itself.

In family dispute resolution in both policy and legislation, victims of violence are protected by either excluding them from FDR altogether and requiring them to apply straight to court or by making the FDR processes safer by having for example, separate rooms, telephone FDR, shuttle, legally assisted FDR.

There are valid questions to be asked regarding the adequacy and effectiveness of the legal and policy protections within FDR. However, the reality is they do exist because it is widely recognised that power differentials between a victim and perpetrator of violence can provide perpetrators with opportunities to continue their abusive and coercive behavior, can expose the victim to further trauma and that the failure to protect victims of violence from such a direct confrontation with the perpetrator in an FDR setting can result in outcomes that are not in the best interests of children.

The current reality is that victims of violence can be excluded from FDR because the FDRP makes a determination that the power differential is too great and it would be unsafe to proceed to FDR and be issued with a certificate which allows them to immediately start proceedings in the court. However, in the court they are left completely unprotected from the perpetrator including during cross examination, if the perpetrator is unrepresented. Besides the issues of systemic abuse; re-traumatisation of victims; and unsafe outcomes for women and their children, this policy dissonance contributes to a larger culture of cognitive dissonance, where on the surface we appear to be prioritising holding perpetrators accountable and keeping women safe, but on a deeper level we are doing the opposite. It reinforces to perpetrators that their violence-supportive attitudes are normal- that they won't be held entirely accountable.

Making family law safer for victims of violence

It is essential for specific protections to be introduced to protect vulnerable witnesses against re-traumatisation.

As such, it is important that the *Family Law Act* include specific protections for vulnerable witnesses to stop direct cross-examination by an abusive ex-partner. Most State jurisdictions in sexual assault criminal trials and some States' domestic violence protection order legislation have introduced provisions that identify certain witnesses as "vulnerable" and set up a process, for example, for a legal aid lawyer to step in to conduct the cross-examination.[3]

Other jurisdictions, including the Commonwealth *Crimes Act* have also legislated to protect "vulnerable witnesses". Eg. Including protection from cross-examination by unrepresented defendants in the context of adult complainants involved in proceedings relating to slavery and slavery-like conditions as well as trafficking in persons or debt bondage.[4]

Recently the Queensland Government in response to 3 domestic violence homicides in one week, fast-tracked the introduction of legislation that gives "special witness protection" to domestic violence witnesses appearing in the criminal courts. This would include a range of protections about giving evidence, including via video link, screens, and support people etcetera.

Family law is currently out of step with other courts on these issues. The inconsistency becomes apparent to clients, as they often appear in multiple courts. Additionally, the Productivity Commission's recent inquiry into civil justice recommended that victims of violence be protected from direct cross-examination by their abuser. (Recommendation 24.2, Access to Justice Arrangements Report http://www.pc.gov.au/__data/assets/pdf_file/0016/145402/access-justice-overview.pdf)

Increased legal aid funding is also part of the solution

Increased legal aid funding is very important to our clients, as legal representation may protect victims of violence to some extent. We will further address issues about legal aid later in this submission. However, legislation that specifically protects victims of family violence from cross-examination by their un-represented abuser is also necessary. This is because there will always be some perpetrators who *choose* to appear unrepresented, as an act of intimidation and control even if they can afford a lawyer or if legal aid funding was available to them.

Legislation that specifically protects vulnerable witnesses when giving evidence is also necessary, as specific legislative guidelines would raise awareness and promote consistent decision-making.

Not all women who are survivors of violence will necessarily use this provision if it were enacted as some may choose to undergo the personal cross examination as a litigation tactic to reveal the true nature of the perpetrator to the judge. However, for other women the trauma would be too much.

Feedback on the WLSA survey on the experience of women survivors of violence being personally cross-examined by their abusers in the family law courts

Information about the survey

When raising the need for vulnerable witness protection WLSA's concerns have largely been dismissed due to a belief this affected only a small group of clients and the issue was not one of widespread concern. In response to this Women's Legal Services Australia (WLSA) developed a survey of 16 questions to catalogue the

[3] Section 150 and 151 Domestic and Family Violence Protection Act 2012 (QLD)https://www.legislation.qld.gov.au/LEGISLTN/ACTS/2012/12AC005.pdf Section 70 Family Violence Protection Act 2008 (Vic) http://www.austlii.edu.au/au/legis/vic/consol_act/fvpa2008283/s70.html

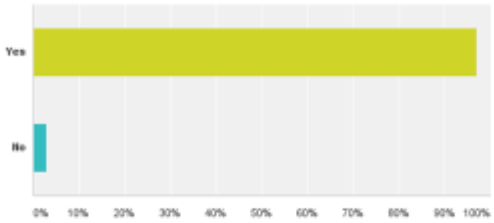
[4] Section 15 YAA and 15 YAB Crimes Act 1914 (Commonwealth) http://www.austlii.edu.au/au/legis/cth/consol_act/ca191482/s15yab.html

experience of women survivors/ victims of domestic violence of being personally cross examined by their abusers in family law proceedings or having to personally cross examine their former partner. The survey was distributed nationally through our networks and social media in September 2015. It is in no way a comprehensive or empirically thorough approach. However, it has provided so far some valuable insights into the issue of personal cross examination by perpetrators and in relation to the family law court system as a whole. At the time of writing we had received 270 responses. Some analysis of the survey responses is included below.

The survey was interested in the experience of female survivors of domestic violence and 97% of respondents identified they did experience DFV during their relationship with their ex-partner.

Q2: Did you experience domestic/family violence during your relationship with your ex-partner?

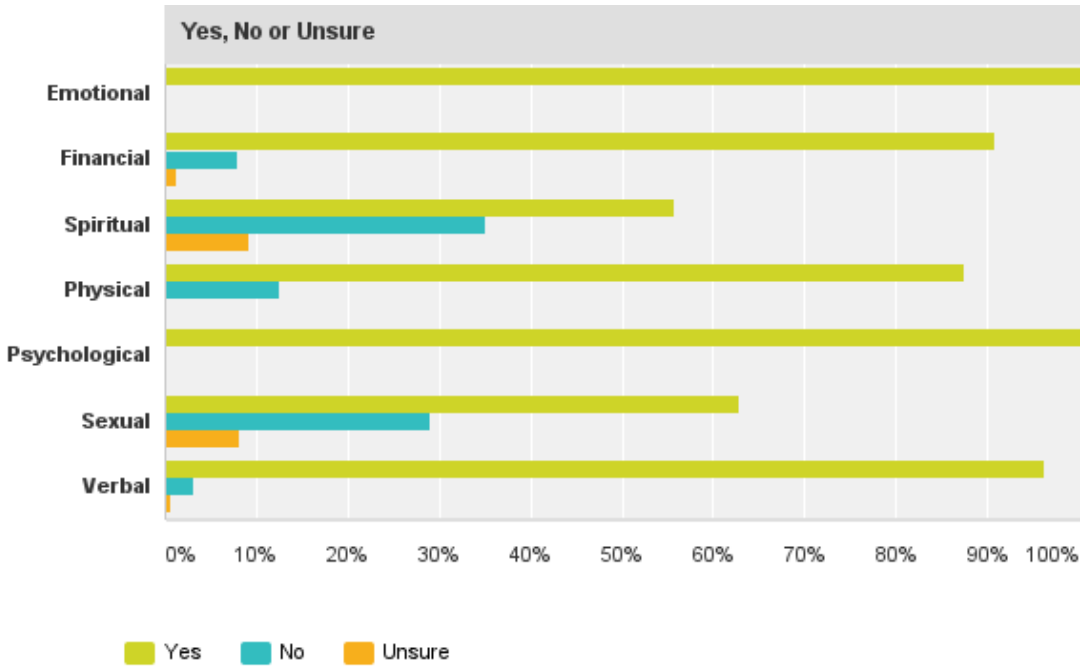
Answered: 269 Skipped: 1



Powered by SurveyMonkey

Answer Choices	Responses	
Yes	**97.03%**	261
No	**2.97%**	8
Total		**269**

The survey asked about the kind of violence they had experienced.



Yes, No or Unsure				
	Yes	No	Unsure	Total
Emotional	**100.00%** 170	**0.00%** 0	**0.00%** 0	170
Financial	**90.80%** 148	**7.98%** 13	**1.23%** 2	163
Spiritual	**55.71%** 78	**35.00%** 49	**9.29%** 13	140
Physical	**87.42%** 139	**12.58%** 20	**0.00%** 0	159
Psychological	**100.00%** 166	**0.00%** 0	**0.00%** 0	166
Sexual	**62.84%** 93	**29.05%** 43	**8.11%** 12	148
Verbal	**96.32%** 157	**3.07%** 5	**0.61%** 1	163

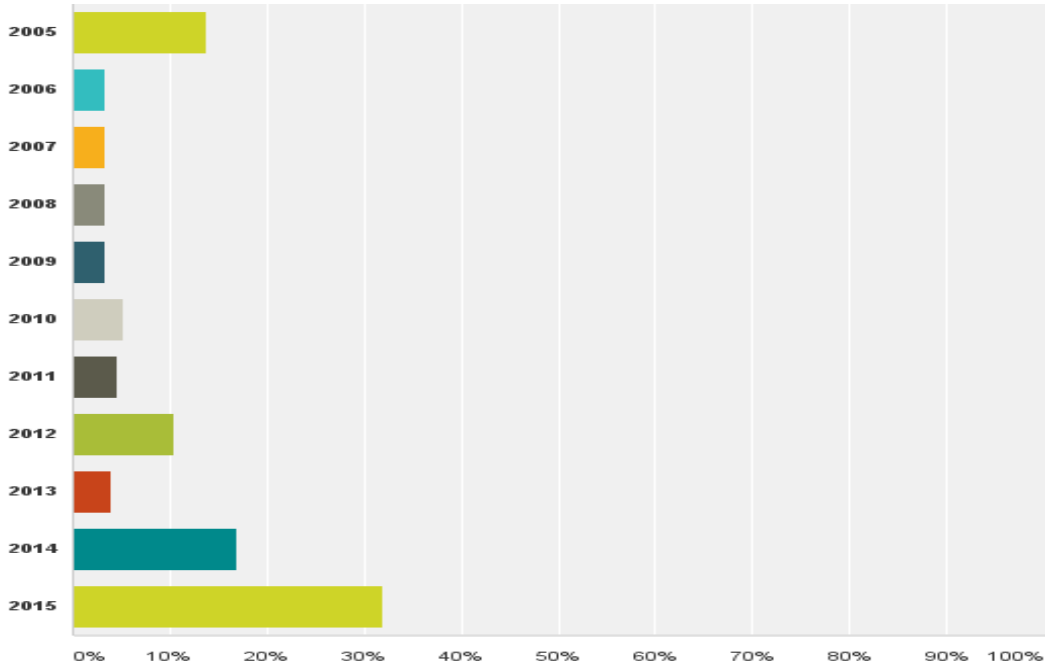
Of the respondents that answered this question, 100% identified with emotional and psychological abuse. 87% with physical abuse and nearly 63% with sexual abuse.

Of particular interest is the high level of sexual abuse reported in the survey. We are unsure if this was disclosed to the court or in evidence as we know that this aspect of domestic violence can be one of the most under-reported. However, the reality is if these victims of sexual violence pursued their matters through the criminal courts, in most jurisdictions in Australia they would be protected from direct cross examination by their abuser. As these issues were litigated in the family courts, these victims receive little protection.

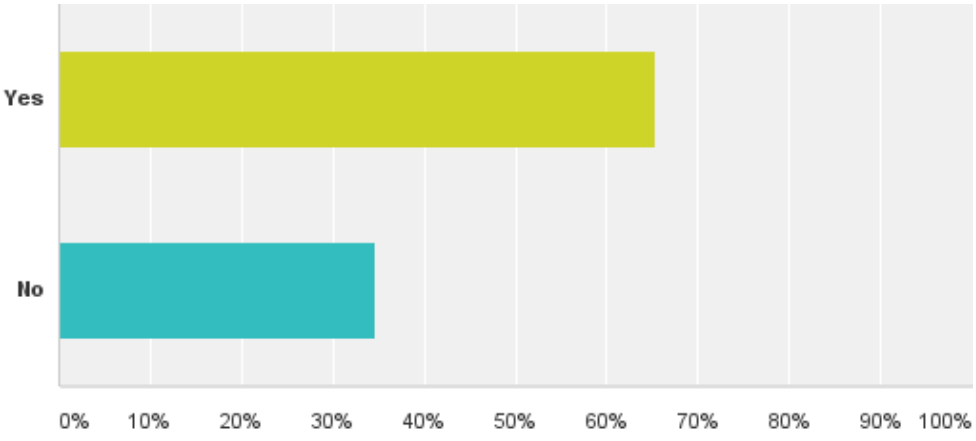
This is particularly concerning given that women who have been sexually abused by their partner suffer greater mental health consequences compared with those who are physically abused only, even after controlling for the

severity of the physical violence. Apart from depression, low self-esteem and body image issues, they also suffer more severe post-traumatic stress.[5]

This graph below shows expresses a time-line of the respondent's cases.



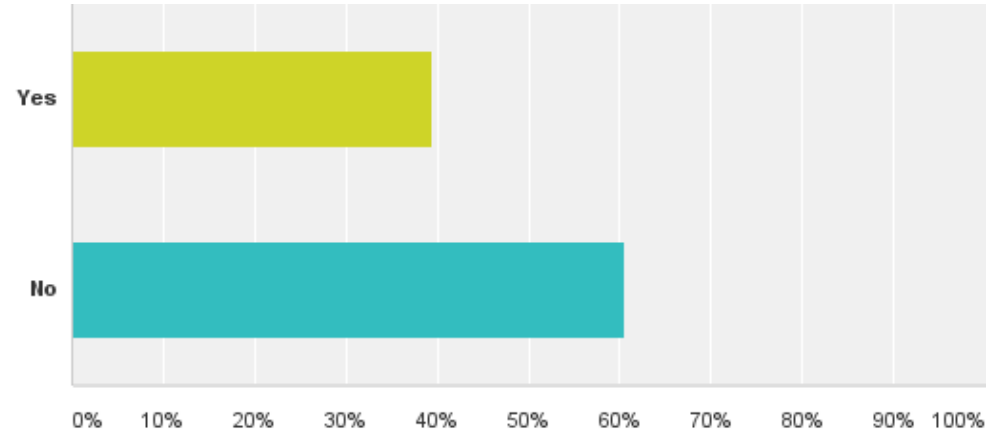
Survey respondents were asked if they were legally represented. We did not ask if they were funded by legal aid. However, in the qualitiative feedback some women spoke about going into debt and the high legal fees incurred. It also supports WLSA's position that this is not simply a legal aid issue and legislative protection is also required as having a lawyer does not necessarily protect the victim from the trauma of being personally cross examined by their abuser.



[5] See Braaf R and Barrett Meyering I *Domestic Violence and Mental Health* (2013) Australian Domestic Violence and Family Violence Clearinghouse Fast Facts 10

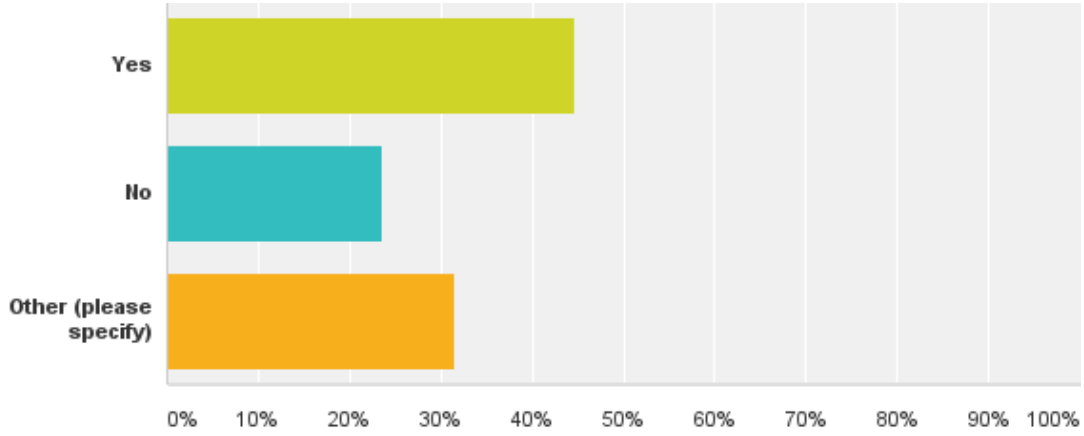
Answer Choices	Responses	
Yes	**65.43%**	106
No	**34.57%**	56
Total		**162**

Respondents were asked if their matter settled before the final trial decision and nearly 40% said that it had.



Answer Choices	Responses	
Yes	**39.38%**	63
No	**60.62%**	97
Total		**160**

The respondents whose matters had settled before trial were then asked whether the prospect/ fear of personal cross examination by their ex-partner was a factor in their decision to settle. 45% said it was a factor in their decision to settle.

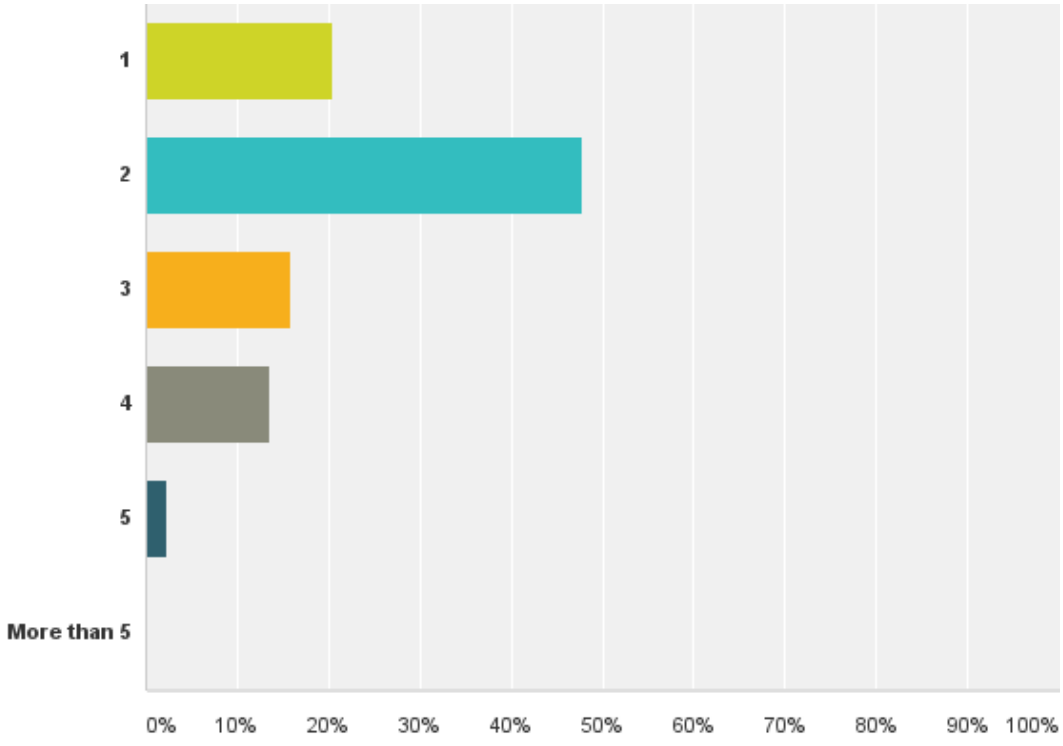


Answer Choices	Responses	
Yes	**44.74%**	34
No	**23.68%**	18
Other (please specify)	**31.58%**	24
Total		**76**

The survey then asked those respondents who indicated it was factor, to assess the significance of the prospect/ fear of personal cross examination in their decision to settle. Nearly 73% of respondents said it was very significant reason in their decision to settle. Another 12% indicated it was of medium significance. Overall 85% of those respondents who indicated it that the personal cross examination was a factor in their reason to settle weighted it as a medium to very significant factor. This is an important finding and extremely concerning that victims of violence are settling matters in children's matters because of a fear of being cross examined by their perpetrator. It is evidence of WLSA's assertion that matters may be settling in circumstances that are not in the best interests of children.

	One of many factors	Of medium significance	Very significant	Total	Weighted Average
Significance	**16.28%** 7	**11.63%** 5	**72.09%** 31	43	2.56

After the release of the survey we added another question asking about the numbers of children responder's had. At this stage 226 had already responded to the survey. Those families must have had at least 1 child involved in the family law proceedings. The 44 respondents who answered since the question was inserted involve 101 children. So we estimate that these issues are affecting the outcomes of possibly 327 children.



Answer Choices	Responses	
1	**20.45%**	9
2	**47.73%**	21
3	**15.91%**	7
4	**13.64%**	6
5	**2.27%**	1
More than 5	**0.00%**	0
Total		**44**

Distressing themes arising from the feedback

Respondents were asked to describe the impact on them of being personally cross examined by the perpetrator both immediately at the time and afterwards. The responses we received makes for distressing reading. 115 respondents provided qualitative feedback about their experience of personal cross examination and 35 provided qualitative feedback on having to personally cross examine their former partner.

It is clear from the survey respondents feedback that they feel the family law system dismisses, minimises and ignores issues of domestic violence. The women felt they had no voice and their concerns about domestic violence and their children's safety were not heard, which further reinforces the political dissonance regarding keeping women and children safe.

Failure to intervene or recognize trauma

The system underestimates or disregards their symptoms of trauma and extreme levels of distress when it requires them to directly face their abuser in this way. The feedback clearly identifies the system is contributing to the negative mental health outcome for the survey respondents. Some respondents did not feel that the court system did enough to protect them. This supports WLSA arguments for more detailed legislation and decision-making steps concerning vulnerability of witnesses. Judges and lawyers in general are not trained in trauma responses or trauma symptoms.

> *Triggered panic attacks and fear like no other. The following trial day was so terrifying after that experience; I had a panic attack on the side of the road driving to court. I rang to inform them and they didn't care at all.*
>
> *Couldn't speak very well, frozen*
>
> *I feel he used the court to continue his abuse and manipulation of me and the court let him. Even looking at the judge, not wanting to answer his questions, my face pleading. The judge continued to allow him to do it, almost like I didn't matter or was making it up.*
>
> *The fear of cross examination also made me drop some criminal charges against him in the criminal court. In the family court proceedings I repeatedly requested that I appear by video link from a different room and this was not granted to me by any judge, magistrate or ICL.*
>
> *Really intimidating. The judge was hostile too – when he was telling me I was nothing but a liar, the judge did not stop him, just sat back in his chair and cross his arms. I have had trouble sleeping since, it was so unfair and still haunts me.*

Terrifying. I could not look at him. Judge later said in his submission that I hate the man cause I couldn't look at him. The man terrorized me for years and to this day is still making me paranoid that he will carry out his death threat.

I felt frozen, on the outside looking normal, on the inside like I was "bound and gagged". His tactic and lies were treated as 'truth' he had direct contact to all barristers and lawyers. I was 'silenced' I could not look at him.

….Magistrates that got cranky when I couldn't remember or answer with a yes or no answer. I was suffering post-traumatic stress that was never considered in court, even though he spent time in jail.

Suicidal

Of particular concern, three respondents spoke of being suicidal as a direct result of the personal cross examination, having their medication increased and described that functioning on a day to day basis post court was difficult. Many more respondents advised that as a result of the personal cross examination or in anticipation of it they had their post-traumatic stress symptoms triggered.

Impact of the cross examination

Many respondents spoke of their anxiety, depression and ongoing distress. Three respondents spoke about being physically ill before the court appearance, and during the process of the personal cross examination. One of the respondents was violently ill on the side of the road on the way to the court and this made her late for the court date and it was vacated. There were other serious impacts including a woman being medicated to even make it into the court room and admitted to a psychiatric hospital and another reported their disability was exacerbated by the stress. Women used words such as fear, anxiety, and depression, debilitating, worst nightmare, humiliating, degrading, horrific, horrendous, intimidating, bullied, defamed, belittled and unjust to describe their experience.

Physical effects including onset of [disability symptoms] post court; nausea; impacted my parenting capacity due to trauma of the event; trembling and loss of memory.

Immediately- very intimidated, I didn't want to make eye contact as he was being very hostile within his questioning, nervous, fear of what would happen next

Systems abuse

Many women identified the systems involvement in the abuse by allowing their abuser to cross examine them. They spoke about fighting not only their former partner but also the legal system. They reported being exhausted, emotional and for some the violence and abuse continues.

I felt that he had the 'privilege' to continue his intimidation and threats yet in a confined, legal space. It defeats the purpose of having the 'Safety Room' at court - my support person and I sit there to avoid seeing him yet we are 'thrown to the Wolves' when we enter the court room. It made me feel all the feelings all over again, it made me sick to my core.

Felt violated all over again

Absolutely broken, angry at our current justice system, scared

Horrific that he could use the tone of his voice put me down in the witness stand.

Absolutely paralyzing fear then anger. I felt assaulted all over again.

…..I was very scared at the time and angry later on because of the injustice and how the legal system helps abusers keep abusing their partner legally.

Horrible, it was just horrible. It felt like he was given a stick to beat me while everybody watched.

It still haunts me. It intimidated me and retraumatised me. It felt like I was going through it again and he had all the power and the courts allowed him to have the power and abuse me again..Made worse by a system that is supposed to protect me that actually allowed him to traumatise and have power over me again in court.

Quality of evidence was impacted

Some respondents spoke about that they were too frightened to give the evidence they wanted and were being controlled by him in the stand and this had impacted on the quality of the evidence received by the court.

I was a mess not only had I escaped this man but then I was questioned continuously by him in the stand. I felt intimidated and scared he was in control again. Something I had managed to get away from and now the courts allowed him to put me right back there in the abuse. Although the room was full of people all I saw was him. All I heard was him the way he looked at me. I knew exactly how he wanted me to answer or I was going to cop it. I suffer from PTSD and nightmares.

I knew he was going to cross examine me, and so I purposefully did not bring up the abuse I endured. I tried, but I couldn't. I was too scared of him cross examining me on that issue. He exerted so much control over me that I was too scared to raise it at all. As a result, he has once a week and alternate weekends with my child. He should not.

I played down everything; I still was controlled by him due to years of conditioning. Knowing the consequences if I had answered truthfully. The tone, the way he asked questions. There was so much more to everything than what everyone else heard. He walked out winning again. I had the kids but on his terms.

Horrifying. I felt vulnerable and emotional. He knew what buttons to push. I am so pleased the judge intervened. Maybe it was the terrifying look on me.

I could not talk at all. Too afraid

I became emotional, lost for words, unable to concentrate because I could feel his rage, feel as though I was back there with no power of me.

Physically unable to talk, overwhelmed by feelings of fear/stress/anxiety, hyperventilating, feeling like I was going to be sick, shaking, experiencing symptoms similar to a panic attack. Afterwards - nightmares, shaking, feeling like again he had control and was controlling me.

I felt under extreme pressure, I was very anxious and I was trembling whilst I was under cross examination. I thought it would never end. I felt that the judge was unaware of the extreme stress I was under; I made mistakes when I was being cross examined because I felt so cloudy and confused. I didn't think the judge protected me from some of his questions- I thought some of his questions were completely irrelevant and out of line.

Lack of safety in court precincts

Although the survey was about the issue of personal cross examination, some respondents did comment on the lack of safety in general in the court precinct.

I never got into the court room as my ex attacked me in the court waiting room. I was so terrified I could not come out of the toilet.

It is very traumatizing event whether the abuser represents himself or not. Just waiting around a court for up to 8 hours in the same vicinity, getting stared at, threatened via hand gestures and verbally. Generally when no one's in ear shot. Not all courts are set up to protect victims adequately. Country courts don't have the space or room to put victims in until their case is heard.

I have now been cross examined several times. Each time is terrifying. I remember feeling ill and constantly need the toilet. I was just so frightened…… The safety arrangements are poor at best, making it more nerve wracking. It is hard to give evidence when you are so scared. Afterwards I felt unsafe, not just when leaving the court building but months afterwards.

Wanting to be heard on issues of domestic violence and lack of perpetrator accountability

I am so glad you are asking these questions this process has been hell.

Lawyers lack sensitivity to the extent of family violence and its long term damaging emotional and psychological effect and not deemed to be applicable to the content of my affidavit nor protecting the child from exposure past present or in the future.

Still haven't reached a settlement or made any progress but continuously have to go over the deep and painful past and still have to prove I'm innocent and his threats to kill my child and myself are not empty threats. When will anyone take this seriously?

The system is broken and traumatic for dv survivors.

The whole process was incredibly disempowering and exhausting. I tried to raise my concerns about the domestic violence with the family court consultant but it wasn't until the ICL was able to identify and articulate what was happening for my child that the consultant finally relented and acknowledged what my ex-partner was doing.

I hope change is made to the whole system as it is traumatizing to say the least.

Bullied/ intimidated into agreement

Women reported being "bullied" into agreements.

I couldn't go back in that room and face him.

I was absolutely terrified that he could cross examine me…….He continued his abuse through this system, that's what they do and the criminal justice system is blind to it whilst helping to support it. An abusive dv perpetrator is STILL an abusive person even after you have left. The children are not safe because he is no longer living with you that does not make him an ok father because he is not living with you and abusing you anymore, it just involved the children more in the abuse as he uses them to relay it to the victim.

Some mixed responses – positive and negative

Four respondents did report experiencing some positive elements. These responses provide some evidence of WLSA's position that some victims/survivors of violence may not wish to use a legislative protection as they may tactically choose to allow the personal cross examination. However, their experience still revealed concerning impacts on their mental health and wellbeing.

Before the trial I was terrified. At times even suicidal. My ex-husband represented himself.. I was cross examined by him for many hours. It wasn't easy but to my surprise it wasn't as bad as I thought it would

be. For the first time I had a voice. He couldn't abuse or intimidate me in the court room so for the first time I was able to be heard. In a way it was closure for me.

While empowering in some ways, for example being able to maintain composure and respond in a considered and measured manner it felt like being publicly re-victimised and publicly humiliated as he was allowed by the judge or magistrate to make false statements and rant abusively at me during his questioning. It felt satisfying in some ways to see him humiliate himself by being publicly abusive and ranting it was humiliating for me as well. I continue to suffer from PTSD.

Terrifying, frightening stressful. And then empowering.

One was overwhelming positive.

It was fantastic. He was so bad at representing himself. I found it empowering being able to answer him in the safety of the court. A lawyer may have been more successful at being brutal towards me – many lawyers are as verbally brutal as their clients.

It also raises the issue of the way that victims of violence who have been traumatized by the experience can be spoken to aggressively in the court by judges and lawyers.

Aggressive cross examination by lawyers

My ex-partner's lawyer brutalized me in open court about a sexual assault that had occurred.

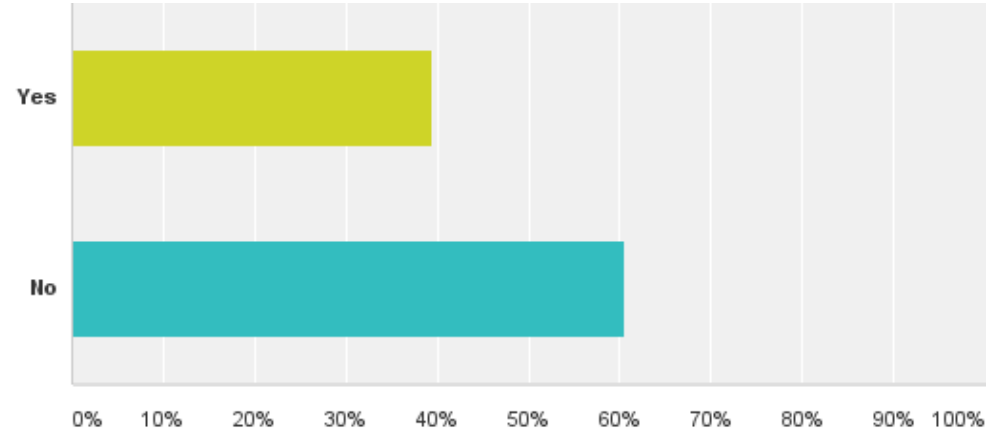
It is in the public interest that issues of sexual violence be considered, so that the victims/survivors are able to get appropriate treatment and support and that levels of risk can be properly assessed. Sexual violence is recognised as a key risk factor in lethality risk indicators which means it is directly relevant to a determination of the best interests of the child.

Women will not make disclosures of this nature if they receive this kind of treatment in the court.

This raises the question about how the cross examination should take place when the witness has suffered trauma and possible multiple episodes of trauma. Is aggressive questioning really getting to the truth of the matter? We would suggest given the levels of trauma in the family law system that specialised guidelines be developed to guide appropriate cross examination of victims/survivors of domestic violence and other vulnerable witnesses by lawyers.

Personal cross examination by the victim of the perpetrator of violence

Respondents were also asked if they personally cross-examined their abuser and nearly 40% advised that they did. They were asked about the impact this had on them. 32 provided qualitative answers to this.



Answer Choices	Responses	
Yes	**39.38%**	63
No	**60.62%**	97
Total		**160**

Impact on victim of cross examining their abuser

These are some examples of their responses. Similar to the impact on victims being cross examined themselves the respondents spoke about not bringing up the violence and therefore this impacting on the quality of the evidence, being completely incapable of undertaking the cross examination, triggering PTSD and panic attacks and impacts on their health.

Intimidating and hopeless unless you know how to ask questions in a legal manner you are stopped.

Anxiety. PTSD, panic attack.

It was nerve wracking and difficult.

It was also why I couldn't bring up the violence. I was humiliated.

Being in the same room was traumatic and he thought it was funny.

It almost made me physically ill to have to communicate with the individual under those circumstances, I will never get over having to live the history over and over again simply to have to ask the court to protect my child from a person who had threatened and continues to this day to threaten both myself and my child. .

As mentioned before I could not get words out. I was crying and could not articulate what I wanted to say. I felt like I was back in the midst of the domestic violence all over again, but this time with a witness. He swore at me and called me names and was not reprimanded……I did not feel safe or supported.

I was inept and my disability increased.

It destroyed me. My ex was sitting laughing with their lawyer in the court before it happened.

I didn't say what I intended to or wanted to.

I was too afraid to really question him and I felt when I tried the judge continually silenced me.

Unfortunately I had to cross examine but was so out of my depth I might as well have just given up. I suffered from the broad and expected range of weight and sleep loss and pure exhaustion as my restraining orders continued to fail me and I slept with one eye open for years.

Survey Analysis

This survey is evidence of the immediate need for legislative protection regarding vulnerable witnesses in family law from being directly cross examined/ or having to directly cross examine their abuser and the need for a wider range of protections for vulnerable witnesses more generally, when giving evidence. There is evidence that traumatised clients are let down by the family law system that they turn to for protection. Perhaps more distressing is that the system exacerbated and unwittingly involved itself in their ongoing abuse.

The survey is also evidence that direct cross examination of victims/survivors by abusers (not unsurprisingly) results in skewed evidence going before the court as some victims/survivors are controlled by the perpetrator in the court, and are too frightened to tell the truth about the violence and extent of the abuse. The inability of women to properly asked questions in their cross examination of their abuser also impacted on the quality of evidence before the court. This has a direct impact on the ability of the court to make decisions in the best interests of children.

An overall theme of the evidence in the survey was the severe psychological toll "court sanctioned" questioning of this nature had on victims/survivors of violence. Respondents described being suicidal, depressed, unable to function on a day to day basis, having ptsd triggered, their disability exacerbated, being admitted to a psychiatric hospital, feeling cloudy and confused during the process of cross examination, hyperventilating, having symptoms similar to a panic attack and unable to answer the questions. One has to wonder if some were also dissociating whilst in the witness stand. It can be described as nothing less than inhumane.

It seems clear that women are leaving the family law court system in a mentally unhealthier position than when they entered it. The links between mental health and domestic violence are well established in research and the family law system needs to respond urgently to the issue. The reality is that all legal systems probably need to respond to this including the domestic violence and child protection systems who are also dealing with large numbers of victims/ survivors of domestic violence.

Braaf and Barrett Meyering wrote the following in relation to the health system's response to domestic violence but it is equally applicable to the legal system.

> *Findings linking domestic violence and mental health raise important issues for service response. Firstly, health systems and practitioners need to be attuned to negative mental health impact of domestic violence for victims in order to assist them; that is, to address their psychological needs, as well as refer to specialised services to address their safety and other needs.* ***Secondly, health services and systems need to be mindful of increasing levels of harm for victims who may have experienced multiple exposures to violence (including child abuse, sexual violence outside of intimate relationships, experiences of war and partner violence).*** *There is a need for a public health focus on the prevention of intimate partner violence as a means of reducing population levels of mental disorder.* [6]

Recommendation 3:

> *That the Family Law Act be amended to include specific protections for victims of domestic violence to stop direct cross-examination by an abusive ex-partner and to put in place systems that also mean that domestic violence victims do not have to cross examine their ex-partners.*

[6] Braaf and Barrett Meyering (2013)

Recommendation 4:

That State domestic violence and child protection system legal systems consider similar protections to provide for a seamless court experience for victims of domestic violence.

Recommendation 5:

That the Evidence Act be amended to particularise and extrapolate all the options/ ways that vulnerable witnesses in family law can be protected whilst giving evidence. Eg. Video link, support people.

The evidence gathered by this survey revealed disturbing evidence of systems failure that is wider than just the issue of personal cross examination. WLSA believes there is an immediate need to commence work on redesign of the family law system. The family law system must be made safer and be more responsive to domestic violence and trauma. We will speak about this more fully in our section "Attributes of a domestic violence responsive court" below.

ADDRESSING THE GENDER-BIAS IN LEGAL AID FUNDING IS KEY TO ACHIEVING ACCESS TO JUSTICE FOR WOMEN

WLSA is aware that the Family Law Council does not have a brief to consider access to justice in its current reference. However, it is so fundamental to our clients' experience of the legal system that we cannot ignore it. Our clients need lawyers with expertise and knowledge about domestic violence and access to legal aid if they are going to achieve safe outcomes and effectively navigate their way through the legal system.

The AIFS evaluation of the 2012 family violence amendments found despite extensive legislative amendment of the Family Law Act in 2012 about family violence, the ultimate outcome for children and families is there seems to have been little change.

> *Overall, the evidence indicates that the 2012 family violence amendments have had a greater influence on identification and screening practices than they have had on patterns in parenting arrangements. Practice continues to evolve and it is likely that greater effects from the reforms will unfold over time.*[7]

Why is this the case? The system cannot just identify and screen for issues of violence (as important as this is) – there is a missing component /component/s.

One of these components, we believe is the ability of victims/survivors of violence to access justice. Legal change can be meaningless unless you can effectively access these safety provisions and appropriately argue for them in the court system. Inextricably linked to the idea of a fair trial is having access to legal representation. This in turn raises issues about access to legal aid.

Women are discriminated against in accessing grants of legal aid by virtue of their gender-specific legal needs and this can lead to unsafe outcomes and overall unfairness

Even in the arena of legal aid - an initiative designed to assist vulnerable and disadvantaged people to access justice, ingrained societal gender-bias still operates to prevent women from accessing justice and ensuring women and their children are safe from violence. One important example of this is the disparity of grants of legal aid between genders.

[7] Evaluation of the 2012 family violence amendments (2015) Australian Institute of Family Studies Executive Summary

The gender bias in grants of legal aid was first formally identified as a concern in the early 1990s and was raised early as an issue by one of our member services, Women's Legal Services Victoria. An issues paper published in 1994 by the Legal Aid and Family Services (LAFS) branch of the Attorney-General's department, *Gender Bias in Litigation Legal Aid*[8], found that women do not receive as much legal aid funding for litigation as men do. In 1992/3, 63% of national legal aid expenditure on litigation assistance was paid on behalf of men and the success rates for women's applications for aid were lower than men. LAFS found that "a female applicant has less chance of getting legal aid than a male applicant"[9]. The report made it clear that the disparity was a result of indirect discrimination against women. Eleven years later Legal Aid Queensland in their Gender Equity Report observed in the period 2003-2004, women received 35% of legal aid grants and had a higher percentage of refusals.[10]

It would seem not much has changed in the 20 years when this was first identified and the gap may be widening. When viewed as a whole, funding allocated to legal assistance services still favours criminal law matters.[11] This systematically disadvantages women, as men are more likely to be charged with an offence that could likely result in imprisonment and are therefore more likely than women to seek assistance in criminal law matters. For example, a recent study found 75% of the highest users of Legal Aid in NSW were men and all participants in the study had accessed criminal law services.[12] On the other hand, women are more likely to require assistance in relation to being a victim/survivor of domestic and family violence, particularly in the family law system and/or civil law system.

In the seminal work of Graycar and Morgan[13], the gender bias in legal aid funding was directly attributed to the impact of the High Court decision of *Dietrich and R (1992) 177 CLR 292* which upheld the need for legal representation in major criminal matters to ensure the right to a fair trial. As a result of Dietrich there was a skewing away of legal aid funding from family law and civil matters, such as discrimination and personal injuries damages claims for past abuse (issues that mainly impact on women) towards criminal law. Graycar and Morgan conclude:

"….*But the barriers of the type we have described above operate as a latter day form of civil death in that they prevent women from invoking the legal system to redress the harms they have suffered. In that sense, they create considerable obstacles to women's full enjoyment of citizenship, an essential aspect of which is access to the justice system."*[14]

The Productivity Commission in its recent report into *Access to Justice Arrangements*[15] made the recommendation to increase funding for civil legal assistance services by an additional $200 million. The recommendation indirectly gives support to the existence of gender bias by recommending that such funding *not be diverted to criminal legal assistance*.[16]

To be clear, WLSA supports the Productivity Commission's recommendation for additional and new monies for civil legal assistance (and that it not be re-distributed from current levels of criminal law funding) and that it be

[8]Office of Legal Aid and Family Services (OLAFS) *Gender Bias in Litigation Legal Aid* (Canberra) Commonwealth Attorney-General's Department 1994.

[9] Ibid p53

[10] Hunter R (Ed) 2008) "Rethinking Equality Projects in Law: Feminist Challenges, USA, p.92

[11] Productivity Commission, *Access to Justice Arrangements – Productivity Commission Draft Report,* April 2014 at 627.

[12] Cited in Productivity Commission (2014). *Access to Justice Arrangements – Productivity Commission Draft Report.*

[13] Regina Graycar and Jenny Morgan (1995) Disabling Citizenship: Civil Death for Women in the late 1990s 17 Adel LR 49-76 at p52

[14] Ibid p.76.

[15] Productivity Commission Inquiry Report, Overview No 72, 5th September 2014

[16] Recommendation 21.4

quarantined from re-distribution towards criminal law matters in the future.

Recommendation 6:

That the Family Law Council recongises that reforming the law and legal systems is only effective if victims of domestic violence and other vulnerable clients have access to the law.

GENDER-BIAS IN THE APPLICATION OF LEGAL AID COMMISSION FAMILY LAW FUNDING GUIDELINES ALSO RESULTS IN JUSTICE AND IMPACTS ON A FAIR TRIAL

Gender bias is also evident in the application of Legal Aid Commissions' family law policies and guidelines. For example, some legal assistance services have reported cases of legal aid grants being terminated if a party does not agree with the recommendations made by a family report writer who has been appointed to comment on the care, welfare and development of a child in a family law matter.[17] This is particularly concerning given that there are no universally applicable minimum standards or mandatory training for family report writers in relation to their knowledge and understanding of the nature and dynamics of family and domestic violence, which can impact on the conclusions they reach in their reports. This is despite issues of family and domestic violence and child abuse being so frequently raised in the family law system that they are referred to as 'the core business' of family law.[18]

Women's Legal Services have raised concern for approximately 15 years about gender bias in the interpretation of legal aid guidelines, to the disadvantage of women who have experienced family and domestic violence. A particular concern is the need for clients to establish a "substantial dispute" to be eligible for legal aid in family law matters. On the face of it, such a requirement seems reasonable because we all would want public monies expended on important and substantive rather than frivolous issues.

However, it is the way that this guideline is interpreted in practice that is particularly concerning for women who are trying to negotiate safe 'time with' arrangements for their children. It is not uncommon for women who are experiencing or have experienced family and domestic violence to feel guilty, bullied, exploited, or manipulated into arrangements for their children that are unsafe or expose themselves or their children to ongoing violence. For example, women can believe the law says the children should be shared 50:50 and enter into arrangements on this basis before obtaining legal advice. The need for formal 'living with' orders (custody orders) that clearly set out arrangements for children is an issue of safety for many women and children who experience violence. However, women who have experienced family and domestic violence can be ineligible from obtaining these orders. The reasoning is explained below.

> *"In practice, the guideline often works against women seeking to formalise their residence arrangements and establish a clear regime for contact. These women may be domestic violence survivors and want the safety of a residence order before providing contact, but this is not interpreted through the guidelines as a 'dispute about a substantial issue'. If the inability to obtain a residence order makes them reluctant to provide contact to the children's father, they may find themselves in a situation where he becomes eligible for legal aid because he can claim he is not having contact with his children."*[19]

[17] For example, Women's Legal Services Australia (WLSA), a national network of community legal centres specialising in women's legal issues in the *WLSA submission to the Productivity Commission's Access to Justice Inquiry*, 4 November 2013 at 18.

[18] Brown T, Fredrico M, Hewitt L, Sheehan R *Child Abuse and the Family Court*, Australian Institute of Criminology, Trends and Issues, No 91

[19] Rendell, K, Rathus, Z. and Lynch, for the Abuse Free Contact Group (2002) *An Unacceptable Risk: A Report on Child Contact Arrangements Where There Is Violence in the Family* (rev.ed), Brisbane, Women's Legal Service, at p.70.

Socially excluded women are not getting legal aid

Research by Hunter and De Simone draws on a study of applications for, and refusals of legal aid for family law, domestic violence and anti-discrimination matters by socially excluded women in Queensland. Their research found that 70% of the family law applications were refused on the basis of the Commonwealth guidelines. The most frequently used guidelines were those which stated that aid would not be granted when there was 'no substantial dispute' or 'no substantial dispute about residence'. [20]

The article goes on further to say that "*the guidelines and merit test were clearly open to interpretation, they could be used flexibly to deal with budgetary fluctuations, or what was colloquially known as 'turning the tap on and off'…..the 'benefit/ detriment clause' and especially the 'substantial dispute' clause would be interpreted strictly if money was tight and more generously if they were tracking under budget. The result of this practice was the creation of systemic inconsistencies and inequities in grants decision-making between grants offices over time"*[21]

The legal aid merit test is not a true test of the legal merit of a case

This research evidences WLSA's argument that the legal aid merit test is not a true and independent test of the legal merit of a case. The decision-making around funding a case on merit can be overly influenced by funding availability.

A recent example of the issue around substantial dispute and how it disadvantages victims/survivors of family and domestic violence involved a woman who was a victim of abuse from her former partner. He was charged with serious criminal offences after attacking her violently with a weapon in a public space in front of their children. She was hospitalised for some time as a result of the attack. He is currently in prison on remand for the offences and she made an application for legal aid for family court orders that would provide her with certainty around the living arrangements for the children. Legal aid was refused on the basis there was not a substantial dispute as her case was "too strong". She suffered post-traumatic stress after the incident and was very frightened about the upcoming court case in case he made an appearance, even via telephone/ video. Sometimes our clients are unable to even attempt to obtain protective family law orders – either their case is too weak and not substantial enough to warrant public expenditure or their legal case it too strong and this again precludes them from funding. Again, the issue of trauma has not been taken into account in the legal aid decision making process made in this example.

Urgent need for the development of a specific legal aid pathway for family law and victims/survivors of family and domestic violence to enhance justice

As this last case example illustrates, the position of WLSA is there is an urgent need for the development of a specific legal aid pathway for women in family law who have experienced family and domestic violence, with their own set of national funding guidelines that take into account the complex nature and dynamics of violence and abuse. As the Hunter research highlighted, socially excluded women are being refused legal aid funding. These national guidelines should be comprehensive but with a degree of flexibility and developed with professionals who have specific expertise in family and domestic violence.

Recommendation 7:

That the government address the systemic gender-bias in legal aid funding in Australia and implement the Productivity Commission recommendation for an increase in funding levels of at least $200 million for the legal assistance service provision in family law and other civil matters.

[20] Hunter, Rosemary and De Simone Tracey (2009) Women, Legal Aid and Social Inclusion, Australian Journal of Social Issues Vol 44 No. 4 Summer edition at p. 388

[21] Ibid p. 389

Recommendation 8:

That a specialised pathway in legal aid is developed for domestic violence matters in family law that appropriately takes into account the dynamics of violence and issues of trauma. That the pathway be developed with acknowledged domestic violence experts including WLSA.

CHILD AND ADULT DEATH REVIEWS

Most state child protection authorities have child death review teams that review the circumstances surrounding the deaths of children who have died who have had contact / interaction with the child protection system. These reviews are generally carried out by multi-disciplinary, independent, teams that consider the case from a systems response and whether there are lessons to be learnt about systemic change for the child protection system immediately and in the long term. These panels usually make annual reports about their recommendations to parliament.

It is clear that there is little difference between families involved in the child protection system and the family law system. However, there is no systemic response to the deaths of adults or children who have had involvement with the family law system. Sometimes these deaths may be considered by coronial inquests or domestic violence death reviews. The child protection system obviously has felt the need for internal scrutiny of its systems in addition to coronial inquests. Not all states and territories have a DV death review mechanism and there are inconsistencies about the cases that are reviewed and how across states and territories. There is also some level of confusion or inability about how state based death reviews effectively deal with federally based laws and agencies and courts and a more nuanced and specialised approach is therefore required.

WLSA believe urgent consideration needs to be given to this issue. Recommendations regarding reforms to the family law system could be made through currently existing state and territory domestic violence death review mechanisms. However, this is dependent upon the death review panels have the expertise to ask the right questions. Eg. lawyers with specialist in domestic violence and family law matters. These DV death review mechanisms can also take place sometime after the actual death because of coronial and criminal court proceedings. The more specialised reviews within child protection can take more quickly after the suspicious death and make interim findings to improve systems. It is essential that recommendations be independently monitored and evaluated and where recommendations are not implemented agencies, including federal agencies, provide reasons for this. If we do not address this issue we are missing opportunities for systemic change and improvement to the family law system.

Recommendation 9:

That the federal government immediately commence work on the best model that should be established to systemically analyse family child and adult deaths in the family law system (family law courts, FRCS, FDR Services) with the purpose of investigating deaths to make recommendations for immediate and long term systemic change and that such a team be multi-disciplinary, independent and accountable.

ATTRIBUTES OF A DOMESTIC VIOLENCE AND TRAUMA-RESPONSIVE COURT

We propose a systems redesign. This should be developed following standards of international best practice and in consultation with specialists in domestic violence and trauma who have expertise working with victims/survivors of violence (including WLSA representatives), men's behavior change programs and child and domestic violence experts.

That the redesign includes:

- That the safety of victims/survivors of violence and children be prioritised in the short and long term in all system's responses;

- That the court system overall become more client-centred, especially taking into account the number of self-represented litigants that use the court system.
- That an inquisitorial rather than adversarial approach be adopted.
- That guidelines be developed about the conduct of cross examination of cases involving domestic violence or where the witness has/ is likely to have experienced trauma.
- That prior to court, a specialised model of domestic violence informed FDR be developed and implemented (similar to the Coordinated Family Dispute Resolution Model) that offers an extra level of FDR assistance that is legally assisted to families where there was domestic violence and it is safe to proceed. That specialised domestic violence risk assessment is a part of the model. That clients would be excluded from the process at any time if the issues of safety and risk were too great and that they be directed to file proceedings in the court. That a new FDR certificate be developed called, for example, CFDR certificate that would alert the court that the matter is from CFDR and has been assessed as containing special issues of risk and safety. That these matters be directed into specialised case management and a specialised decision making pathway. That legal aid be available to clients in these circumstances. Risk is dynamic and changing and risk assessment has to be continuous.
- It needs to be recognised that for a range of reasons some victims/survivors of violence will not reveal the violence to professionals at the earliest opportunity. This should not be held against them or result in the minimising of such violence if they choose to reveal the violence at a later point in the system. A domestic violence responsive court must respond appropriately to domestic violence whenever it is disclosed.
- To increase safe responses and given domestic violence is core business in the family law courts, professionals within the system should start from a position that families are presenting with domestic violence until this is proved otherwise. .
- Specialised FDR be developed for Aboriginal and Torres Strait Islander families.
- Early domestic violence risk assessment and ongoing risk assessment in the court by suitably qualified personnel;
- That women and children be able to be referred to domestic violence specific therapeutic assistance to assist their recovery and that this may mean an abeyance in contact arrangements with the perpetrator during this time of recovery.
- That the court has access to domestic violence specific programs for perpetrators of violence who will be/ are having contact with their children.
- That one judge be appointed to each matter so as to provide consistent decision-making in the case;
- Early decision-making about the existence of domestic violence and referral into a specialised pathway if it is present, with the awareness and understanding that for a range of factors victims/survivors may not always disclose violence early in proceedings and that a domestic violence responsive court responds appropriately to domestic violence whenever it is disclosed.
- That these cases be closely monitored for systems abuse and steps be taken to address this if it arises.
- That vulnerable witness protection for victims/survivors of domestic violence in family law proceedings be legislated and specific provisions about protecting all vulnerable witnesses in family law be introduced.
- That a specialised legal aid pathway be developed within legal aid in family law and child protection matters that provides for funding for victims/survivors of violence in these courts. These guidelines are developed with experts in domestic violence and recognise the nature and dynamics of violence and that some actions of victims/survivors of violence can be counter intuitive. (eg. Some victims of violence may return to their abuser despite their fear because they are concerned about their children having unsupervised contact with him).
- That the family law court system incorporates court assistance services, violence support services and mens' specialists who work from a victim's /survivor's perspective and follow international best practice in relation to their work with perpetrators.

- That no contact orders be a feasible option and that there be no legal repercussions on victims/survivors as these are viewed as a protective action.
- That the Family Courts join and be active in local coordinated community responses to domestic violence
- That all court personnel, legal practitioners and judges obtain ongoing training in the nature and dynamics of domestic violence from acknowledged experts in domestic violence.
- That speciliased domestic violence reports be used in the court.
- That the presumption of equal shared parental responsibility be removed and emphasis on shared parenting be removed from the legislation.

WLSA notes that Women's Legal Services NSW (WLS NSW) is developing an Issues Paper through a NSW Law and Justice Foundation Grant to encourage discussion about confidentiality in family law proceedings through a family violence lens. The idea is to highlight the competing interests and positions about how sensitive material can be put before the family law courts. Competing interests include the public interest of ensuring relevant evidence related to the best interests of the child is put before the court versus the public interest in preserving confidentiality and the therapeutic relationship. In making decisions about producing documents, WLS NSW proposes decisions be made through a family violence lens and in considering best available evidence, alternative sources of evidence to therapeutic records be sought first. The benefits of closer scrutiny of subpoena requests will also be canvassed in the Issues Paper. This is also relevant in a discussion about a domestic violence responsive court.

Recommendation 10:

That the family law system undergo significant redesign to make it more responsive to domestic violence issues and issues involving trauma

Specialised case worker for complex families

WLSA believe a specialised case worker for complex families as referred to in Part 7 of the discussion paper in family law proceedings could work well and make a real difference. We would advocate that such a worker would be a good fit within the current holistic service provision practiced by Women's Legal Services.

Recommendation 11:

That specialised case workers for complex families could be situated within Women's Legal Services.

Thank you for the opportunity to a give a voice to women and children escaping violence.