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Co-Chairs
Embolden Executive Committee
31 Jan 2020

Joint Select Committee on Australia's Family Law System
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Parliament House
Canberra ACT 2600
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Dear Joint Select Committee,

Re: Submission on Australia's Family Law System

Thank you for the opportunity to provide this submission to the Joint Select Committee's Inquiry into Australia's Family Law System.

Embolden is the statewide peak body for domestic, family and sexual violence services in South Australia, representing 28 organisations from metro, regional and rural South Australia.

This submission refers to the following Terms of Reference for this Inquiry:

- a.) Information sharing
- b.) Evidence of domestic and family violence in family law courts
- c.) Reforms in the family law system
- f.) Impact of family law proceedings
- g.) Grandparents as carers
- j.) Pre-nuptial agreements

Embolden would like to indicate our availability to appear before the Committee hearings.

Yours sincerely,

Susie Smith and Belinda Halliday
Embolden Co-Chairs

**EMBOLDEN INC: SUBMISSION
TO JOINT SELECT COMMITTEE
ON AUSTRALIA'S FAMILY LAW
SYSTEM**

31 JAN 2020

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About Embolden

Embolden is the statewide peak body of non-government organisations working to respond to and eliminate domestic, family and sexual violence in South Australia.

Our members provide services that promote women and their children's safety and wellbeing, and work to prevent and respond to violence against women.

We lobby and advocate for women's rights to respect, safety and self determination, and represent providers of specialist services in the domestic, family and sexual violence and related sectors, including services that work with men who use violence against women and Aboriginal specialist services.

About this Submission

This submission has been prepared by Embolden with consultation and input from our members and key stakeholders, including women with children who have lived experience with both domestic and family violence, and family law proceedings.

It is submitted on behalf of our member organisations, including:

Bramwell House
Ceduna Regional Domestic Violence and Aboriginal Family Violence Services
Coober Pedy Regional DV & Aboriginal Family Violence Service
Cross Border/APY Lands Aboriginal Family Violence Service
Domestic Violence Crisis Line
Eastern Adelaide DV Service
Fleurieu and KI DV Service
Homelessness Gateway Service
Integrated Programs
Kornar Winmil Yunti Aboriginal Cooperation
Limestone Coast Domestic Violence Service
Louise Place
Migrant Women's Support Program
Murray Mallee and Adelaide Hills DV Service
Ninko Kurtangga Patpangga
Northern Adelaide DV Service
Nunga Mi:Minar
Port Augusta Regional DV & Aboriginal Family Violence Service
Relationships Australia (SA)

Riverland DV Service
Southern Adelaide DV Service
Victim Support Service
Vinnie's Women's Crisis Centre
Western Adelaide DV Service
Whyalla Regional Domestic Violence Service
Yarredi Services
Yorke and Mid North Domestic Violence Service
Zahra Foundation Australia

We also wish to highlight the significant work done by organisations such as the Australian Women's Alliance Against Violence, Our Watch, the Law Council of Australia and the Australian Human Rights Commission (amongst others) in documenting their submissions to this Joint Select Committee. We particularly urge the Committee to refer to these submissions and recommendations alongside previous inquiries and reports such as:

- Australian Law Reform Commission 2019, '[Family law for the future – An inquiry into the Family Law system](#)'¹
- Law Council of Australia 2018, '[The Justice Project Part I: People who Experience Family Violence](#)'²
- House of Representatives Standing Committee on Social Policy and Legal Affairs 2017, '[A better family law system to support and protect those affected by family violence: Recommendations for an accessible, equitable and responsive family law system which better prioritises safety of those affected by family violence](#)'³
- Family Law Council 2016, '[Final Report on Families with Complex Needs and the Intersection of Family Law and Child Protection](#)'⁴
- Family Law Council 2015, '[Interim Report on Families with Complex Needs and the Intersection of Family Law and Child Protection](#)'⁵
- Victorian Royal Commission 2016, '[Family Violence Report](#)'⁶
- Australian Institute of Family Studies 2015 '[Evaluation of the 2012 Family Law Act amendments](#)'⁷

¹ Available online at: <https://www.alrc.gov.au/publication/family-law-report/>

² Available online at: <https://www.lawcouncil.asn.au/justice-project/final-report>

³ Available online at:

https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Report

⁴ Available online at:

<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Families-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems%E2%80%93Interim-Report-Terms-1-and-2.pdf>

⁵ Available online at:

<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Families-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems%E2%80%93Interim-Report-Terms-1-and-2.pdf>

⁶ Available online at: <http://files.rcfv.com.au/Reports/Final/RCFV-All-Volumes.pdf>

- Federal Senate Finance and Public Administration References Committee inquiry report 2015, '[Domestic violence in Australia](#)'⁸
- Productivity Commission 2014, '[Access to Justice Arrangements Inquiry Report](#)'⁹
- Joint report of the Australian Law Reform Commission and NSW Law Reform Commission 2010, '[Family Violence – A National Legal Response](#)'¹⁰
- Professor Richard Chisholm 2009, '[Family Courts Violence Review](#)'¹¹
- Family Law Council 2009, '[Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues](#)'¹²

Our principle position remains that urgent reforms (identified in AWAVA's [Joint Statement](#), to which we are a signatory) are required of the family law system in Australia to make it safe for those with lived experience of family violence. These include:

1. Making sure courts identify safety risks that should be considered in any court decision, by implementing consistent screening and risk assessment processes to protect children and parents at risk of violence;
2. Ensuring the courts have access to all relevant information by establishing a national information sharing framework to ensure information from state jurisdictions can be considered where relevant, and the courts are supported to make informed decisions that prioritise child safety and wellbeing;
3. Ensuring victim-survivors of family violence are supported and don't have to go through the court process alone – by providing social and legal supports for all parties to family law matters involving family violence or child abuse;
4. Prioritising matters where people are at high-risk by creating a specialist case management stream for family violence matters involving children and parents at serious risk of harm, and

⁷ Available online at: <https://aifs.gov.au/publications/evaluation-2012-family-violence-amendments>

⁸ Available online at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Domestic_Violence/Report

⁹ Available online at: <http://www.pc.gov.au/inquiries/completed/access-justice/report>

¹⁰ Available online at: <https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/>

¹¹ Available online at:

<https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Documents/Family%20Courts%20Violence%20Review.doc>

¹² Available online at:

<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20responses%20to%20family%20violence.pdf>

5. Requiring those who influence court proceedings to have competency in identifying and responding to domestic and family violence in diverse family contexts – by implementing an accreditation framework for all court officials and family law practitioners and professionals, starting with court report writers and supervised contact centre workers.

About Violence Against Women and Their Children and Family Law in Australia

As the Federal Circuit Court itself acknowledges in its *Family Violence Plan*, domestic and family violence is widespread in Australia, affecting the physical, psychological and emotional wellbeing of both adults and children who experience and live in fear of it¹³. We know, from the extensive research and data collection from key bodies such as the Australian Bureau of Statistics and the Australian National Research Organisation for Women's Safety, that domestic and family violence is a gendered crime. While such violence is a serious denial of human rights that can happen in any relationship where one person exerts coercive control and abuse against another or others, the vast majority of such violence is perpetrated against women and children, most often by men¹⁴, and intimate partner violence is the leading preventable contributor to death, disability and illness in women aged 15-44¹⁵

This human rights violation is rightly recognised as an epidemic that affects the breadth and depth of our communities, not limited to certain socioeconomic classes or cultural backgrounds. It affects every strata of Australian society; however the evidence is clear that certain women and children are particularly vulnerable to experiencing gendered violence, while at the same time facing systemic barriers to accessing services, support and just outcomes. For example, Aboriginal and Torres Strait Islander women are between 34 and 80 times more likely to experience DFV than non-Indigenous women¹⁶, and 32 times more likely to be hospitalised as a result of experiencing this violence¹⁷. Women with disabilities experience additional

¹³ Family Court of Australia and Federal Circuit Court of Australia 2019, '*Family Violence Plan*', accessed from <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/publications/family-law/fv-plan>

¹⁴ ABS, Crime victimisation, Australia, 2012–13 cat no 4530.0 December 2014, accessed at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4530.0main+features100022012-13>

¹⁵ ¹⁵ Webster, K 2016, '*A preventable burden: Measuring and addressing the prevalence and health impacts of intimate partner violence in Australian women*', ANROWS Compass, 07/2016, accessed from <https://d2rn9gno7zhxqg.cloudfront.net/wp-content/uploads/2019/01/19025309/28-10-16-BOD-Compass.pdf>

¹⁶ Available on at <https://theconversation.com/factcheck-ganda-are-indigenous-women-34-80-times-more-likely-than-average-to-experience-violence-61809>

¹⁷ Ibid

violence because of their disabilities and encounter more barriers to protection and justice, being 40% more likely to experience domestic violence than those without disability¹⁸, and experiencing sexual victimisation at rates from four to ten times higher than for other women¹⁹. While there is limited data available on the experiences of culturally and linguistically diverse women facing violence, we do know that they face additional barriers to safety, including immigration risks (compounded for those on temporary visas experiencing violence), lack of financial support, language barriers and isolation, among other factors²⁰. Similarly, those who identify as LGBTIQ+ face additional barriers in seeking safety from domestic and family violence that are distinct from those of other victim-survivors²¹.

Such prevalence is even more pronounced in the family court landscape, with over three quarters of cases before the family court involving allegations of family violence, according to a recent analysis²². This finding is congruent with the evidence that separation and/or attempts to leave the abusive relationship are strongly linked to persistence and escalation of violence experienced by women (not found to be experienced by male victims)²³.

The evidence also shows that children and adolescents exposed to domestic violence face higher risks of being exposed to emotional, physical and sexual abuse with long-lasting impacts on their wellbeing. However, a strong relationship with and attachment to a caring adult, usually the mother, is a significant protective factor that may mitigate against these impacts²⁴.

With this understanding, we simply cannot overstate the necessity of a family law reform agenda that places children and women's safety at its core. It is also imperative that gender and intersectional lenses are applied to truly

¹⁸ Brownridge, D 2006, 'Partner violence against women with disabilities: Prevalence, risks and explanations', *Violence against Women*, vol. 12, no. 9, pp. 805–22

¹⁹ Dowse, L., Soldatic, K., Didi, A., Frohmader, C. and van Toorn, G. 2013, 'Stop the Violence: Addressing Violence Against Women and Girls with Disabilities in Australia. Background Paper', Hobart: Women with Disabilities Australia

²⁰ Dimopoulos, M. & Assifiri, H, 2004, 'Pathologising NESB women and the construction of the "cultural defence"', Point of Contact Book 9 Working with Diversity, Partnerships Against Domestic Violence, Commonwealth of Australia, Canberra

²¹ See: Safe Steps Family Violence Response Centre and No To Violence 2015, 'Joint submission into the Royal Commission into Family Violence: Family Violence and LGBTIQ Communities'; Drummond Street Services and the Victorian AIDS Council (2015) 'Joint submission into the Royal Commission into Family Violence: Family Violence and LGBTIQ Communities'; State of Victoria, 'Royal Commission into Family Violence: Summary and recommendations', Parl Paper No 132 (2014–16).

²² Harmon, J 2017, 'The prevalence of family violence in proceedings before the Federal Circuit Court of Australia', *Family Law Review*, 7, 3–19, accessed from <http://sites.thomsonreuters.com.au/journals/2017/04/06/family-law-review-update-vol-7-pt-1/>

²³ Bagshaw, D, Brown, T, Wendt, S, Campbell, A, et al. 2010, 'Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families Who Separated Post-1995 and Post-2006', Attorney-General's Department, Canberra

²⁴ Holt, S, Buckley, H & Whelan, S 2008, 'The impact of exposure to domestic violence on children and young people: A review of the literature', *Child Abuse & Neglect*, 32, 797–810

understand the complexities faced by families and ensure that appropriate, specialised services and support are made available – a ‘one-size-fits-all’ model simply will not do. We again reiterate our support for the 5 steps recommended by Women’s Legal Services Australia in their ‘*Safety first in family law*’ plan, namely:

1. Strengthen family violence response in the family law system
2. Provide effective legal help for the most disadvantaged
3. Ensure family law professionals have real understandings of family violence
4. Increase access to safe dispute resolution models
5. Overcome the gaps between the family law, family violence and child protection systems²⁵

Despite the evidence-supported prevalence of domestic and family violence as outlined above, and the devastating impacts on the Australian children and adults who it affects, many alarming myths and misconceptions are commonly held by those in the family court system and the wider community²⁶. Some of these myths and misconceptions pose a real danger to victim-survivors and their children as they seek to minimise the effects of family violence²⁷. Others seek to cast perpetrators as victims, and/or portray survivors as perpetrators, often co-opting the language and frameworks of evidence-based, anti-domestic violence theories in the process.

For example, members of this Joint Select Committee may come across the term ‘parental alienation’ many times in the course of reading these submissions, and in the context of current discourse around family law reform. Those who would seek to punish, silence or discredit survivors of abuse frequently use allegations of mothers ‘alienating’ children from their fathers as a tactic²⁸. Understanding this to be the case through our members’ work with victim-survivors as they navigate the family law system in the context of experiencing and/or escaping domestic and family violence, we wish to draw the Committee’s attention to the fact that in the thirty years since the concept of ‘parental alienation syndrome’ (PAS, also known as parental alienation (PA)) was introduced, there remains no credible evidence

²⁵ Women’s Legal Services Australia 2019, ‘*Safety first in family law*’, accessed from http://www.wlsa.org.au/uploads/campaign-resources/Safety_First_in_Family_Law_Plan.pdf

²⁶ Hunter, R. 2006, ‘*Narratives of domestic violence*’, *Sydney Law Review*, 28, 733, accessed from https://research-repository.griffith.edu.au/bitstream/handle/10072/58925/46778_1.pdf%3Bsequence=1

²⁷ Peters, J 2008, ‘*Measuring Myths about Domestic Violence: Development and Initial Validation of the Domestic Violence Myth Acceptance Scale*’, *Journal of Aggression, Maltreatment and Trauma*, 16 (1), 1-21

²⁸ Laing, L. 2017, ‘*Secondary victimization: Domestic violence survivors navigating the family law system*’, *Violence Against Women*, 23(11), 1314-1335. doi:10.1177/1077801216659942

supporting this theory²⁹. Further, given the absence of scientific data to support the concept, and the alarming propensity by its author, Dr Richard Gardner, to dismiss and diminish the deleterious effects of child sexual abuse³⁰, we ask the Committee to critically examine submissions which rely on claims of parental alienation to support their thesis, and robustly question who may benefit from such claims being accepted and adopted into the mainstream discourse around family law reform.

Distinct from 'parental alienation' as described above however, is *maternal* alienation, a term that may be used to describe the sabotage of the mother-child bond by an abusive partner³¹. This subset of an authoritative/aggressive parenting style is a deliberate attempt by an abusive parent (most commonly the father) to bring about a child's rejection of the non-abusive parent³² as an intersecting form of emotional violence.

Another misconception that will become familiar, if not so already, is that mothers frequently misuse domestic violence orders (DVOs, or family violence intervention orders (FVIOs)) as a tactic to 'win custody battles' and punish innocent men. This Committee will hear, from those who stand to benefit from perpetuating such a stereotype, that DVOs are easily and fraudulently obtained by cruel and capricious women, aided by Police and supported through the court system. There is little objective evidence to support such a claim; however, misuse of courts systems and processes by perpetrators of domestic and family violence, most frequently men, have been consistently identified as a pattern of systems abuse^{33 34 35 36} causing additional trauma, harm and hardship to victim-survivors of domestic and family violence involved in family law proceedings.

Further, yet another myth given credence by those who prioritise 'equal parenting rights' over the safety of women and children, is the claim that '21 fathers a week' commit suicide as a result of family court proceedings. Even

²⁹ O'Donohue, W, Benuto, L. T, Bennett, N 2016, 'Examining the validity of parental alienation syndrome', *Journal of Child Custody*, 13 (2-3), 113-125

³⁰ Gardner, R.A 1991, 'Sex Abuse Hysteria: Salem Witch Trials Revisited' Cresskill, NJ: Creative Therapeutics

³¹ Drzod, L.M & Olesen, N.W 2004, 'Is it Abuse, Alienation or Estrangement? A Decision Tree', *Journal of Child Custody* 1 (3)

³² Johnston, J. R., Gans Walters, M., & Olesen, N. W. 2004, 'Is it alienating parenting, role reversal or child abuse? An empirical study of children's rejection of a parent in child custody disputes', *Journal of Emotional Abuse*

³³ Australian Law Reform Commission and New South Wales Law Reform Commission 2010, 'Family Violence – A National Legal Response', Report 114

³⁴ Cameron, P 2014, 'Relationship Problems and Money: Women Talk about Financial Abuse', Research Report, *Wire Women's Information*

³⁵ Kaspiew, R., Horsfall, B., Qu, L., Nicholson, J. M., Humphreys, C., Diemer, K. & Dunstan, J. 2017, 'Domestic and family violence and parenting: Mixed method insights into impact and support needs: Final report', ANROWS Horizons 04/2017, Sydney: ANROWS

³⁶ Douglas, H 2018, 'Legal Systems Abuse and Coercive Control', *Criminology & Criminal Justice* 18(1), 84-99

setting aside the fact that this is statistically unverified³⁷, we submit to the Committee's consideration that, far from the Family Court driving fathers to suicide because of family law systems and practices biased against men, the evidence instead suggests that domestic violence perpetrators are further enabled to inflict violence through shared parenting arrangements which afford them continued access to their children, even when they have previously perpetrated violence against their children and current or ex-partners³⁸

We support former Australian of the Year Rosie Batty's endorsement of Women's Legal Services Australia's five-step plan for family law reform, *Safety First in Family Law* (outlined above), and reiterate her call for urgent reform based on research, evidence and key recommendations from previous family law inquiries³⁹. Strengthening the power of the Family Court to keep victim-survivors of domestic violence and their children safe must be a central concern for any review or reform of this system, as has been reiterated in the recommendations of WLSA, ALRC, AWAVA and others as previously identified.

³⁷ <https://theconversation.com/factcheck-are-up-to-21-fathers-dying-by-suicide-every-week-87308>

³⁸ Brown, T, Bricknell, S, Bryant, W, Lyneham, S, Tyson, D, Fernandez Arias, P 2019, 'Filicide Offenders', Trends & Issues in Crime & Criminal Justice 568, Australian Institute of Criminology, accessed from <https://www.aic.gov.au/file/6680/download?token=mJ8WcNKY>

³⁹

http://www.wlsa.org.au/media_releases/rosie_batty_urges_government_to_adopt_new_reform_plan_-_23_october_2019

Summary of Recommendations

Embolden recommends that the Australian Government:

Information Sharing

1. Develop an effective information sharing mechanism across child protection, domestic violence and family law systems, which:
 - a.) Prioritises the safety of children,
 - b.) Appropriately acknowledges and mitigates risks associated with domestic violence and apprehended violence orders,
 - c.) Upholds the dignity, privacy and safety needs of those experiencing and/or escaping domestic violence while engaging in family law and child protection proceedings, and
 - d.) Is upheld by principles of cultural safety and appropriateness, particularly in relation to Aboriginal and Torres Strait Islander family violence victim-survivors who come into contact with the child protection and family court system

Evidence of Domestic and Family Violence in Family Law Courts

2. In accordance with the final ALRC report, include the 'use of systems or processes to cause harm, distress or financial loss' in the definition of family violence⁴⁰
3. Provide specialist training to family law practitioners and professionals to recognise and prevent systems abuse through the family court and related systems, and hold perpetrators to account
4. Develop specialist training for domestic and family violence specialist workers to support and/or provide evidence in family court processes, in collaboration with domestic and family violence service delivery staff

Reforms in the family law system

5. Maintain separation of the Family Law Court and the Federal Circuit Court

⁴⁰ Australian Law Reform Commission 2019, '[Family law for the future – An inquiry into the Family Law system](#)'

6. Engage with specialist women's safety services to develop and implement effective ongoing court based family violence risk assessment practices, including training family court staff, judiciary and related practitioners
7. Adopt a 'safety first' framework, in which the safety and rights of children and adult victim-survivors of domestic and family violence are prioritized above equal shared parenting rights/responsibilities
8. Actively increase the family law system's capacity for cultural appropriateness, diversity and inclusion through recruitment and governance practices

Impact of family law proceedings

9. Implement the 5th recommendation of the 2019 ALRC report
10. Implement the reform plan laid out by Women's Legal Services Australia's 'Safety First in Family Law' policy platform⁴¹

Grandparents as carers

11. Implement safety mechanisms and risk assessments in cases where grandparents or other family members are to act as carers
12. Give consideration to differing family structures in consultation with culturally appropriate service providers, including Aboriginal and Torres Strait Islander organisations with specialised Family Violence practitioners

Pre-nuptial agreements

13. We recommend that the Family Law Act be amended to specifically set aside provision for circumstances in which family violence (including coercion and financial abuse) has occurred, to help prevent Binding Financial Agreements from being used to perpetrate further violence and abuse

⁴¹ Women's Legal Services Australia 2019, 'Safety first in family law', accessed from http://www.wlsa.org.au/uploads/campaign-resources/Safety_First_in_Family_Law_Plan.pdf

14. We also recommend that family court staff be trained in recognising the signs of financial abuse; its use by perpetrators to inflict further systems abuse upon their victims; and the devastating, long-lasting impacts it wreaks on families affected by abuse

Response to Terms of Reference

Information Sharing

- a.) *ongoing issues and further improvements relating to the interaction and information sharing between the family law system and state and territory child protection systems, and family and domestic violence jurisdictions, including:*
- i. *the process, and evidential and legal standards and onuses of proof, in relation to the granting of domestic violence orders and apprehended violence orders, and*
 - ii. *the visibility of, and consideration given to, domestic violence orders and apprehended violence orders in family law proceedings;*

There is much room for improvement within existing information sharing processes and practices between the family law and child protection systems to improve outcomes for those whose safety has been compromised due to domestic and family violence, and we welcome the opportunity provided by this Inquiry to set out recommendations for doing so. In particular, we draw the Committee's attention to existing recommendations provided by Women's Legal Services Australia as part of their 'Safety first in family law' plan, specifically Step 5, which seeks to 'overcome the gaps between the family law, family violence and child protection systems' by:

"The Australian Government, and state and territory governments, [developing] an appropriate framework that crosses over the family law system and other federal, state and territory systems, including family support services and the family violence and child protection systems"⁴²

This recommendation seeks to provide a seamless engagement framework from the point of view of family law, family violence and child protection system users. By ensuring that the Family Court routinely and appropriately takes into account domestic orders and apprehended violence orders, such a framework may conceivably save children's lives – a recent Australian Institute of Criminology study found that 43% of male filicide offenders were recorded by Police as having a history of domestic violence offending,

⁴² Women's Legal Services Australia 2019, 'Safety first in family law', accessed from http://www.wlsa.org.au/uploads/campaign-resources/Safety_First_in_Family_Law_Plan.pdf

including being issued with domestic violence orders⁴³ (16% for women filicide offenders).

At the same time, information sharing between federal and state jurisdictions must include safety mechanisms that uphold the privacy and safety of family court service users, including prohibiting perpetrators from accessing information about women and children affected by violence, and ensuring that victim-survivors' consent is obtained before their information may be shared.

Recommendations:

We recommend that the Australian Government:

1. Develop an effective information sharing mechanism across child protection, domestic violence and family law systems, which:
 - a.) Prioritises the safety of children,
 - b.) Appropriately acknowledges and mitigates risks associated with domestic violence and apprehended violence orders,
 - c.) Upholds the dignity, privacy and safety needs of those experiencing and/or escaping domestic violence while engaging in family law and child protection proceedings, and
 - d.) Is upheld by principles of cultural safety and appropriateness, particularly in relation to Aboriginal and Torres Strait Islander family violence victim-survivors who come into contact with the child protection and family court system

⁴³ Brown T *et al* 2019. *Filicide offenders*. Trends & issues in crime and criminal justice no. 568. Canberra: Australian Institute of Criminology, accessed from <https://aic.gov.au/publications/tandi/tandi568>

Evidence of Domestic and Family Violence in Family Law Courts

b.) the appropriateness of family court powers to ensure parties in family law proceedings provide truthful and complete evidence, and the ability of the court to make orders for non-compliance and the efficacy of the enforcement of such orders;

“It took a massive toll on my emotional and physical wellbeing as I received constant affidavits stating all sorts of terrifying statements almost on a weekly basis such as me being a drug addict and incapable mother.

The list goes on and all of it was untrue...

I really was dumbfounded that the court would allow someone to lie and get away with it as I provided honest, evidence based statements and followed my lawyer’s instructions.

How could someone be allowed to do this?” – Jo’s story⁴⁴

Domestic and family violence is a factor in around 75% of cases before the Family Court⁴⁵, however this prevalence is not currently reflected in safety considerations and other routine practices, as experienced by our members’ clients and as told to us by survivors in relation to their experiences of domestic violence and the family law system. However, the National Domestic and Family Violence Bench book lays out a number of commonsense guidelines and recommendations, including the Family Violence Best Practice Principles⁴⁶. These Principles are a set of voluntary guidelines that family law judiciary are unfettered by, and the experience of our members’ and their clients would suggest that these best practice principles are not, in fact, as widespread as one would hope in their application in the family law system. This is consistent with

⁴⁴ Jo’s story, as it appears here and throughout this document, is of a victim-survivor of domestic violence, as provided directly to Embolden. All names have been changed and some details de-identified to protect the anonymity of those concerned

⁴⁵ Harmon, J 2017, ‘The prevalence of family violence in proceedings before the Federal Circuit Court of Australia’, Family Law Review, 7, 3-19, accessed from <http://sites.thomsonreuters.com.au/journals/2017/04/06/family-law-review-update-vol-7-pt-1/>

⁴⁶ Federal Circuit Court of Australia 2016, ‘Family Violence Best Practice Principles’, accessed from <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/publications/family-law/family-violence-best-practice-principles>

Laing's study that found 63% of women surveyed experienced secondary victimisation within the family law system⁴⁹. As with society more broadly, women continue to experience disbelief about their experiences, and/or victim blaming about the gender-based violence they have experienced⁵⁰. However, as with other forms of gender-based violence, false allegations of DFV are extremely low⁵¹

Evidence describes, however, a pattern of systems abuse by perpetrators who may use family law proceedings to further their violence. This includes exploiting the intersection between family law, child protection and criminal legal systems to their advantage, raising counter-allegations and unjustifiable applications in family law or personal protection orders; manipulative engagement with family law services, non-compliance with court orders and exhausting women's legal and financial resources⁵²

Perpetrators also often engage in deceitful behaviours in the course of their violence, which in the context of family law disputes can present in the form of perpetrators falsifying and/or withholding income and other financial information in order to minimize their settlement, maintenance or child support obligations, therefore increasing the adverse financial impact on their victims⁵³

It is the view of this submission that mechanisms should be put in place by which:

- Perpetrators will be held to account and prevented from enacting systems abuse against their victims, and
- Specialist training is provided to family law practitioners and related professionals (including specialist family violence service providers)

⁴⁹ Laing, L. 2017, 'Secondary victimization: Domestic violence survivors navigating the family law system', *Violence Against Women*, 23(11), 1314–1335. Doi:10.1177/1077801216659942

⁵⁰ Ting, I, Scott, N & Palmer, A 2020, 'Rough justice: How police are failing survivors of sexual assault', ABC News, Digital Story Innovation Team, accessed from <https://www.abc.net.au/news/2020-01-28/how-police-are-failing-survivors-of-sexual-assault/11871364>

⁵¹ Joint report to the Director of Public Prosecutions by Alison Levitt QC, Principal Legal Advisor, and the Crown Prosecution Service Equality and Diversity Unit 2013, 'Charging perverting the course of justice and wasting police time in cases involving allegedly false rape and domestic violence allegations', accessed from <https://www.cps.gov.uk/sites/default/files/documents/publications/Under-the-spotlight-perverting-the-course-of-justice-report-March-2013.pdf>

⁵² Kaspiew, R., Horsfall, B., Qu, L., Nicholson, J. M., Humphreys, C., Diemer, K. & Dunstan, J. 2017, 'Domestic and family violence and parenting: Mixed method insights into impact and support needs: Final report', ANROWS Horizons 04/2017, Sydney: ANROWS

⁵³ Women's Legal Services Australia 2014, 'Submission to House of Representatives Standing Committee on Social Policy and Legal Affairs on Child Support' p 12, accessed from http://www.wlsa.org.au/uploads/submission-resources/WLSA_Child_Support_Submission.pdf

to ensure that perpetrators aren't engaging in vexatious litigation and false claims, and that genuine victim-survivors of violence are recognised as such and provided with appropriate support as required

This view is informed by best practice on working with domestic violence victim-survivors, which recognises the evidence that domestic violence remains under-reported to the authorities, whilst at the same time being over-represented in cases before the family court.

Recommendations:

2. In accordance with the final ALRC report, include the 'use of systems or processes to cause harm, distress or financial loss' in the definition of family violence⁵⁴
3. Provide specialist training to family law practitioners and professionals to recognise and prevent systems abuse through the family court and related systems, and hold perpetrators to account
4. Develop specialist training for domestic and family violence specialist workers to support and/or provide evidence in family court processes, in collaboration with domestic and family violence service delivery staff

⁵⁴ ALRC Final Report proposal 8-3

Reforms in the Family Law System

c.) beyond the proposed merger of the Family Court and the Federal Circuit Court any other reform that may be needed to the family law and the current structure of the Family Court and the Federal Circuit Court;

“I couldn't for the life of me understand why on earth he was going to family court to get access to the kids as he had never done anything for them or bonded with them in any way.

He would even ignore them almost all of the time when we lived together.

It was my DV worker that explained to me that this is common for DV perpetrators to do as a way to maintain control, using the system to continue to scare and intimidate me”- Jo's story

We are a signatory to Women's Legal Services Australia's Open Letter to the Attorney General on the concerns about the proposed Family Court and Federal Circuit Court merger⁵⁵. This letter expressed the sector's position of preferencing a model that retains a stand-alone specialist superior family court, and increases family law and family violence specialisation. The safety of children and adult victim-survivors of family violence requires increased specialisation. While we recognise that there may be benefits from a well-resourced and properly equipped system in which victims/survivors only need to navigate a single court, the merger as proposed is not that. The proposed merger is not designed to serve the needs of victim-survivors and the concerns raised should be heeded.

Specialist women's domestic violence services, alongside women's legal services, specialist Aboriginal and Torres Strait Islander and multicultural legal services, have developed and maintained and refined the knowledge, skill and competence required to tailor service responses that apply a safety first principle and they need to be adequately resourced and supported to deliver those services comprehensively and equally for women and children accessing assistance, including and especially within family law proceedings. We believe that the role of the specialist women's services is vital in Australia's

⁵⁵ Women's Legal Services Australia 2019, 'Open Letter: Concerns about proposed family court merger', accessed from http://www.wlsa.org.au/submissions/open_letter_-_concerns_about_proposed_family_court_merger

response to violence against women and their children and as a member of the Australian Women against Violence Alliance (AWAVA), have developed a Policy Brief to that effect. The brief states that:

“These services know how to plan for safety and assess complex and changing risks; they advocate for and with victims/survivors and support them to navigate complex systems; they understand the dynamics of violence and the impacts of trauma; and they use principles of empowerment and client-centred approaches to support women and their children to recover from the impacts of violence and trauma. These services have led prevention efforts and created men’s behaviour change programs that hold women’s and children’s safety at their core. Specialist services contribute to social change using their on-the-ground knowledge of women’s experiences”⁵⁶

We note that of the 95 employees in the Family Court of Australia, only one employee is identified as Aboriginal and/or Torres Strait Islander.⁵⁷ The situation in the Federal Circuit Court is similar. There are only 7 Aboriginal and/or Torres Strait Islander staff members among 560 employees.⁵⁸ The Family Law Council’s Interim Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems⁵⁹ highlighted the need for the government to provide funding for the employment of Aboriginal and Torres Strait Islander family liaison officers. We support increasing the family law system’s capacity for cultural appropriateness, diversity and inclusion, including through recruitment and governance practices.

Recommendations:

5. Maintain separation of the Family Law Court and the Federal Circuit Court
6. Engage with specialist women’s safety services to develop and implement effective ongoing court based family violence risk

⁵⁶ Australian Women Against Violence Alliance 2016, ‘*The Role of Specialist Women’s Services in Australia’s Response to Violence Against Women and their Children*’, accessed from <http://awava.org.au/wp-content/uploads/2016/05/AWAVASpecialistWomensServicesPolicyBrief2016.pdf>

⁵⁷ Family Court of Australia, 2016–2017 Annual Report.

⁵⁸ Federal Circuit Court of Australia, 2016–2017 Annual Report

⁵⁹ Family Law Council (2015) Families with Complex Needs and the Intersection of Family Law and Child Protection Systems, Interim report.

<https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Families-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems%E2%80%93Interim-Report-Terms-1-and-2.pdf>

assessment practices, including training family court staff, judiciary and related practitioners

7. Adopt a 'safety first' framework, in which the safety and rights of children and adult victim-survivors of domestic and family violence are prioritized above equal shared parenting rights/responsibilities
8. Actively increase the family law system's capacity for cultural appropriateness, diversity and inclusion through recruitment and governance practices

Impact of Family Law Proceedings

d.) the impacts of family law proceedings on the health, safety and wellbeing of children and families involved in those proceedings;

“The family court process then went on for three years and consumed all of my time visiting lawyers, attending court dates and dealing with my children’s erratic behaviour and emotional issues as they did not want to see their father, but [were] forced to by the court...”

Children are forced by the family court to see abusive fathers and women are subjected to ongoing abuse, trauma and issues that it brings.

My children are now receiving ongoing therapeutic support and treatment for what they have been through” – Jo’s story

As noted earlier in this submission, domestic and family violence are a reality for many of the families involved in family law proceedings in Australia, with more than three-quarters of cases before the court featuring allegations of family violence⁶⁰. The impacts of domestic and family violence in Australia are devastating on multiple levels, from the effects on

⁶⁰ Harmon, J 2017, 'The prevalence of family violence in proceedings before the Federal Circuit Court of Australia', Family Law Review, 7, 3-19, accessed from <http://sites.thomsonreuters.com.au/journals/2017/04/06/family-law-review-update-vol-7-pt-1/>

individuals, families and our broader community. These impacts include adverse health outcomes⁶¹, economic disadvantage [PWC report], homelessness [AIHW 2015 Homelessness Services report] and the welfare of children who are exposed to domestic and family violence in a multitude of ways⁶².

For those who are going through the family court system as well as dealing with the effects of domestic violence on themselves and their families, the stress and pressure can feel overwhelming, and compound the experience of trauma. Mother and domestic violence survivor Jo describes the experience of going through family court proceedings as “near impossible... It felt like I was suffocating as my thoughts were consumed day and night by it and I was terrified for my children”.

For the safety and wellbeing of children whose families are involved with family court proceedings, the family law system must be reformed to prioritise their safety, and the safety of adults with lived experience of family violence.

Recommendations:

9. This submission supports the 5th recommendation of the recent ALRC report, which states [emphasis added]:

“Section 60CC of the Family Law Act 1975 (Cth) should be amended so that the factors to be considered when determining parenting arrangements that promote a child’s best interests are:

- a. **What arrangements best promote the safety of the child and the child’s carers, including safety from family violence, abuse, or other harm;**
- b. **Any relevant views expressed by the child;**
- c. **The developmental, psychological, and emotional needs of the child;**
- d. The benefit to the child of being able to maintain relationships with each parent and other people who are significant to the child, where it is safe to do so;
- e. The capacity of each proposed carer of the child to provide for the developmental, psychological, and emotional needs of the child,

⁶¹ Australian Institute of Health and Welfare 2019. *Family, domestic and sexual violence in Australia: continuing the national story 2019*. Cat. no. FDV 3. Canberra: AIHW

⁶² ANROWS (Australia’s National Research Organisation for Women’s Safety) 2018. *Research summary: the impacts of domestic and family violence on children*, Sydney: ANROWS

- having regard to the carer's ability and willingness to seek support to assist with caring; and
- f. Anything else that is relevant to the particular circumstances of the child"

10. It is our recommendation that the Federal Government immediately takes steps to implement the reform plan laid out by Women's Legal Services Australia's 'Safety First in Family Law' policy platform in order to improve the safety of children and adults undergoing family court proceedings, and lessen the detrimental impacts suffered by those experiencing domestic violence. This includes prioritising the safety of children over the presumption of equal shared parental responsibility and ensuring that family court staff and related practitioners are appropriately trained to recognise and understand domestic violence.⁶³

Grandparents as Carers

e.) any issues arising for grandparent carers in family law matters and family law court proceedings;

It is the view of this submission that in the process of designating care arrangements for children in family law matters, it is essential to consider specific safety considerations for risks that may arise as a result of one or more grandparent or other family member sharing carer responsibilities.

We also strongly believe that that representatives from Aboriginal and Torres Strait Islander and culturally and linguistically diverse organisations must be consulted with and lead the design of care arrangements responsive to their needs, as family structures may differ.

Recommendations:

11. Implement safety mechanisms and risk assessments in cases where grandparents or other family members are to act as carers
12. Give consideration to differing family structures in consultation with culturally appropriate service providers, including Aboriginal and Torres Strait Islander organisations with specialised Family Violence practitioners

⁶³ Women's Legal Services Australia 2019, 'Safety first in family law', accessed from http://www.wlsa.org.au/uploads/campaign-resources/Safety_First_in_Family_Law_Plan.pdf

Pre-nuptial Agreements

f.) the potential usage of pre-nuptial agreements and their enforceability to minimise future property disputes;

While Binding Financial Agreements, also known as prenuptial agreements, may suit some couples where coercion and/or violence or other forms of abuse are not a factor, this may be contraindicative in cases where one partner exerts significant and harmful power over the other. Assessment of this prior to submission of Agreements is vital. Studies of the use of Binding Financial Agreements in the United States and Australia highlight the dangers for women into entering into such an agreement⁶⁴, arising from the imbalance of bargaining power when such agreements are entered into, leading to greater individual and systemic vulnerability amongst women at the time of enforcement⁶⁵

Recommendations:

13. We recommend that the Family Law Act be amended to specifically set aside provision for circumstances in which family violence (including coercion and financial abuse) has occurred, to help prevent Binding Financial Agreements from being used to perpetrate further violence and abuse
14. We also recommend that family court staff be trained in recognising the signs of financial abuse; its use by perpetrators to inflict further systems abuse upon their victims; and the devastating, long-lasting impacts it wreaks on families affected by abuse

⁶⁴ Mackay, A 2003, 'Who gets a better deal? Women and prenuptial agreements in Australia and the USA', University of Western Sydney Law Review 109, accessed from <http://www5.austlii.edu.au/au/journals/UWSLRev/2003/6.html>

⁶⁵ B Fehlberg and B Smyth 2000, 'Pre-nuptial Agreements for Australia: Why Not?', Australian Journal of Family Law 80 (14)