

**Parliamentary inquiry into a better
family law system to support and
protect those affected by family
violence**

Legal Aid NSW submission to the Standing
Committee on Social Policy and Legal Affairs

June 2017

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**'Legal Aid NSW'**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law. Specialist services focus on the provision of Family Dispute Resolution Services, family violence services (as outlined below) and the early triaging of clients with legal problems through the Early Intervention Unit. Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order (**ADVO** or 'protection order') lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

Through its Women's Domestic Violence Court Advocacy Program (**WDVCAP**), Legal Aid NSW administers funding to 28 non-government organisations to provide Women's Domestic Violence Court Advocacy Services (**WDVCASs**). WDVCASs work alongside the legal system to assist women and their children seek legal protection in obtaining ADVOs. WDVCASs also provide women with information and referrals for their ongoing legal, social and welfare needs. WDVCASs have a presence in 118 local courts across NSW. WDVCAS receive referrals of all domestic violence reports made to NSW police about women and children under the NSW Government *It Stops Here: Safer Pathway* state wide domestic and family violence reforms.

The Legal Aid NSW Domestic Violence Unit (**DVU**) is a specialist unit helping clients who have experienced domestic and family violence with both their legal and non-legal needs. The DVU is made up of specialist lawyers and social workers who connect with clients at crisis point. The DVU provides legal advice and representation in a range of areas including: apprehended domestic violence orders, family law, care and protection, housing, social security, credit/ debt problems, victims' support, financial assistance matters and criminal law.

The Family Advocacy and Support Service (**FASS**) provides integrated legal and social support services to families affected by family violence in the family law court registries across Australia by legal aid commissions. In NSW duty legal services are delivered to both victims of family violence, and people with allegations of family violence made against them in their family law matter in the Sydney, Parramatta, Newcastle and Wollongong Family Law Court registries. Legal Aid NSW also administers funding for, and works in close partnership with, the local WDVCASs and Relationships Australia to provide social support services in each of these registries.

Legal Aid NSW welcomes the opportunity to make a submission to the inquiry into how the federal family law system can be improved to better protect people affected by family violence. We have had the benefit of viewing the Victoria Legal Aid submission to this inquiry, and endorse its contents. Legal Aid NSW is also part of National Legal Aid (**NLA**) and has contributed to, and endorsed, the NLA submission.

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Legal Aid NSW specialist family violence services

Family Advocacy and Support Services (FASS)

The Commonwealth Government has recently funded legal aid commissions nation-wide to deliver integrated legal and social support services in family law court registries to families affected by family violence. This suite of services are known as the Family and Advocacy Support Services (**FASS**). Legal Aid NSW started delivering the FASS in New South Wales non-circuit family law court registries (Sydney, Parramatta, Newcastle and Wollongong) on 1 March 2017.

In New South Wales, the FASS has been adapted from the Women's Domestic Violence Court Advocacy Service (**WDVCAS**) model operating in Local Courts, where lawyers and social support services work collaboratively to ensure that both the legal and social welfare needs of clients are identified and addressed. FASS also aims to help clients navigate the fragmented and overlapping state-based domestic violence protection order and care and protection jurisdictions and the federal family law jurisdiction. Services are co-located at family law court registries. Services do not currently operate at circuit locations.

FASS legal services are provided by Legal Aid NSW specialist family violence solicitors. The service focuses on supporting clients affected by family violence and assisting the Court to make evidence-based and safe decisions.

FASS social support services provide trauma-informed, high quality social support services to families. These services aim to identify and address social welfare issues, particularly where they elevate the risk of family violence, such as drug and alcohol use, mental health and homelessness. In New South Wales, services for women are provided by the WDVCASs and services for men are provided by Relationships Australia.

The FASS was specifically designed to better protect people affected by family violence in the federal family law system. As outlined below, FASS services are particularly relevant to a number of the terms of reference raised in this parliamentary inquiry (in particular terms of reference 1, 2 and 3). Legal Aid NSW supports the continuation and expansion of the FASS to families affected by family violence at all family law court locations including circuit locations to better support Australian's affected by family violence in rural and regional locations.

Recommendation 1: Legal Aid NSW supports the continuation and expansion of the Family Advocacy and Support Services to families affected by family violence at all family law court locations.

The South West Sydney Domestic Violence Unit

In September 2015, the Commonwealth Government funded Legal Aid NSW to pilot an innovative and integrated model of service delivery to assist women experiencing family violence in south west Sydney as part of the Women's Safety Package. On 9 May 2017

the Attorney General announced the allocation of a further \$3.4 million over two years to establish up to six new domestic violence units.

South West Sydney Domestic Violence Unit (**SWS DVU**) is made up of specialist family violence lawyers and a social worker who work together to assist victims of family violence with their legal and social welfare needs. SWS DVU provides casework litigation and social work assistance to victims of domestic and family violence who are at serious threat and/or have complex legal and social needs.

SWS DVU assist clients with a range of legal problems often precipitated from their experience of family violence, including assistance with getting a domestic violence protection order, arrangements for children and property, child support, divorce, forced marriage, child protection, victims support, immigration, credit and debt issues, housing and criminal law issues (particularly for female defendants who are identified as the primary victim of family violence).

The social worker provides a range of services including risk assessment, safety planning, court support, referral, practical assistance, non-legal advocacy and casework management with a particular focus on supporting clients through their legal processes. The social worker also provides expert advice to the lawyers about issues such as the dynamics and impact of family violence, social theories around the cycle of violence, trauma informed practice as well as information about effective community referrals.

SWS DVU provides duty legal services (in partnership with the South West Sydney WDVCS) to victims alongside the domestic violence protection order lists at Bankstown and Liverpool Local Courts. SWS DVU also provides a free domestic violence advice clinic at a women's health service in the south west Sydney community. A free telephone advice line is also available to clients. In addition, Legal Aid NSW has partnered with Settlement Services International (**SSI**) to provide a comprehensive community legal education program about the legal protections for victims of family violence, as well as about Australian law and caring for and keeping children safe in Australia. This program is provided to newly settlement migrants, asylum seeker as well as SSI staff. SWS DVU play a key role in providing this community education program in the south west Sydney community.

The SWS DVU model is also relevant to a number of the terms of reference raised in this parliamentary inquiry (in particular, term of reference 1). Legal Aid NSW supports the continuation and expansion of the SWS DVU model of service delivery to better support victims of family violence at other locations across Australia. We welcome the Government's announcement to extend these services to other locations. We hope the current Parliamentary inquiry considers the support and protection that victims of family violence receive through these services for a relatively small amount of funding.

Legal Aid NSW provides additional domestic violence services to clients including through its Central Sydney Domestic Violence Unit, Women's Domestic Violence Court Advocacy Program and the family law division more broadly. We have focused on the FASS and SWS DVU models for the purpose of this inquiry.

Recommendation 2: Legal Aid NSW supports the continuation and expansion of the SWS DVU model of service delivery under the Women’s Safety Package to better support victims of family violence at other locations across Australia.

TOR 1: Ensuring the safety of people affected by family violence

Early identification and response to family violence through FASS

Through integrated legal and social support services, FASS is designed to facilitate the early identification of and response to family violence in the family law system. The FASS social support services are provided to both victims and those who use family violence, with separate services for women and men. These services address the social welfare needs of clients, and work collaboratively with the FASS legal service to ensure the safety of people who are or may be affected by family violence. The FASS social services which help achieve this goal include:

- comprehensive assessment of a client’s social welfare needs
- risk assessment using a State-wide consistent risk assessment tool (the Domestic Violence Safety Assessment Tool)
- safety planning for court events and liaison with the court about implementation of safety plans
- safety planning in collaboration with the client in relation to safety at home, for children and in the community
- identification of and referrals for a client’s social welfare needs including issues which elevate the risk of family violence (such as drug and alcohol use, mental health and homelessness)
- providing information, advocacy and court support for clients during the family law court process, and
- non-legal advocacy on behalf of the client with organisations such as the NSW Police in relation to applications for protection orders, Housing NSW, Centrelink and Victims Services.

FASS legal services are provided by specialist family violence lawyers who also have expertise in risk assessment and providing trauma-informed responses to a client’s legal needs.

FASS is co-located at the family law registries. This aspect of FASS allows appropriate responses to clients’ needs to be delivered early on in their engagement with the family law system.

Further, where parties consent, FASS legal and social services are able to share relevant information. In some cases, FASS legal and social services may assist the same client in family law as well as domestic violence protection order proceedings. This places FASS

in a unique position to work collaboratively between service providers and across jurisdictions to identify family violence, assess the level of risk, and provide appropriate legal and non-legal responses.

FASS has already been able to deliver services that more quickly and effectively ensure the safety of people who are or may be affected by family violence in the family law system, as outlined in the case study about Sarah below.

Case Study – Sarah*

Sarah attended a Family Law Court Registry seeking the recovery of her children to her care. Sarah and Phillip had five children together. Recently, Phillip had forced Sarah out of the home. The children remained at home with Phillip. Sarah was referred to the FASS for advice and assistance.

Initially, Sarah suggested to the FASS lawyer that there had been some verbal abuse and intimidation but also downplayed the violence she had experienced, commenting that she had been to blame.

Through the building of rapport and appropriate questions, the FASS lawyer established that Sarah had experienced a long history of family violence perpetrated by Phillip, including physical, financial, emotional, psychological and social abuse.

Sarah disclosed that Phillip was a member of an outlaw motorcycle club and had access to weapons. Phillip had made threats to kill Sarah or the children if they ever left. Phillip was frequently very physically violent to Sarah, and his behaviour had been escalating. It appeared likely that Phillip was tracking Sarah's movements and communication on her phone. Sarah also said that Phillip had threatened suicide— she was worried that he had “nothing to lose” and would harm or kill the children to punish her. The meeting with the FASS lawyer was the first time Sarah has ever disclosed the extent of the violence to which she and her children had been subjected.

The FASS service immediately responded to this high level of risk and the following actions were taken:

- The social worker joined a conference with the FASS lawyer to let Sarah know about the supports which might be available in her area. The social worker also assisted in some safety planning for Sarah and her children to address the level of risk that she faced.
- After a long conference, Sarah agreed to attend the police station that afternoon to make a statement and seek a domestic violence protection order. The social worker called the police station to let them know that Sarah was coming and to flag the high level of risk involved.
- The following day, Sarah was able to get her children together and fled to a safe location. Sarah continued to work with the police, who put in place a domestic violence protection order to protect Sarah and the children.

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- The social worker assisted Sarah to apply for urgent funding from Victims Services to purchase new clothing for the children, and to allow the children to access counselling. She also made referrals to domestic violence services in Sarah's area. The social worker regularly checked in with Sarah over the next few weeks to ensure she felt safe and was able to access appropriate services.
 - The FASS lawyer remained in regular contact with Sarah to check the progress of the domestic violence protection order, and to see whether any further legal action was necessary.

Police experienced difficulty serving the domestic violence protection order, so the local WDV CAS (also the provider of the FASS social support service) ensured that Sarah's matter would be discussed at the upcoming Safety Action Meeting (SAM).¹ At the SAM, the Department of Education agreed to give the children exemptions from attendance at school for the remainder of the school term to eliminate the risk of Phillip collecting the children before the protection order was served. NSW Health representatives agreed to assist Sarah to obtain medication for one of the children which had been left behind when she fled the house.

Ultimately, Phillip was charged with a serious assault and was incarcerated. A police raid on Sarah and Phillip's home led to a discovery of weapons, including firearms.

Sarah obtained private housing near family members, and plans to enrol the children in a nearby school for the next term.

As stated above, Legal Aid NSW supports the continuation and expansion of the FASS services to improve the family law system's ability to quickly and effectively ensure the safety of people who are or may be affected by family violence.

Early identification and response to family violence through SWS DVU

SWS DVU lawyers and social workers are specialist family violence professionals who have expertise in risk assessment and providing trauma-informed responses to a client's legal and social welfare needs. The SWS DVU lawyers work closely with the social workers and the local WDV CASs to ensure the legal and social welfare needs of victims of family violence are identified and addressed.

¹ SAMs are a mechanism under the NSW Government *It Stops Here: Safer Pathway* reforms. They aim to deliver a coordinated response to women who have been identified as at serious threat of further harm. SAMs are chaired by a senior police officer and attended by local representatives from government agencies, along with key NGO representatives who will be or have been involved with the victim and can provide useful information about her particular circumstances. The aim of a SAM is to immediately reduce the threat of further harm to the victim and her or his children.

SWS DVU primarily connects with clients in the community at a women's health service, through community legal education provided for vulnerable communities and alongside the domestic violence protection order court lists. In particular, clients needing the protection of a domestic violence protection order are usually at crisis point, so SWS DVU is well placed to provide early intervention and assistance in family law matters. This may include family law advice, assistance with an application for legal aid, as well as representation in family law proceedings.² SWS DVU often identifies family violence issues for clients and supports them before they enter the family law system. SWS DVU also helps clients navigate the often confusing and overlapping legal processes in the Local Court, the Children's Court and the family law courts. SWS DVU therefore also contributes to TOR 1, by identifying people affected by family violence early, assessing the level of risk, providing appropriate legal and non-legal responses as well as supporting clients with their legal needs across jurisdictions.

National screening and risk assessment tool

Legal Aid NSW supports the consistent use of screening and risk assessment tools by all practitioners and across State and Commonwealth jurisdictions. A nationally consistent screening and risk assessment tool would help ensure:

- continuity, so that that same risks were being assessed in the same manner and with the same degree of prioritisation
- more accurate identification of risk factors, as well broader social needs which elevate the risk of family violence (such as drug and alcohol use, mental health and homelessness)
- earlier identification of risk factors as well as social welfare needs, resulting in better service referral and safety measures
- greater awareness of risk and urgency
- a flag or common language for all services involved about safety concerns
- improved communication between services and jurisdictions, and
- collection of consistent data.

A national risk assessment and screening tool should be simple in application and limited in the time required to complete it, to increase the likelihood of its consistent use.

Legal Aid NSW considers that the Domestic Violence Safety Assessment Tool (**DVSAT**) used by the NSW Police Force and other agencies across NSW has already demonstrated that a standard tool has great benefits. For example, a service provider can instantly understand how serious a situation is, even if they do not have an existing relationship with a victim or the other service provider with whom they are liaising. There should be consideration given to adopting or adapting the DVSAT within the federal family law system.

² The DVU lawyer may represent the client in family law proceedings, or warm refer the client to a lawyer in the Legal Aid NSW Family Law litigation section.

A tool cannot replace sound clinical judgment, the role of specialist family violence assistance or sophisticated and nuanced judicial decision making. However, as a preliminary screening mechanism, and a technique for enhancing objectivity and commonality of approach, such a tool would be extremely valuable. It would ensure that services had to talk to each other to provide a coherent response to family violence. It would also help to bring the responses across the jurisdictions together.

It is noted that the FASS legal and social support services use a consistent approach to screening, risk assessment and safety planning in all NSW family law registries through common FASS screening questions, the DVSAT and safety planning templates. FASS is also staffed by specialist family violence lawyers and support workers who provide professional judgment in assessing risk. The DVSAT also incorporates a capacity to exercise professional judgment in the assessment of threat.

As recommended by the Family Law Council in its Report about *Complex Families and the Intersection between the Family Law and Child Protection Systems*, this screening and risk assessment tool should be accompanied by:³

- protocols and guidelines to assist practitioners to utilise strategies to ensure that risk is identified and managed effectively, including through warm referrals to specialised family violence services, and
- the development of a strategy to support the implementation of these measures among legal practitioners who practice family law in the context of their professional obligations to their clients, ethical responsibilities as legal practitioners and the professional indemnity issues that responses to risk raise.

Recommendation 3:

- (a) Legal Aid NSW supports the use of a nationally consistent and simplified screening and risk assessment tool across state and Commonwealth jurisdictions.**
- (b) Consideration should be given to adopting or adapting the NSW Domestic Violence Safety Assessment Tool in the family law system.**
- (c) The implementation of the tool should be accompanied by protocols and guidelines to assist practitioners to utilise strategies to ensure that risk is identified and managed effectively, including through warm referrals to specialised family violence services.**
- (d) The tool should also be accompanied by a strategy to support the implementation of these measures among legal practitioners who practice family law in the context of their professional obligations to their clients, ethical responsibilities as legal practitioners and the professional indemnity issues that responses to risk raise.**

³ Recommendation 3, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report* – June 2016 (Terms 3, 4 and 5)

A national register of court orders

The early identification of family violence would be assisted by the creation of a national register of court orders, operating between the family law courts, children's courts and local courts.

Legal Aid NSW notes that a national database of domestic violence protection orders is in the process of being implemented. Such a register could also include personal protection injunctions, as well as other family law orders, children's court orders and bail conditions. The register could potentially also include parenting orders that sit alongside domestic violence protection orders.

We refer to recommendation 30-18 of the Australian Law Reform Commission Report about *Family Violence – A National Legal Response* and recommendation 5 of the Family Law Council Report on *Complex Families and the Intersection of the Family Law and Child Protection Systems* (terms of reference 1 and 2) which also recommends government consider the establishment of this form of database or register. Recommendations in those reports provide more details about who should have access to such a database, what information should be provided and the privacy principles to be applied.

The benefit of such a database or register is that it could provide the courts with instant access to secure information that would allow the presence of domestic and family violence to be identified and flagged earlier on. It would also allow courts to be aware of orders and proceedings in other jurisdictions that affect the same family, so as to help ensure consistency and the safety of family members.

This is an important step towards meeting the urgent needs of families with complex needs in circumstances where they may be put at further risk as a consequence of a delay in or absence of significant information.

Recommendation 4: Legal Aid NSW supports the creation of national register or database of orders operating between the family law courts, children's courts and local/magistrate courts.

Changes to family law arrangements when a domestic violence protection order is made

The law currently provides for a State and Territory Court to vary, discharge or suspend existing parenting arrangements pursuant to a family law order when making a domestic violence protection order.⁴

However, there is a 21 day time limit on the variation, discharge or suspension of the family law orders. In our experience, a 21 day period is not sufficient for a matter to be listed in the family law courts and for the family law order to be considered and varied. Currently, if a matter does not return to the family law court for consideration, there is

⁴ Section 68R *Family Law Act 1975* (Cth).

confusion and uncertainty about parenting arrangements for children which can elevate safety concerns.

We agree with the Senate Legal and Constitutional Affairs Committee's *Report on the Family Law Amendment (Financial Agreement and Other Measures) Bill 2015* (February 2016) that:

... the removal of the 21 day time expiration period would be beneficial to victims of family violence, because it would help to ensure that they and/or their children are not subject to conflicting court orders. The committee is persuaded that consistent court orders are a key element in facilitating protection from violence.

Accordingly, Legal Aid NSW supports the implementation of the Family Law Amendment (Financial Agreement and Other Measures) Bill 2015 for the removal of the 21 day limit on the variation of family law orders by state and territory courts.

In this respect, we note the submissions of Legal Aid NSW and National Legal Aid in relation to the draft Family Law Amendment (Financial Agreement and Other Measures) Bill, as well as recommendation 4 of the Family Law Council report on *Families with complex needs and the intersection of the family law and child protection systems*.

Recommendation 5: Remove the 21 day limit on the variation of family law orders made by state and territory courts.

More resources and improved case management in the family law courts

It is widely acknowledged that the family law system is overburdened and under resourced. As a consequence, parties to family law proceedings experience significant delays of up to three years in having their matter determined. Such delays present barriers to the early identification of family violence, and the delivery of appropriate legal and non-legal responses.

Legal Aid NSW is concerned that many families with complex needs have been waiting for judicial determinations for excessive periods of time due to a shortage of judges. While these families wait, disputes often become more entrenched and risk issues can be heightened. Delay also increases the pressure on judicial officers and lawyers in terms of volume of work, which in turn decreases the likelihood of appropriate and comprehensive judicial responses to family violence. Reducing delay would allow for earlier findings of fact in relation to family violence to be made by the court.

In order to improve the early identification of and response to family violence, Legal Aid NSW supports the increased resourcing of the family law courts with judicial officers who have family law and family violence expertise. Family law is a complex and specialised area of practice. A sophisticated understanding of the dynamics, impact and the perpetration of family violence is critical to safe judicial decision-making for children and families.

In addition, Legal Aid NSW supports resources to improve the case management of family law proceedings, particularly through the use of technology. More efficient case management could reduce delays and pressure on the family law system and contribute to the earlier identification of and response to family violence.

An example of the use of technology for more effective case management is “YourCase” which was designed by technology and innovation company *Portable* and piloted in the Local Magistrates Court in Collingwood, Victoria. “YourCase” provides for a court user to check in and track the activities the court needs them to do before their matter is heard. The court user’s matter can be tracked digitally through the entire day and beyond.

It also allows registrars and other administrators (for example, associates, family consultants, security, duty lawyers and support workers) to:

- schedule tasks
- manage the general pattern and/or particular way in which matters are called (for example, all matters with interpreters are listed first or a particular matter with a safety concern is interjected)
- communicate with other services, and
- publicly display activities around the premises.

Once “YourCase” has been implemented in a court setting, it also assists administrators to track critical data around court performance, as well as enabling the court to pinpoint resources for specific days and recognise trends to improve court experiences for users. For more information, please see <<http://www.portable.com.au/case-studies/yourcase/>>.

Recommendation 6:

- (a) Legal Aid NSW supports increased resourcing of the family law courts with judicial officers who have family law and family violence expertise.**
- (b) Legal Aid NSW supports resources to improve the case management of family law proceedings, particularly through the use of technology.**

TOR 2: Consent orders where there are allegations or findings of family violence

Safer arrangements for families through the FASS

On occasion, parties affected by family violence present to the court with unsafe consent orders in the context of family violence. In agreeing to unsafe consent orders, victims may have been impacted by the dynamics of family violence and/or motivated to consent to unsafe arrangements out of a desire to avoid the traumatising environment of court.

Through the provision of specialist family violence and trauma-informed services, access to FASS services can facilitate safer arrangements or orders being made. This is outlined in the case study below. The assistance of the FASS support service at court, in providing

safety planning for court events, support at court as well as safe room facilities, may reduce the traumatising effect of the environment.

Case Study – Katrina*

Katrina and Greg were in a relationship for five years. They have one child together, aged 12 months. There has been a long history of domestic violence perpetrated by Greg against Katrina. Greg has physically assaulted Katrina leaving her with injuries and he has been very controlling and emotionally abusive throughout their relationship.

After the relationship broke down, Greg kept the child. Katrina was assisted by the FASS lawyer and a successful recovery order was made in the Federal Circuit Court. The child was returned to Katrina.

On the next occasion the matter was in Court, Katrina was again assisted by the FASS lawyer. Katrina told the FASS lawyer that she and Greg were “in the process of getting back together” and that she wanted to “sign over custody” to Greg. Greg was self-represented and pushing for Katrina to enter into consent orders.

The FASS lawyer spent a considerable amount of time with Katrina discussing the dynamics of family violence, the safety of the arrangements proposed by Katrina for their child and advising Katrina about the legal effect of agreeing to binding orders (including child protection advice). The FASS lawyer was also able to negotiate and interact with Greg on Katrina’s behalf so she did not have to engage with him directly about arrangements for their child. As a specialist family violence lawyer, the FASS lawyer had a comprehensive understanding of the dynamics and cycle of family violence.

After receiving advice, Katrina instructed the FASS lawyer that she would not enter into the consent orders as initially proposed.

Katrina ultimately decided to withdraw her application from the court rather than pursue the making of safe orders through the court process. The FASS lawyer encouraged Katrina to return for assistance should she need to in the future. Katrina stated that she felt supported and heard and knew she could return for further assistance.

As stated above, Legal Aid NSW supports the continuation and expansion of the FASS services to assist families affected by family violence to enter into safe arrangements or orders. Other suggestions to further this aim are outlined below.

Codification of the power to decline

Legal Aid NSW supports the codification of the court's positive obligation to scrutinise consent orders to confirm they are in a child's best interests.

In *T & N* [2003], the Family Court held that "consent does not displace the obligation of [the] Court to make orders that judged to be in the best interests of children".⁵ In the experience of Legal Aid NSW, there can be inconsistent application of this judicial scrutiny. Accordingly, we support codification of the power to decline unsafe consent orders, as well as increased resourcing of the Court to apply this scrutiny.

Recommendation 7: Legal Aid NSW supports codification of the court's positive obligation to scrutinise consent orders to confirm they are in a child's best interests.

Training for Local Court Magistrates

Local Court Magistrates presently have the power to hear and make consent orders under the *Family Law Act*. This raises some concern, as Local Court Magistrates often have limited time to make such decisions in busy court lists. Further, judicial decision making in the family law system, particularly where it relates to children and involves allegations or findings of family violence, is complex and specialised. Some Local Court Magistrates may not be familiar with their powers under the *Family Law Act* or for example, the power to decline unsafe consent orders pursuant to case law as set out above.⁶

Legal Aid NSW supports Local Court Magistrates being provided with further training in relation to family law and family violence to avoid the risk of unsafe consent orders being made in the Local Court.

Recommendation 8: Legal Aid NSW supports Local Court Magistrates being provided with further training in relation to family law and family violence.

The involvement of child protection agencies

The family law courts face a number of difficulties when presented with unsafe consent orders including the following:

1. Declining to make consent orders does not stop parties from withdrawing from the proceedings and entering into unsafe arrangements for their children of their own accord in the absence of orders, and
2. In some matters, neither party is a safe or viable carer for the child. In these instances, the court may be unable to make safe orders as an alternative to the unsafe consent orders which have been presented to it.

⁵ *T & N* [2003] FamCA 1129 (4 November 2003) at [39].

⁶ *T & N* [2003] FamCA 1129 (4 November 2003) at [39].

In responding to these difficulties, a family law court can request a child protection agency to assist the court and become a party to the proceedings. However, the court does not have the power to compel the relevant child protection agency to become involved in proceedings or to accept an allocation of parental responsibility. It is the experience of Legal Aid NSW that the Secretary of the NSW Department of Family and Community Services generally declines the court's invitation to intervene. While Legal Aid NSW acknowledges the resource limitations of child protection agencies, we consider that the involvement of those agencies in family law proceedings may be of assistance to the court, as well as to families affected by family violence. The child protection agency may offer or strongly incentivise assistance to address family violence concerns, as well as other non-legal issues affecting parenting capacity or elevating risk. In proceedings where all parties are 'found wanting as carers for the children',⁷ the court may be able to allocate parental responsibility for children to the Minister.

Recommendation 9: Legal Aid NSW supports any legislative or other measures that would allow judges exercising jurisdiction under the *Family Law Act 1975* to also exercise child welfare powers (where appropriate), for example by allowing dual commissions so that in appropriate circumstances a child protection agency could be compelled to assist and intervene in family law proceedings.

Better resourcing of supervised contact centres

Where there are contested allegations of family violence, interim orders for a child to spend time with their parent supervised by a contact centre can be made until the court has an opportunity to determine the allegations at a final hearing. Because of the current delays in the family law courts, proceedings can take several years before a court has determined the allegations. Delays in courts put supervised contact services under strain. Currently in NSW many contact centres are full or have long waiting lists.

Most families cannot afford private supervision costs, which tend to be very expensive. Due to the resourcing of supervised contact centres, there can be significant delays before a family can be accepted for time at a supervised contact centre (for example, four to six months), limited availability for contact (for example, two hours each fortnight) and limited locations for the time to take place (for example, there may not be a contact centre near where the child lives).

The limitations associated with supervised time means that parties with allegations of family violence made against them are less likely to consent to these arrangements. This can lead to unsafe consent orders being made or contested interim hearing and further delay.

Legal Aid NSW also notes that it is the policy of most contact centres not to accept orders for supervision which extend beyond 12 months. In some instances, a Court may determine on a final basis that there is an unacceptable risk in a child spending

⁷ See for example *Secretary of the Department of Health and Human Services & Ray and Ors* [2010] Fam CAFC 258 (22 December 2010).

unsupervised time with a parent (for example, because of family violence), but there is a benefit to the child in having some extent of a relationship with their parent. In these instances, final orders for time supervised at a contact centre is generally not an option available to the court.

Better resourcing of supervised contact centres is likely to prompt an increasingly cautious approach from the family law system (including from parties, practitioners and the court) to allegations of family violence because supervised time may become a more viable option for families affected by family violence.

Recommendation 10: Legal Aid NSW supports better resourcing of supervised contact centres.

TOR 3: Supporting families affected by family violence where one or more party is self-represented

Family law matters featuring allegations of family violence when one or more parties are self-represented are particularly complex. These matters can be challenging for the family law system to resolve in a safe and evidence based way.

The challenges include:

- ensuring that evidence about family violence is before the court
- efficient management of these resource intensive matters
- avoiding the re-traumatisation of victims of family violence through the court process, and
- direct cross examination of a victim of family violence by a perpetrator.

Assistance to self-represented parties through duty legal services

Legal Aid NSW provides duty services to self-represented parties at the Sydney, Parramatta, Newcastle and Wollongong family law court registries.

The FASS is a duty legal service which has a particular focus on assisting self-represented victims of family violence. It is designed to address some of the challenges outlined above.

Duty legal services may include:

- Screening and risk assessment for legally-assisted family dispute resolution in legal aid commission programs.
- Drafting urgent applications and representation in court for matters, such as where there is a need for recovery of children, family law watch list orders to prevent children from being removed from Australia and forced marriage matters.
- Gathering information and evidence about family violence, such as assistance with issuing subpoenas and drafting applications for family and/or expert reports.

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- Drafting notices of risk and supporting affidavit material where there are allegations of family violence.
 - Drafting third party applications by grandparents or other family members where children are at ongoing risk of family violence and providing representation before the Court where necessary.
 - Drafting applications for the use of legislative provisions by the court for the protection of vulnerable witnesses giving evidence and representing parties in relation to those applications before the court where necessary.
 - Providing advice and advocacy in relation to State domestic violence protection orders and child protection orders and their interaction with family law proceedings and family law orders.

The value of duty legal services in assisting families where one or more parties is self-represented is highlighted in the case study below.

Case Study – Amanda*

Amanda presented to the FASS duty lawyer the day before her matter was listed for final hearing. The case related to her two children, twins, aged 10. Amanda and her ex-husband, Tim, were both self-represented.

Amanda reported a history of domestic violence perpetrated by Tim. She reported that he was physically violent, intimidating, threatening, and controlling towards her.

A family report had been prepared in the matter which recommended on one hand, that Tim spend time with the children for around four nights a fortnight. However, the report indicated that if the court was satisfied there had been family violence in the relationship, the court would need to assess the level of risk to the children in making a determination about parenting arrangements.

Amanda had filed an Amended Initiating Application which proposed that Tim spend time with the children four nights each fortnight. Amanda told the FASS lawyer that she did not want to appear “hysterical” and “unrealistic” by limiting Tim’s time with the children. However, she had concerns about their safety in his care given his history of significant violence. Amanda said that because the violence was not “directed towards the children”, but rather towards her, she did not feel that she could suggest that the children were at risk of harm.

The FASS lawyer spent time with Anna advising her about:

- the way that the court considers family violence, including the exposure of children to family violence
- the impacts of family violence on children, even when those children are not the direct subject of the physical abuse

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- the role of the family consultant in providing expert evidence to the court about risks to children and effects of family violence
 - the option of changing her application to ensure that the children were safe during their time with Tim, including the possibility of supervision of Tim's time, or requiring Tim to complete courses or engage in therapy to address his behaviour.
 - how to use police records that Amanda had subpoenaed (which supported Amanda's allegations of serious family violence)
 - ways to ask the family consultant about recommendations regarding safety measures for the children, in the event the court found that the family violence had occurred
 - the measures which might be available to Amanda when giving evidence, given that she would be cross-examined by Tim directly, including intervention by the judge to limit harassing questions, and the possibility of giving evidence remotely
 - procedural advice about cross-examination and submissions, and
 - the considerations for the court when determining what would be in the best interests of the children.

The FASS lawyer also referred Amanda to the FASS social support services, including the new safe room, which would be available for her during the hearing. Amanda was very relieved that those supports would be available to her. Amanda was encouraged to return to the duty lawyer for further assistance during the course of the hearing as required.

As stated above, Legal Aid NSW supports the continuation and expansion of duty legal services (including the FASS) at all family law locations.

Whilst duty legal services contribute to resolving some of the challenges posed by litigation involving self-represented litigants, duty services are no substitute for ongoing casework representation. Direct cross examination of a victim of family violence by a self-represented litigant is also a difficult issue which cannot be resolved solely through the use of duty legal services and requires a range of responses, as well an investment of resources.

Direct cross examination of victims of family violence

It is well documented and non-contentious that direct cross-examination or the prospect of direct cross-examination is problematic for a range of reasons.

Direct cross-examination can cause distress and trauma to victims of family violence. The impact of trauma on parenting capacity is diverse and often detrimental. The further traumatisation of a victim caused by family law proceedings, especially when cross-examined by the alleged perpetrator, may further traumatise a victim leading to a reduction of parenting capacity.

In a family law context, the parties may also be required to have some kind of relationship or link in the future because of their children. The re-traumatisation of direct cross-examination is likely to cause further damage to that ongoing relationship.

Direct cross-examination can also provide an opportunity for an alleged perpetrator to misuse legal proceedings and reinforce dynamics of power and control over the victim.⁸ In such a setting, there is a risk that direct cross-examination may cause victims to settle proceedings in order to avoid cross-examination. At worst this can place children at risk, and at a minimum may compromise their best interests.

Direct cross examination has been justified on the basis of procedural fairness and because the court is focussed on reaching an evidence based or tested outcome that is in a child's best interests.

However, there are doubts as to whether direct cross-examination leads to probative evidence that will assist the Court. This is because of the barriers to a party cross-examining their former partner or family member in an 'objective, effective or meaningful way'⁹ particularly in circumstances where there has been experiences of violence and trauma.

There are a number of complexities that make the resolution of direct cross examination in the family law jurisdiction difficult.

In particular, allegations of family violence are often mutual and contested. A final hearing (including cross examination) may be required before a court can make findings about who is the victim/s and/or perpetrator/s of family violence.

Hearings in family law proceedings can also extend over several days or weeks and cross examination can include questions about a wide range of issues and events over the lengthy period of a relationship and beyond. Any potential resolution to this issue may be resource intensive.

In addition, it may be perceived as unfair to provide representation services to parties on the basis that they have allegations of family violence made against them for the purpose of avoiding direct cross-examination, whilst not necessarily providing representation services to other parties in need of representation (for example, victims of family violence).

Legal Aid NSW notes that a raft of solutions are important to resolving this vexed issue, including:

1. Increased use of existing provisions available in the *Family Law Act* to protect vulnerable witnesses.
2. Increased funding to legal aid commissions to provide legal duty services, as noted above.

⁸ NSW Law Reform Commission and Australian Law Reform Commission, *Family Violence - A National Legal Response*, October 2010, page 863.

⁹ Victims of Crime Commissioner, ACT, August 2015.

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3. Increased funding to legal aid commissions to provide legal representation services.
 4. A statutory prohibition on direct cross-examination where there are allegations of family violence.
 5. Legislation for the establishment of a “counsel assisting role” or other mechanism to facilitate cross-examination by other means and funding to support the role ultimately adopted.
 6. Extension of sections 69ZN and 69ZX of the Family Law Act to financial proceedings.

Increasing funding for legal representation services

For representation services to be provided by Legal Aid NSW, a means and merit test applies. As the Productivity Commission has noted, the means tests applied by legal aid commissions are strict: there are more people living in poverty (14%) than there are people eligible for legal aid (8%).¹⁰ Inevitably, therefore, there remains a large number of people who must self-represent because they are ineligible for legal aid and unable to afford private legal representation.

If funding to Legal Aid NSW were increased, this would allow Legal Aid NSW to broaden its eligibility requirements for grants of legal aid and provide legal representation to more parties in family law proceedings, particularly in matters involving allegations of family violence. This would reduce the number of self-represented litigants and in turn the potential for victims of family violence to be personally cross-examined by their perpetrator.

However, there will still be matters where parties are self-represented, either because they are not eligible for legal aid and cannot afford a lawyer, or because they choose to run their own family law matter. Other protections would also need to be pursued.

Recommendation 11: Legal Aid NSW supports increased funding of Legal Aid Commissions to provide family law representation services.

Statutory prohibition on direct cross-examination where there are allegations of family violence

Legal Aid NSW supports the codified prohibition of direct cross-examination of a party to proceedings by a self-represented party where there are allegations of family violence.

However, there must be provisions to ensure the self-represented party has the ability to cross-examine the other party by other means. Legal Aid NSW supports the recommendation of the Family Law Council in its Report about *Complex Families and the Intersection between the Family Law and Child Protection Systems* for the establishment and funding of a “Counsel Assisting” role.

¹⁰ Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra, pp 1021-1022.

A “Counsel Assisting” role would have benefits for families and the court beyond those associated with preventing direct cross examination. Legal Aid NSW notes the comments of the Family Law Council about the benefits of a Counsel Assisting model:

The use of this model in such cases would assist the court’s determination of the child’s best interests by ensuring that all relevant evidence is identified and collated and that all relevant issues are ventilated before the court in a coherent and efficient way.

Council also notes the potential benefits of a Counsel Assisting model for an unrepresented party who has experienced family violence, including by assisting them to narrow the issues in dispute. Council further notes the potential for this approach to help maintain a focus on the best interests of the child throughout the hearing, which may be otherwise compromised in the context of adversarial proceedings.

Legal aid commissions could be well placed to administer a Counsel Assisting scheme such as this, including either through engaging and training well qualified lawyers to discharge the duties, or establishing a panel of private practitioners. Other options could also be considered, including the Family Court or the Attorney-General’s Department administering a panel for such a scheme.

In the event that this model is not adopted, in the alternative Legal Aid NSW would also support the establishment and funding of a “suitable persons” pool. However, we note that given the complexities of family law proceedings involving family violence and self-represented litigants, and the cost of administering such a scheme, the Counsel Assisting model is preferred.

There would need to be consideration of provisions to ensure professional indemnity for the Counsel Assisting role. The proposed provisions should apply to all family law proceedings and not only child related proceedings.

Consideration may be given to implementing these recommendations through an evaluated pilot scheme at some locations at first instance.

Recommendation 12:

- (a) Legal Aid NSW would support a statutory prohibition on direct cross examination of a victim of family violence where there are allegations of family violence, provided there are provisions to ensure that the self-represented party has the ability to cross-examine the other party by other means.**
- (b) Legal Aid NSW supports the piloting of a “Counsel Assisting” model to address this issue, supported with appropriate funding.**
- (c) These provisions should apply to all family law proceedings where there are allegations of family violence, and not only child related proceedings.**

Application of Sections 69ZN and s69ZX to financial proceedings

Section 69ZN of the *Family Law Act* provides that, in child-related proceedings, the court is to conduct proceedings in a way that will safeguard parties to proceedings against family violence. In giving effect to that principle, Section 69ZX provides that the court may limit, or not allow, cross-examination of a particular witness. These sections relate to child related proceedings only and not financial proceedings.

Legal Aid NSW supports the extension of the section 69ZN and s69ZX provisions to apply to financial proceedings where allegations of domestic violence have been raised. It is the experience of Legal Aid NSW that victims of family violence who are party to financial proceedings require equal protection from the potentially re-traumatising experience of being cross-examined by a perpetrator of violence. The case study below illustrates some of the difficulties created by the gap in protection.

Case Study – Mary

Mary and Greg were married for five years. Greg was emotionally abusive and controlling throughout the relationship. Greg isolated Mary throughout the marriage, restricting her from working or having a car.

When Mary ended the relationship with Greg, he stalked her and severely assaulted her using a weapon. The attack caused Mary to have permanent and severe injuries, as well as post-traumatic stress disorder. Greg is charged with attempted murder and is privately represented in his criminal law proceedings.

Following separation, Greg fraudulently sold the matrimonial home and started to disperse with their joint funds. Mary initiated property settlement proceedings to urgently stop the sale and settle their property. Greg is self-represented in the property settlement proceedings. Greg has refused a number of reasonable offers to settle the proceedings. The matter is listed for final hearing.

Greg is seeking to directly cross-examine Mary in the property settlement proceedings. The discretion of the Court to actively direct, control and manage the conduct of the proceedings to safeguard against family violence pursuant to sections 69ZN and 69ZX do not apply because these are not child related proceedings.

Mary wants to pull out of the proceedings because she is terrified of being directly cross examined by Greg. However, Mary is forced to continue with the proceedings as she has now accumulated a debt of \$40,000 to her private family lawyers which she is unable to afford without the property settlement being resolved.

Recommendation 13: Legal Aid NSW supports the extension of the section 69ZN and s69ZX provisions to financial proceedings where allegations of family violence have been raised.

TOR 4: Supporting people who have been subjected to family violence recover financially

Lack of access to financial resources and housing can be a major barrier to women leaving a violent relationship. According to the personal safety survey, it has been estimated that around 7 in 10 women in Australia who have left a violent relationship left property or assets behind.¹¹ Research also demonstrates that property divisions tend to be worse for women separating from violent partners than other separations.¹²

Just, equitable, prompt and accessible property settlement is a critical part of preventing poverty for victims of family violence and their children. However, the process for obtaining a property settlement in the family law courts is difficult, long and expensive. Property settlement is difficult to achieve without legal representation. Eligibility for legal aid is extremely limited and private representation can be prohibitively expensive. Making property settlement accessible and providing earlier access to financial resources to victims of family violence would build confidence in the family law system and reduce barriers to leaving violent relationships.

Increase funding for dispute resolution and representation services in financial proceedings

As stated above, for dispute resolution and representation services to be provided by Legal Aid NSW, a means and merit test applies. In relation to representation services for property settlement proceedings, eligibility is extremely limited and there remains a large number of people who must self-represent because they are ineligible for legal aid and unable to afford private legal representation.

If funding to legal aid commissions were increased, this would allow us to broaden our eligibility requirements for grants of legal aid and provide legal representation and dispute resolution services to more parties in financial proceedings, particularly in matters involving allegations of family violence. This would support victims of family violence to recover financially.

Legal Aid NSW supports increased funding of legal aid commissions to provide family law property settlement dispute resolution and representation services.

Recommendation 14: Legal Aid NSW supports increased funding of Legal Aid Commissions to provide family law property settlement dispute resolution and representation services.

¹¹ Cox, P. (2015). *Violence against women: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012* (ANROWS Horizons, 01/2015). Sydney: ANROWS.

¹² Qu, L., Weston, R., Moloney, L., Kaspiew, R., & Dunstan, J. (2014). *Post-separation parenting, property and relationship dynamics after five years*. Canberra: Attorney-General's Department.

Codify family violence as a consideration in property division

The law currently provides for the court to take the impact of family violence into account in the court's consideration of a victim's contributions as well as in relation to a victim's future needs (pursuant to the range of factors set out in section 75(2) of the *Family Law Act*).

However, family violence is not specifically referred to in the legislation governing alteration of property interests. Further, the case law in relation to contributions sets a relatively high threshold for family violence to be taken into account. Consequently, the impact of family violence on a party's contributions and/or future needs is often overlooked.

In the Marriage of Kennon [1997] FamCA 27 (**Kennon**) provides authority that family violence is a relevant factor in determining a party's contributions pursuant to section 79(4) of the *Family Law Act*. *Kennon* states that the impact of family violence may be taken into account in the court's consideration of a victim's contributions pursuant to section 79(4) where a violent course of conduct had a "significant adverse impact" on the victim's contribution or, otherwise, made those contributions "significantly more arduous."

Legal Aid NSW supports enhancement and codification of this principle so that any impact of family violence on a victim's contributions must be specifically considered by the court in the division of property.

Further, section 75(2) currently provides that the impact of family violence may be indirectly relevant to an assessment of a victim's future needs under sections 75(2)(a) (health), (b) (income, property or financial resources) or (o) (any other fact or circumstance). For example, the court may take into consideration any ongoing health issues a victim has suffered as a result of family violence, or the inability of a victim to secure or maintain gainful employment due to a physical or physiological injury caused by an abusive partner.

Legal Aid NSW supports amendment of the *Family Law Act* to enable the impact of family violence on a victim's needs to be specifically referred to as a consideration within section 75(2).

Recommendation 15:

- (a) Legal Aid NSW supports amendment of the *Family Law Act* to enable the impact of family violence to be taken into account in the court's consideration of a party's contribution pursuant to section 79(4).**
- (b) Legal Aid NSW supports amendment of the *Family Law Act* to enable the impact of family violence to be specifically taken into account in the court's consideration of a party's future needs pursuant to section 75(2).**

Early allocation of funds to people leaving an abusive relationship so that they can recover financially from family violence

As stated above, lack of access to financial resources and housing can be a major barrier to women leaving a violent relationship. Often, existing spousal maintenance, victims support and child support schemes do not adequately address this barrier. Victims of family violence commonly require immediate access to funds to enable them to leave an abusive relationship, live independently, provide for their children and recover financially. This can often be more significant from a client's perspective than the final division of property.

Legal Aid NSW supports changes to the law in relation to interim spousal maintenance/partial property settlement to enable early allocation of funds to people leaving an abusive relationship so that they can recover financially from family violence:

- Entitlement to spousal maintenance pursuant to section 72(1) of the *Family Law Act* should not require a party to demonstrate that they are “unable to support herself or himself adequately”. Rather the threshold should be broadened to include where a party requires financial resources to live independently, maintain children adequately and/or recover financially from separation in circumstances where their safety or the safety of children could be compromised.
- Family violence should be specifically taken into account in the court's consideration of the party's future needs within the range of section 75(2) factors in its determination of spousal maintenance. This amendment is proposed as part of recommendation 14 (above) and also applies to interim spousal maintenance.
- The circumstances in which urgent spousal maintenance can be ordered pending disposal of the proceedings pursuant to section 77 should be broadened to specifically capture situations where allegations of family violence have been made. However there should not be a requirement for a court to make a finding of family violence at an early stage when such orders are made.
- The process of making applications for interim spousal maintenance/ partial property settlement should be simplified and expedited.

The above proposals would provide more immediate access to financial resources for victims of family violence and their children. It should increase confidence in the family law system as a way of protecting victims including children from violence and reducing the barriers to leaving a violent relationship.

Recommendation 16: Legal Aid NSW supports the early allocation of funds to people leaving an abusive relationship so that they can recover financially from family violence through:

- (a) **Entitlement to spousal maintenance pursuant to section 72(1) should not require a party to demonstrate that they are “unable to support herself or himself adequately”. Rather the threshold should be broadened to include where a party requires financial resources to live independently, maintain children adequately and/or recover financially from separation in**

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- circumstances where their safety or the safety of children could be compromised.
- (b) Family violence should be specifically taken into account in the court's consideration of the party's future needs pursuant to the range of section 75(2) factors in its determination of spousal maintenance. This amendment is proposed as part of recommendation 14 (above) and also applies to interim spousal maintenance.
 - (c) The circumstances in which urgent spousal maintenance can be ordered pending disposal of the proceedings pursuant to section 77 should be broadened to specifically capture situations where allegations of family violence have been made. There should not be a requirement for a finding of family violence at this early stage.
 - (d) The process of making applications for interim spousal maintenance and partial property settlement should be simplified and expedited.

Simplified and expedited processes for division of small property pools

Legal Aid NSW supports the Victoria Legal Aid submission for a new stream in the Federal Circuit Court that would be dedicated to determining small property division. A simplified small property stream would determine matters more quickly and cheaply than the current court process. It would make small property settlements accessible.

In particular, Legal Aid NSW supports the following elements of the VLA proposal:

- The stream could function in a way similar to the current divorce list.
- The determination would be narrowed to a single issue (that is, property division).
- Where there are associated children's matters, these could proceed in the usual way in the family law courts and the matters could be dealt with concurrently but separately. However in some cases it will be appropriate to adjourn the property decision until after the determination of children's matters or hear the matters together in the way they are currently dealt with.
- Parties could perhaps be able to apply using a single, tick-a-box style form which is written in plain English and designed to make it as easy as possible for the parties to provide the judicial officer with the information needed to make a property settlement decision without affidavits or other complex legal documents or legal assistance.
- Decisions in this list could be delegated to a Judicial Registrar, could be made in accordance with the current legislative framework and could be appealable in the usual way.
- A small property division would be limited to claims of property up to a certain ceiling. The potential share of the property pool that a party is likely to receive should be their claim, rather than the total pool.

In addition, Legal Aid NSW supports increasing the monetary limit on family law property settlement matters which can be determined by state and territory courts. We refer to the Legal Aid NSW and National Legal Aid submissions on the exposure draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017.

The above proposals would make property settlement more accessible to victims of family violence and reduce the barriers to leaving a violent relationship.

Recommendation 17: Legal Aid NSW supports simplified and expedited processes for the division of small property pools including through:

- (a) an expedited case management process for the division of small property pools in the Federal Circuit Court, and
- (b) increase of the monetary limit on family law property settlement matters which can be determined by state and territory courts.

TOR 5: Strengthening the capacity of family law professionals

Training for judicial officers exercising jurisdiction under the Family Law Act

As outlined above,¹³ Legal Aid NSW supports judicial officers exercising jurisdiction under the *Family Law Act* being provided with further training in relation to family law and family violence.

Mandatory, specialist and regulated family violence training program for family law professionals in the family law courts

Family law is a complex and specialist area of practice. An advanced understanding of family violence is critical to the safe and effective practice of family law.

Legal Aid NSW supports the establishment of a mandatory, specialist and regulated family violence training program for legal practitioners and other family law professionals working in the family law courts. The training program should be a pre-requisite to appearing in the Family Court or Federal Circuit Court. It could be maintained and regulated in a similar way to accreditation in family dispute resolution.

The training program should cover:

- Social science about family violence including the nature and dynamics of family violence, barriers to disclosure, the impact of family violence on victims and children, contributing risk factors and the effectiveness of various interventions.
- Best practice approaches to screening, identifying risk, risk assessment, safety planning for people experiencing violence and managing litigation in a safe way, referral as well as strategies about working effectively with victims, children and people who use violence.

¹³ See recommendation 7 in relation to the making of unsafe consent orders.

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- Principles of family law relevant to family violence including legislative provisions, case law and the family violence best practice principles. This section should include training around some of the issues raised in this inquiry such as protections available to protect vulnerable witnesses and the court's power to decline unsafe consent orders.

This training program would be for at least one day. It would require resourcing to organisations such as legal aid commissions or Law Society bodies to develop, roll out and maintain the training program across Australia.

We note recommendation 11 of the Final Report of *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* about increased training programs in relation to family violence dynamics for professionals in the family law system.

Provision of a family violence training program would increase the capacity of professionals to assist victims of family violence, as well as people who have used violence, with their family law matters. This should improve outcomes for children and families.

Recommendation 18: Legal Aid NSW supports the establishment of a mandatory, specialist and regulated family violence training program for legal practitioners and other family law professionals working in the family law courts. The training program should be a pre-requisite to appearing in the Family Court or Federal Circuit Court.

TOR 6: Intervention orders for personal protection

Effective enforcement of both state-based domestic violence protection orders and injunctions for personal protection made under the *Family Law Act* is vital to improving safeguards for victims of family violence. The inadequacy of existing enforcement mechanisms is demonstrated by the following case study.

Case Study – Betty* - Interstate Protection

Betty and Gary have two children, aged 11 and 12 years of age. According to family law orders, the children live with Betty in Sydney and spend time with Gary. There is a history of family violence perpetrated by Gary against Betty. Betty is on a Centrelink benefit.

In late 2016, Gary did not return the children as required by the family law orders, driving them instead to regional Queensland.

Betty applied to the family law court for recovery of the children. A recovery order was granted, and the children's time with Gary was suspended. The police enforced the

recovery order and returned the children to Betty's care. Betty arranged flights to Queensland at her own cost to bring the children back home.

Within days, Gary again removed the children from Betty's care and drove them to regional Queensland, refusing to return them. Again, the police enforced the recovery order and returned the children to Betty's care. Again, Betty arranged flights up to Queensland at her own cost to bring the children back home.

The family law court then made an injunction for the personal protection of the children under section 68B of the FLA, restraining Gary from approaching them, their school and Betty's residence.

The following day Gary breached the injunction by again removing the children from Betty's care and driving them to regional Queensland, refusing to return them. Again, the police enforced the recovery order and returned the children to Betty's care. No action was taken by police however in relation to Gary's breach of the personal protection injunction. For a third time, Betty arranged flights up to Queensland at her cost to bring the children back home.

A domestic violence protection order was then made by a Magistrates Court in Queensland protecting Betty and the children from Gary. Soon after, Gary attended the children's school in breach of the personal protection injunction and the Queensland protection order. Betty phoned the NSW Police, who attended the children's school.

However, no action was taken by NSW Police in relation to the breach of the personal protection injunction. No action could be taken by NSW Police in relation to the breach of the Queensland protection order, as it had not been registered in NSW: the existing registration process places the onus on Betty to apply to the NSW court to have the Queensland protection order registered.

In summary, Gary removed the children from Betty's care three times within one month. This was in clear defiance of court orders. This issue has been litigated on a number of occasions in three different courts at public expense and with limited utility. On each occasion, there were difficulties in encouraging interstate police to enforce the recovery order. The injunction for personal protection under the FLA and the Queensland protection order were ineffective. Betty has met the costs of travelling to and from Queensland on each occasion herself, despite her limited means. The children travelled between Sydney and regional Queensland by car or plane on six occasions in just over two weeks. The children cannot be assured of attending school safely and without ongoing exposure to conflict and anxiety.

Given the inadequacies of the current system, Legal Aid NSW supports a national approach to orders made at both state and federal level, including through:

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- Prioritisation of the establishment of a national database to underpin the recently enacted National Domestic Violence Order Scheme.
 - The extension of this database to include personal protection injunctions, other family law orders and children’s court orders (see comments on page 11). This should be underpinned by a comprehensive privacy framework to ensure information provided by courts to the database protects the privacy rights of victims of family violence.
 - Support for interim information-sharing arrangements between interstate law enforcement agencies before the establishment of the database, to ensure that victims of domestic violence are not required to manually register existing orders when they move interstate.

Recommendation 19: Legal Aid NSW supports a national approach to the administration and enforcement of protection orders through:

- (a) prioritisation of the establishment of a national database to underpin the recently enacted National Domestic Violence Order Scheme, and**
- (b) support for interim information-sharing arrangements before the establishment of the database, to ensure that victims of domestic violence are not required to manually register existing orders when they move interstate.**