

# Submission to the Australian Law Reform Commission's review of the family law system

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June 2018

The Centre for Innovative Justice ('the CIJ') welcomes the chance to make a submission to this crucial review of the family law system ('the FLS') by the Australian Law Reform Commission (ALRC). Given the expertise that the review team brings to this task, this review presents a unique opportunity for the substantial body of existing work regarding the need for improvement in the FLS to be brought together, to be synthesised, and to contribute to action on meaningful reform.

In addition to this significant existing work, the CIJ is aware that the ALRC will receive detailed submissions addressing a wide range of questions posed in its Discussion Paper. Some of these submissions will focus primarily on cost and procedural improvement; some will address the family law system's current lack of accessibility for people from CALD, LGBTIQ and Aboriginal and Torres Strait Islander communities; some will focus primarily on experience of the family law system as it impacts on victims of family violence; and, conversely, some may even reflect a sense in certain sectors of the community that the family law system 'favours' some parents over others.

Certainly, the ALRC will hear a wide range of opinions and benefit from varying levels of expertise and evidence on the questions raised in its Discussion Paper. To this end, the CIJ does not consider it useful to address every question in the Discussion Paper, but to focus its submission on those areas in which the CIJ's work specialises.

To make the submission even more targeted, however, the CIJ will apply its expertise through the lens of one of its specialty areas, family violence ('FV'). This is not to suggest that all families seeking the help of the FLS experience FV, nor to suggest that other issues, such as lack of accessibility for people from CALD, LGBTIQ and Aboriginal and Torres Strait Islander communities, are not vital.

Rather, the CIJ proposes this approach because, as the ALRC's Discussion Paper acknowledges, the most complex of matters going through the FLS frequently involve FV; because the FLS's imperative to make decisions in the best interests of children demands greater recognition of the impacts of FV on children; and because, in the CIJ's view, the failure of the FLS to grapple in full with evolving evidence regarding FV is the challenge which needs most urgent attention. This challenge, of course, includes the lack of integration between the FLS and other court jurisdictions. When children – whose best interests are supposed to be *protected* by the FLS – are being placed in abusive situations or even killed by vengeful parents because, as an overall system, we have failed to understand the risk that they face, this means that improvements in the FLS's response to FV is where reform needs to start.

## Background and scope of this submission

The CIJ is a research and reform body attached to RMIT University. The CIJ's objective is to develop, drive and expand the capacity of the justice system to meet and adapt to the needs of its diverse users. The CIJ meets this objective by providing life changing experiences to students through contact with innovative justice approaches and practitioners, as well as through clinical experience providing services to some of the legal system's most vulnerable participants. The CIJ also meets this objective by conducting rigorous research which focuses on having impact – taking our research findings, most of which involve direct engagement with service users, and using them to develop innovative and workable solutions. We then work with those agencies charged with implementing reform – from Government Departments, through courts to service providers – to help that reform seem as achievable as possible.

To date, much of the CIJ's work has focused on the Victorian criminal justice system, with particular focus on therapeutic and restorative approaches; as well as on legal system responses to FV, particularly those responses connected with the Magistrates' Court and Children's Court jurisdictions. Clearly, there are important differences between these jurisdictions and the FLS and, while individual team members at the CIJ have prior experience of family law, the CIJ does not claim to have a comprehensive understanding of the current FLS.

That being said, as the ALRC's Discussion Paper acknowledges, recent research makes clear that significant numbers of people have legal issues which bring them into contact with multiple legal arenas, including criminal, child protection, FV *and* family law. This means that the FLS does not deal with family law disputes in isolation, with the matters dealt with by the FLS increasingly involving clients who face complex issues such as FV, substance abuse and mental health issues. The CIJ has developed expertise around how people presenting with issues such as these can be most effectively engaged by and responded to when they encounter legal systems.

As a result, the CIJ takes the view that strategies developed in the context of state-based courts have relevance for the FLS, given that it is often the same clients with the same complex issues that come into contact with both state-based courts *and* the FLS. What's more, while many aspects of the FLS already embody principles and practices consistent with therapeutic jurisprudence, and while many aspects provide less adversarial forms of dispute resolution, it is within those jurisdictions which are the subject of the CIJ's expertise that the growth of explicitly therapeutic jurisprudence-informed justice mechanisms has largely occurred. This means that the approaches that have been developed at the state-based level have not necessarily been applied within the FLS, this review therefore presenting a useful opportunity for cross-sector learning.

Meanwhile, the CIJ's acknowledged expertise in FV and, in particular, in perpetrator interventions, gives the CIJ a distinct knowledge base from which to converge our expertise in innovative justice approaches with this expertise in FV. As such, we hope to be as useful as possible to the ALRC by combining our expertise in a targeted way.

## Part One

### The tension between a no-fault approach and acknowledging family violence

Undeniably, the new approach to the breakdown of relationships heralded by the passage of the *Family Law Act* was a vast improvement on the previous legal regime governing these matters. Prior to this change, the primary mechanism for obtaining a divorce was via a legal process that required the establishment of fault. Litigants needed to prove that their spouse had committed a 'matrimonial offence' such as adultery, desertion or cruelty.<sup>1</sup> Adultery was the most common ground relied upon, and divorce proceedings of the day tended to involve the submission of photographic evidence that depicted, sometimes in graphic details, a spouse's acts of infidelity.<sup>2</sup>

As a consequence, prior to the passage of the *Family Law Act*, divorce proceedings were generally humiliating experiences for the parties.<sup>3</sup> Decisions about arrangements for the care of children following parents' separation tended to be highly shaped by judges' assessments of the parties' moral conduct during the marriage.<sup>4</sup> By contrast, the *Family Law Act* created a single, no-fault ground for divorce, aiming to enhance the dignity of the process for separating couples, and embodying a new vision of divorce that reflected changing social mores, whereby divorce was no longer seen as a moral failing.<sup>5</sup> An effect of the new Act was therefore that court decisions regarding children's care arrangements were no longer determined with reference to moral assessments of the parties, instead prioritising expert social science opinion on children's needs.<sup>6</sup>

Shifting the legal response to family breakdown from an assessment of parents' moral failings to one in which the court's chief concern was about making future arrangements that would best meet the children's needs, was ultimately desirable. Ironically, however, the collective desire to avoid attribution of *blame* meant that the FLS has continued to avoid adequate understanding and attribution of *risk*. This means that the decision to avoid blame for the breakdown of a romantic relationship has continued to blind the system to the full extent of past and current behaviour which should inform a thorough assessment of what children's best interests may really be.

This is not to say that the FLS does not consider past conduct in assessing children's best interests. Indeed, the *Family Law Act* explicitly requires the courts to consider 'the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence'.<sup>7</sup> Awareness is also growing that children may be severely affected by being aware of or witnessing FV, even where they themselves are not the direct target of it,<sup>8</sup> as well as that the trauma experienced by children exposed to FV may continue to affect them long term.<sup>9</sup>

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<sup>1</sup> *Matrimonial Causes Act 1959* (Cth) s 28.

<sup>2</sup> Shurlee Swain and Danielle Thornton, 'Fault, gender politics and family law reform' (2011) 57 *Australian Journal of Politics and History* 207, 209-210.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, 212.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*, 213.

<sup>7</sup> *Family Law Act 1975* (Cth) s 60CC(2)(b).

<sup>8</sup> Caroline McGee, *Childhood Experiences of Domestic Violence* (Jessica Kingsley, 2000). Juliet Behrens has made the point that even where such a connection is drawn, the courts will consider the past conduct of a parent 'in a way which looks forward, rather than backwards'. That is, courts will only examine past behaviour of a parent insofar as it deems this to be relevant to its task of determining future arrangements for children. Juliet Behrens 'Meeting the needs of victims of domestic violence with family law issues: The dangers and possibilities in restorative justice' (2005) 1 *International Journal of Law in Context* 215, 221.

<sup>9</sup> *Ibid.*

### Limits on understanding – effectiveness of referrals and legal interventions

The FLS can, therefore, recognise that past violence perpetrated by one parent against the other may directly affect children in the future to some extent. Overall, however, this does not take proper account of the full impacts of FV on child and adult victims, nor of the patterns of FV perpetration. For example, decisions about parenting arrangements may mistakenly assume that, where FV has ‘only’ been committed against an adult victim (albeit impacting the children), that an increased risk of physical or emotional violence may not then be *transferred* to children where their mother is no longer an intervening presence while their father has contact with them.

Similarly, this may not consider the fact that, despite asserting their positions as ‘good fathers’, many men who perpetrate FV have not had much direct care of their children prior to separation. This means that the increased stress of suddenly providing primary care to vulnerable and traumatised children can escalate risk further.<sup>10</sup> In addition, it leaves unaddressed the question of whether someone can, indeed, be a ‘good father’ if they are, or have been, perpetrating FV against the children’s other parent.<sup>11</sup>

To this end the CIJ would like to draw the review’s attention to the FLS’s increasing referral of perpetrators of FV to Men’s Behaviour Change Programs (MBCPs) as a way of ‘addressing’ FV prior to decisions about parenting arrangements. Based on the CIJ’s expertise in this area, the CIJ cautions against an assumption that referral to a MBCP program will be likely to result in sufficient behaviour change for risk to children to be reduced. Rather, substantial evidence points to the fact that referral to participate in a single program over a period of months is unlikely to address attitudes and behaviours developed over a lifetime.<sup>12</sup> This evidence does not necessarily suggest that MBCPs do not ‘work’ or are not legitimate. Rather, it indicates that it is not reasonable to expect the burden of ‘holding perpetrators accountable’ to fall on MBCPs alone, and that *all* aspects of an integrated accountability system need to be functioning together to increase family safety.<sup>13</sup>

What’s more, expectation that participation in a single MBCP will reduce risk sufficiently does not take account of the complexity of perpetrator behaviours, or pathways towards change. An increasing body of qualitative research with perpetrators indicates that pathways towards desistance from FV are far from linear but, rather, can be very stop-start endeavours. This research indicates that long-term risk reduction seems to be dependent on, amongst other things:

- (a) Perpetrators making desistance from violence as a ‘lifetime project’;<sup>14</sup>
- (b) Perpetrator participation in multiple programs and access to ongoing support;<sup>15</sup>

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<sup>10</sup> Centre for Innovative Justice, (2016) *Pathways towards accountability: mapping the journey of perpetrators of FV – Phase 1*, RMIT University.

<sup>11</sup> Cathy Humphreys and Monica Campo, CFCA Paper No. 43, *Fathers who use violence: Options for safe practice where there is ongoing contact with children* (2017); Cathy Humphreys and Monica Campo, CFCA Paper No. 43, *Fathers who use violence: Options for safe practice where there is ongoing contact with children* (2017).

<sup>12</sup> Centre for Innovative Justice, (2015) *Opportunities for early intervention: bringing perpetrators of family violence into view*, RMIT University; Vlasis, Rodney et al, (2017) *Family and domestic violence perpetrator programs: Issues paper of current and emerging trends, developments and expectations*, Stopping Family Violence Inc, Western Australia

<sup>13</sup> Kathleen A. Sheehan, Sumaiya Thakor and Donna E. Stewart, 'Turning Points for Perpetrators of Intimate Partner Violence' (2012) 13(1) *Trauma, Violence, & Abuse* 30-40.

<sup>14</sup> Carlo Clavio-Lopez (2016), *Desistance from intimate partner violence: a narrative study of men with histories of violence against their female partners* PhD Thesis, Monash University

<sup>15</sup> D Morran, (2013) ‘Desistance from domestic violence: influences, patterns and processes in the lives of formerly abusive men’, *Howard Journal of Criminal Justice* (53) 3, 306.

(c) Perpetrators accept that seeking external support is appropriate male behaviour;<sup>16</sup>

(d) The convergence of external and internal motivating forces, including the prospect of negative justice system consequences.<sup>17</sup>

The CIJ has conducted its own qualitative research with perpetrators which confirms how denial and minimisation prevents many perpetrators from taking genuine responsibility for their behaviour.<sup>18</sup> This includes views about MBCP participation in the context of mandated referrals by courts, in which many perpetrators may see participation as simply 'doing their time' in order to 'get the certificate' at completion.<sup>19</sup> This can also accord with what evidence suggests are the views of many perpetrators who may consent to FVIOs as 'just a piece of paper'.<sup>20</sup>

Evidence also indicates that some men are incapable of meaningful participation in MBCPs,<sup>21</sup> particularly without additional case management or individual, FV informed, counselling conducted by specialist programs. The CIJ notes that the latter is to be distinguished from mainstream, individual psychological counselling.

The CIJ therefore encourages the review to consider how the FLS views participation in a MBCP when it makes decisions about parenting arrangements, taking account of the potential for men to see their participation as simply a way to prove to the court that they are a good father and 'deserve' contact with their children, rather than to undergo any genuine change. For this reason, the CIJ believes that, while MBCP participation should still be component of an integrated response, this should be considered in combination with comprehensive risk assessment, which is a more useful measure of the risk that a perpetrator poses. This will be discussed further below.

The CIJ also suggests that the review take account of whether referral to other programs will appropriately address FV, including contributing factors, without compounding the sense that violent behaviour is driven primarily by substance abuse or mental health issues, rather than by power and control.<sup>22</sup>

### Fluctuating and dynamic risk

Further to these considerations, an eagerness to facilitate children's relationships with both parents in the FLS context may not take full account of the fact that:

(a) separation is often a time of *increased* risk to victim/survivors, including of lethal violence, as the review will no doubt be aware. This means that the FLS may be dealing with families in the context of heightened danger, rather than simply considering past behaviour;

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<sup>16</sup> Ibid

<sup>17</sup> Roguski, Michael and Natalie Gregory, 'Former family violence perpetrators' narratives of change' (2014) <<https://library.nzfvc.org.nz/cgi-bin/koha/opac-detail.pl?biblionumber=455>

<sup>18</sup> Centre for Innovative Justice, (forthcoming) *Bringing pathways towards accountability together*, RMIT University.

<sup>19</sup> Sheehan et al, above n 13.

<sup>20</sup> Chung, Donna et al, 'Breaching safety: Improving the effectiveness of violence restraining orders for victims of family and domestic violence' (2014) <[www.womenscouncil.com.au/uploads/6/1/1/9/6119703/breaching\\_safety\\_final.pdf](http://www.womenscouncil.com.au/uploads/6/1/1/9/6119703/breaching_safety_final.pdf)

<sup>21</sup> Gondolf, Edward W., *The future of batterer programs: Reassessing evidence-based practice* (Northeastern University Press, 2012)

<sup>22</sup> Centre for Innovative Justice (2016) above n 10.

(b) even where risk of lethal or physical violence is reduced, that tactics of perpetration can simply shift, rather than be eliminated;

(c) that risk can fluctuate over time, with increasing practitioner concern about the relevance not only of dynamic risk, but *acute* dynamic risk, in which particular events can create a 'spike' in the risk that a perpetrator poses to family members. This can include an upcoming family law hearing, or a decision in a family law proceeding which may prevent the perpetrator from having care for, or contact with, his children.<sup>23</sup>

This fluctuating risk can mean that, even where perpetration of physical violence has not previously been evident, and where perpetrators appear to be otherwise law abiding, their desire to enact revenge on their former partner for what they perceive as them denying their 'right' to see their children can tragically lead to the murder of children as a way of punishing a former partner.<sup>24</sup>

Further to this, a legislative imperative to facilitate children's relationships with both parents may fail to take account of the fact that:

(d) FV dynamics, including the power that a perpetrator may have exerted over the home and the fear in which victim/survivors may have lived, may mean that children align with a perpetrator simply to avoid negative consequences. This likelihood is increased where children are interviewed in the presence of the perpetrator.<sup>25</sup>

(d) FV perpetration often includes attempts to undermine a mother's capacity to parent, as well as children's relationship with their mother, making them less likely to seek time with their mother than they might otherwise;<sup>26</sup> and

(e) Separation provides an opportunity for perpetrators of FV to undermine the maternal/child relationship further, free from the intervention or presence of the mother while in contact with their children.<sup>27</sup>

This means that the FLS is often presented with a distorted version of the reality that child and adult victims are experiencing. Far from a question of 'past behaviour', if FV has been present in the home prior to separation, FV is highly likely to remain a factor in the lives of adult and child victims during the span of their contact with the FLS and be dictating much of their current decisions.

For example, the fear that many victims of FV continue to experience during and after family law proceedings mean that, even where a FVIO is in place against the perpetrator, the victim/survivor may continue to 'allow' him to attend the home and/or not report breaches of the order to police simply to avoid escalation.

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<sup>23</sup> Gabrielle Klepfisz, Michael Daffern & Andrew Day (2015) Understanding dynamic risk factors for violence, *Psychology, Crime & Law*, 22:1-2, 124-137, DOI: 10.1080/1068316X.2015.1109091

<sup>24</sup> Debbie Kirkwood, Discussion Paper No. 8, *'Just Say Goodbye': Parents who kill their children in the context of separation*, Domestic Violence Resource Centre Victoria No (2013). Lundy Bancroft, Jay G. Silverman and Daniel Ritchie, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (SAGE Publications, Inc., 2nd ed, 2012).

<sup>25</sup> Caroline McGee, *Childhood Experiences of Domestic Violence* (Jessica Kingsley, 2000) 66.

<sup>26</sup> Katie Lamb *Seen and Heard: Embedding the Voices of Children and Young People who have Experienced Family Violence in Programs for Fathers* (PhD Thesis, The University of Melbourne, 2017) 22.

<sup>27</sup> *Ibid*

Indeed, this risk management is the reason why many women do not separate in the first place, preferring instead to manage the risk while they can function as an intervening presence between the perpetrator and their children.<sup>28</sup> Despite this, this scenario may see perpetrators argue that the other party to the relationship is not in fear of them, and that allegations of FV have been invented simply to secure a result in family law proceedings.

For this reason, the CIJ strongly urges the review to ensure that all professionals working in the FLS have specialist FV expertise. This includes those preparing Family Reports for judicial officers, many of whom may currently only see family members for a short period, and do so with no specialist FV expertise. This increases the chance that they may collude with a perpetrator's narrative that he is, in fact, a victim; as well as the chance that a victim may have her own account minimised or ignored. It also increases the chance that children's perspectives will not be taken into account in the context of appropriate risk assessment. A report prepared by a multidisciplinary team which includes specialist FV workers may help to minimise these problems further.

### **Abuse of process and misidentification**

In addition to these considerations, the impact of *other* court proceedings relevant to FV is not always visible to the FLS. The review will no doubt receive many submissions about the need to include abuse of legal processes in its definition of FV, and the CIJ strongly supports this. However, the CIJ draws particular attention to the collision of child protection and family law jurisdictions, in which the former has historically expected victims of FV to prove that they are acting as a 'protective parent' by limiting children's exposure to the perpetrator, while the latter has historically taken a poor view of victims who are seeming to be 'obstructive' by limiting children's contact with their fathers.<sup>29</sup> While this is not the subject of a particular review question, the CIJ urges the review to consider how the FLS may take account of child protection involvement with any families with whom they are dealing and the impact of these competing imperatives.

A further jurisdictional involvement which can 'muddy' the assessment of risk posed to children can be the increasing use of cross-applications in terms of Family Violence Intervention Orders ('FVIOs'). The CIJ conducts substantial work in the Magistrates' Court of Victoria's FV jurisdiction and is aware of an increase in recent years of FVIOs being brought against women who the system subsequently shows have been Affected Family Members (AFMs) to other FVIOs and victims of serious violence.

Meanwhile, the work of the CIJ's strategic partner, the Law and Advocacy Centre for Women (LACW), a firm which provides legal representation for women charged with criminal offences, reports a significant rise in the number of clients charged with breach of FVIOs, orders either applied for by aggrieved former partners while family law proceedings are on foot or by police (discussed below). LACW further reports that many charges are withdrawn at the door of the court or dismissed as groundless by a Magistrate in court, suggesting that the applications were used primarily as a tactic by a perpetrator to cast doubt on their former partner's suitability as a mother.

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<sup>28</sup> Kirkwood, above n 24.

<sup>29</sup> Cathy Humphreys, *Domestic Violence and Child Protection: Challenging Directions for Practice*, Australian Domestic & Family Violence Clearinghouse, Issues Paper 13.

To this end, the CIJ's broader work also indicates an increase in the number of men later identified as perpetrators who are presenting as victims to the justice and broader service system. For example, from its work in this area the CIJ is aware that a consistent proportion of men who present to Victim's Assistance Programs are subsequently revealed to have a long history of FV perpetration. Consequently the CIJ encourages the review team to seek the advice of Victims' Assistance Programs in Victoria and NSW, in particular, on this subject if the review has not already received submissions in this regard.

Meanwhile, the MCV and LACW also report that FVIO applications are also being brought against women by police who, in an attempt to take a 'zero tolerance' approach to FV, may bring an application against a woman who they wrongfully identify as a 'primary/predominant aggressor' when they attend a FV incident.

This may involve an assessment of a woman as a perpetrator where she has used physical force in self-defence against a partner who has been wielding significant coercion and control for some time; as well as assessments of women as perpetrators who present as aggressive and/or defensive upon police attendance while the male (who may well have called the police himself) presents as rational and calm. A common tactic in this context is for the male partner to assert that his partner has mental health or substance abuse issues and that he simply wants her to seek help.

The CIJ is part of a steering group working to develop a more nuanced and appropriate 'Predominant Aggressor Identification Tool' for Victoria Police, to be released for wider consultation in the second half of this year. Given the substantive body of broader evidence which highlights that the vast majority of perpetrators of FV are men and the vast majority of victim/survivors are women, it is highly likely that this tool will identify that a higher number of women are being identified as Predominant Aggressors than is currently understood.

This new tool will put additional focus on FV as pattern-based, rather than incident-based, supported by a solid evidence-base which points to the importance of viewing FV, and shifting our response to it, through this lens.<sup>30</sup> As such, evidence indicates that, where women *do* commit acts of FV against their male partners, it is less likely to be part of a pattern of coercive and controlling behaviour and far more likely to be an incident resulting from self-defence or from attempts to protect children.<sup>31</sup>

This is not to suggest that men are never victims of FV. Rather, evidence suggests that, where men are genuinely the victims of FV, they are more likely to have experienced FV from other men, including male intimate partners; fathers; sons; other male relatives; or even the male intimate partners of female relatives.<sup>32</sup> Either way, a definition of FV as pattern-based, rather than incident-based can allow a more realistic assessment of the risk that one party to a family law matter poses to the other party, or to their children. This includes if the FLS is assessing risk in the context of same-sex relationships.

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<sup>30</sup> Amanda L Robinson, Andy Myhill and Julia Wire, 'Practitioner (mis)understandings of coercive control in England and Wales' (2018) 18(1) *Criminology & Criminal Justice* 29-49; Evan Stark, 'Rethinking Coercive Control' (2009) 15(12) *Violence Against Women* 1509-1525.

<sup>31</sup> Lisa Young Larence and Susan L. Miller, 'In Her Own Words: Women Describe Their Use of Force Resulting in Court-Ordered Intervention' (2016) 23(12) *Violence Against Women* 1536-1559.

<sup>32</sup> Centre for Innovative Justice (2015), above n 12.

### Patterns of behaviour, assessments of risk

To this end, while the review considers the definition of FV in the *Family Law Act*, the CIJ encourages the review to include acknowledgment of pattern-based, rather than incident-based behaviour. This is to avoid conclusions by a court that a relationship simply involves ‘mutual conflict’, rather than FV, where one party has used force in one incident while the other has a long term history – conclusions that can pose serious long-term risks to children.

Conversely, while coercive control is not included as an element of state-based FV regimes, the CIJ suggests that it is worth retaining this emphasis in the *Family Law Act’s* definition. It may be that this should be an element that *can* be present, rather than *must* be present in an assessment of the presence of FV. This shift may avoid unfortunate failures to take into account behaviour by a perpetrator which might be described as a ‘one-off’ but which, combined with other factors, points to serious risk. This includes factors such as strangulation or harm to family pets which the review will be aware are indicated by FV literature to be serious risk factors. Most importantly, assessments should be brought in line with other, established understandings of FV risk.

To this end, the CIJ also urges the review to make recommendations for the inclusion of comprehensive, specialist FV risk assessments conducted in the context of family law proceedings. Conducting such risk assessments would *not* indicate a drift from the jurisdiction’s no-fault foundations, but instead assess past (and ongoing) behaviour to inform more nuanced and expert considerations of what current and future risk children may be facing and therefore what arrangements for their care should appropriately be made.

These risk assessments should take account of the fact that many men who may be sufficiently well resourced to persist with protracted family law proceedings (including so as to drain the resources of their former partner) and who may otherwise seem compliant with the law, may nevertheless pose significant risk to their family members. In this way, specialist FV risk assessments differ from other forms of risk assessment, such as those in Correctional environments, in which low risk of reoffending generally can often be mistaken for low levels of dangerousness. At the intersection of FV and the FLS, however, this mistaken assessment can have tragic consequences.<sup>33</sup>

### Interests and invisibility of children

The Victorian Royal Commission into Family Violence (RCFV) noted that children are often referred to as ‘silent victims’ of FV because system responses have historically focused primarily on women’s safety needs and have failed to consider that children also have distinct needs and experiences.<sup>34</sup> The RCFV reported that, while there are promising signs that this attitude is shifting, children and young people are still marginalised and ignored as unique victims in their own right.<sup>35</sup> The RCFV made a number of recommendations in response to this issue. These were largely concerned with making children and young people-focused FV services more available.<sup>36</sup>

To this end, the CIJ notes that the *Family Violence Protection Act 2008 (Vic)*’s general restriction on the presence of children and young people during FVIO proceedings may be contributing to the invisibility of children and young people within system responses. Consistent with this, children are often excluded from participation in a range of legal proceedings which affect them.

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<sup>33</sup> Kirkwood, above n 24.

<sup>34</sup> Victoria, Royal Commission into Family Violence, (2016) *Report and Recommendations*, Vol II, 101.

<sup>35</sup> *Ibid.*

<sup>36</sup> Victoria, Royal Commission into Family Violence, (2016) *Summary and Recommendations*, 51.

This may be understandable given that an oft-quoted passage by Judith Herman argues that ‘...if one set out intentionally to design a system for provoking symptoms of posttraumatic stress disorder, it might look very much like a court of law.’<sup>37</sup>

Less frequently acknowledged, however, is that Herman has also argued that participating in the justice system also has the potential to provide mental health and other benefits to victims of crime/interpersonal violence. Herman argues that, even though legal processes can be highly stressful and may fail to be victim-centred, engaging with them may nonetheless deliver outcomes to victims that mean they are safer. Further, some may find the process empowering, and some may experience public acknowledgement and have other justice needs met.<sup>38</sup> Herman ultimately concludes that involvement in the legal system in itself is not inherently damaging to victims’ mental health. Rather, she suggests that it is the *quality* of the encounter with the legal system that determines whether the experience is harmful or beneficial for victims.<sup>39</sup> This is consistent with procedural and therapeutic jurisprudence – explored further in Part Two.

Herman’s work and much of the therapeutic jurisprudence research deals with adults’ experiences of legal systems, with very little scholarly attention devoted to children and young peoples’ experiences of going to court. However, a small, yet growing, body of research does look at children and young people’s experiences of the court process in the context of child protection proceedings. Some of these studies sought to measure the emotional impact for children and young people of attending court, finding no evidence of high distress following the court experience and indicating a keen desire by children and young people to be able to attend hearings if they so choose.<sup>40</sup> Other commentators have concluded that children and young people subject to child protection interventions want to have more involvement in decision making that affects them, but that this was a desire for the opportunity to be heard, rather than to determine outcomes. As one put it, this desire included the chance to ‘have a say’ rather than ‘their own way’,<sup>41</sup> while others explain that:

*...children express desire to participate and to have a voice in decisions; they are disappointed when they do not feel listened to.*<sup>42</sup>

Research is certainly starting to acknowledge the importance of asking children and young people directly about the impact of FV on their lives.<sup>43</sup> Yet it also indicates that this is not a common experience for many. While FV has been an ongoing experience in their lives, studies indicate that they feel frequently excluded from decisions which affect them,<sup>44</sup> in turn leaving them with a sense of powerlessness.<sup>45</sup>

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<sup>37</sup> Judith Herman *Trauma and Recovery: The Aftermath of Violence* (Basic Books, 1992).

<sup>38</sup> Judith Herman, ‘The Mental Health of Crime Victims: Impact of Legal Intervention’ (2003) 16 (2) *Journal of Traumatic Stress* 159, 160.

<sup>39</sup> *Ibid.*, 162.

<sup>40</sup> Vicky Weisz, Twila Wingrove, Sarah Beal and April Faith-Slaker, ‘Children’s participation in foster care hearings’ (2011) 35 (4) *Child Abuse and Neglect* 267; Stephanie Block, Howard Oran, Diane Oran, Nikki Baumrind and Gail Goodman, ‘Abused and neglected children in court: Knowledge and attitudes’ (2010) 34(9) *Child Abuse & Neglect* 659.

<sup>41</sup> Judy Cashmore, ‘Promoting the participation of children and young people in care’ (2002) 26 *Child Abuse & Neglect* 837, 845.

<sup>42</sup> Monica Miller and Brian Bornstein *Stress, Trauma and Wellbeing in the Legal System* (Oxford University Press, 2013).

<sup>43</sup> For a useful overview see: Katie Lamb *Seen and Heard: Embedding the Voices of Children and Young People who have Experienced Family Violence in Programs for Fathers* (PhD Thesis, The University of Melbourne, 2017) 22.

<sup>44</sup> Jude Irwin, Fran Waugh, and Michelle Bonner, ‘The inclusion of children and young people in research on domestic violence’ (2006) 1(1) *Communities, Children and Families Australia* 17, 22.

<sup>45</sup> Caroline McGee, *Childhood Experiences of Domestic Violence* (Jessica Kingsley, 2000) 66.

This contrasts with what studies suggest is children's keen awareness that FV is about power and control.<sup>46</sup> To this end, other studies indicate that children also benefit from seeing that their experience has been named by an authority and that consequences have been experienced by those who have made them feel scared and powerless.<sup>47</sup> While the FLS has long included children's perspectives to a greater degree than other jurisdictions, this emerging evidence suggests that it may be time to increase opportunities for children to be heard.

### Conclusion to Part One

Overall, despite the formal ability of the courts to have regard to FV, this capacity has not kept pace with the evolving evidence base about patterns and tactics of FV perpetration nor, as the last subsection explains, children's experiences of this. Forty years ago, when the *Family Law Act* was first introduced, victims of FV may have had greater freedom to separate from a violent partner without the indignity and damage of fault-based divorce proceedings. The attempts to avoid attribution of *blame* for the breakdown of a relationship, however, led to avoidance of attribution of *risk*.

This means that the determination of the FLS to ignore past behaviour and focus on future arrangements has, over time, rendered the complexity and dynamics of FV only *partially* visible at best. It has led to the silencing of victims of FV who have sometimes felt, somewhat ironically, blamed for raising allegations of FV as indication of vengeful attitudes towards fathers and who experienced disbelief and minimisation of their victimisation.<sup>48</sup> This lack of visibility of the full story about FV perpetration within a family continues to compromise the best interests of children where this should be the FLS's primary concern.

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<sup>46</sup> Mullender, A., Hague, G., Imam, F. I., Kelly, L., Malos, E., & Regan, L. *Children's perspectives on domestic violence* (Sage Publications, 2002); Fergus Hogan and Máire O'Reilly *Listening to children: Children's stories of domestic violence* (Office of the Minister for Children Department of Health and Children, Dublin 2007) 81.

<sup>47</sup> Lamb, above n 26.

<sup>48</sup> Lesley Laing, 'Secondary victimization: Domestic violence survivors navigating the family law system (2017) 23 *Violence Against Women* 1314, 1321.

## Part Two

### Bringing a focus on innovative justice approaches to FLS matters involving FV

Since the passage of the *Family Law Act 1975*, the FLS has attracted its share of criticism, ranging from accusations of gender bias; unfair process; inaccessibility due to cost; and the ineffectiveness of orders when non-compliance remains so difficult to enforce.<sup>49</sup> Part One of this submission has added to this criticism in terms of highlighting the FLS's constrained capacity thus far to respond in full to the dynamics of FV or the growing evidence about its complexity.

In addition to the suggestions by the CIJ in relation to expanding this capacity – from encouraging consideration of the intersection of different system imperatives to the inclusion of specialist risk assessments - this submission now turns to suggestions for procedural reform to the broader work of the FLS which may improve the experience of parties living with FV and participating in the FLS. This is because these approaches attempt to ensure that contact with the FLS is a positive intervention in the lives of system users, rather than the negative intervention which many people currently experience. It is also because improved design to procedure and process may change the way in which the FLS and its decisions are viewed, and complied with, by parties using the system.

#### Procedural justice

Procedural justice research suggests that a person's experience of court - as well as other factors in the legal process - is shaped by how a person feels that decision makers have dealt with them and their issues.<sup>50</sup> This means that, while no person enjoys 'losing', if a person perceives that the processes used to manage their case were fair and that the treatment they received was respectful, they are more willing to accept the outcome and comply with any orders made.<sup>51</sup> In other words, when authorities act in a procedurally just manner, people view them and the laws they apply as legitimate and, as a result, are more inclined to obey the decisions made by these authorities.<sup>52</sup>

Given the evidence described above regarding the way in which referrals and court orders are often viewed by perpetrators of FV, an imperative exists for the FLS to ensure that its processes maximise the potential for compliance by delivering procedural justice. This is, of course, easier said than done where a perpetrator is determined that the 'system is against him' and that he is, in fact, the victim. As referred to in relation to court report writers above, it is also easier said than done to avoid collusion in this narrative by a judicial officer eager to seem compassionate. Nevertheless, specialist FV jurisdictions are well practised in this nuanced form of court craft and have a lot to offer the FLS in terms of how to conduct this work.

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<sup>49</sup> Hunter R, *Through the Looking Glass: Clients' Perceptions and Experiences of Family Law Litigation* (2002) 16 *Australian Journal of Family Law* at 7-19.

<sup>50</sup> Tom Tyler, 'Procedural Justice and the Courts' (2007) 44 *Court Review* 26.

<sup>51</sup> Thibaut, J. & Walker, L. (1975). *Procedural justice: A psychological analysis*. Hillsdale, MI: Lawrence Erlbaum Associates; Tom Tyler, *Why People Obey the Law* (Yale University Press, 1990).

<sup>52</sup> Tom Tyler, 'Legitimacy and criminal justice: The benefits of self-regulation' (2009) 7 *Ohio State Journal of Criminal Law*, 307, 313.

Of course, procedural justice approaches, just like therapeutic justice approaches, are a more straightforward exercise in the context of criminal matters, where much procedural justice literature is focussed.<sup>53</sup> This is because the hearing involves only one individual party, being the offender, and focuses on past behaviour, rather than future conduct. This means that the court can focus on the causes of the crime and use the process to address any issues which have contributed to the offending.

In the context of FV or family law proceedings, there is more than one party involved, and much more than one perspective. Nevertheless, procedural justice research sheds light on the factors that determine whether a legal process is perceived to be procedurally just by a person subject to it. These factors include:

- Having the chance to be heard (voice);
- That officials and decision makers approach the case with an open mind (neutrality of the decision maker);
- That officials and decision makers are consistent in how they treat similar cases, and in how they relate to the same person over time;
- Being treated with respect.<sup>54</sup>

Importantly, a significant study conducted by Raymond Paternoster and his colleagues in the USA in 1997 examined procedural justice theory in the FV context.<sup>55</sup> The researchers investigated a data set comprising approximately 1000 cases where police intervened in response to an incident of FV. The aim of this research was to determine whether the manner in which police treated the alleged perpetrators had an effect on recidivist violence, as distinguished from those caused by the police's choice of response – such as to arrest the alleged perpetrator or to issue him with a warning. The researchers found a statistically significant relationship between alleged perpetrators' experience of procedural justice in their interactions with police and their recidivism rates. Those who were arrested and perceived that they had experienced fair treatment had lower recidivism rates than those who were arrested and experienced unfair treatment.

Paternoster and his colleagues' findings are further supported by the work of Carrie Petrucci, who studied a specialist FV court in California which had been found to have achieved low recidivism rates. As the result of her study, Petrucci suggested that the shared respect that was built between the judicial officers and perpetrators in this court program formed the basis for the perpetrators' compliance and thus their reduced rate of reoffending. She observed that judicial officers in this court were 'caring, genuine, consistent but firm' with the perpetrators who appeared before them.<sup>56</sup>

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<sup>53</sup> For an overview, see Deborah Epstein, 'Procedural Justice: Tempering the State's Response to Domestic Violence' (2002) 43 *William and Mary Law Review* 1843, 1878-1882.

<sup>54</sup> *Ibid.*

<sup>55</sup> Raymond Paternoster, Ronet Bachman, Robert Brame and Lawrence Sherman, 'Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault' (1997) 31 *Law and Society Review* 163.

<sup>56</sup> Carrie Petrucci, 'Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilises Therapeutic Jurisprudence' (2002) 38 *Criminal Law Bulletin* 288.

These judicial officers conveyed a respectful attitude by ‘actively listening to defendants and seldom interrupting them when they spoke, body-language that demonstrated attentiveness, and speaking slowly, clearly and loudly enough to be heard, while conveying concern and genuineness.’<sup>57</sup> Applied to the FLS, procedural justice has the capacity to produce outcomes with which parents are more willing to accept and comply, arguably reducing the need for parties to return to court to enforce orders. Importantly, procedural justice can also strengthen the public’s trust in the system, a particularly important incentive for the FLS.

No legislative change would be required for the FLS to adopt a procedural justice framework in its approach - although a legislative intention may assist in the framework being accepted and implemented. Procedural justice could be encouraged by:

- providing education and training of judicial and administrative staff;
- providing education and training for family lawyers;
- introducing simple design changes to make the court more accessible and less intimidating for all people (including victims and perpetrators of family violence, people from CALD communities, people with a disability).

### The family courts as therapeutic courts

Of course, procedural justice is seen as the necessary foundation upon which a therapeutic jurisprudential approach should be built. Therapeutic or solution-focused courts – courts which usually function as specialist courts - use procedural justice as a frame for their interactions with people who come before them. For example, at the Red Hook Community Justice Center in the United States, the court is designed to deliver procedural justice from the moment a person enters to the moment they leave. This includes its signage (which was designed to make the courthouse less intimidating to visitors and understandable to all populations, including non-English speakers and those with low literacy) to the ways in which all staff – including receptionists and registry - interact with clients.<sup>58</sup>

Although it is not commonly recognised as such, the Family Court of Australia is a specialist court, dealing in relationship breakdown and its consequences. To this end, former Chief Justice Diana Bryant and Deputy Chief Justice John Faulks have maintained that the Family Court has been working in a way that is generally consistent with the underlying principles of therapeutic jurisprudence.<sup>59</sup> Similarly, it has been noted that when the Family Court first opened, its use of less formal judicial approaches and provision of in-house counselling services gave it the character of a problem-solving court, even though that term had yet to be coined.<sup>60</sup>

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<sup>57</sup> Ibid, 299.

<sup>58</sup> <https://www.nccdglobal.org/blog/procedural-justice-and-red-hook-community-justice-center> accessed 12 June 2018.

<sup>59</sup> Bryant CJ, Faulks J, ‘The helping court comes full circle: The application and use of therapeutic jurisprudence in the Family Court of Australia’ (2007) 17 *Journal of Judicial Administration* 93.

<sup>60</sup> Helen Rhoades, ‘The Family Court of Australia: Examining Australia’s first therapeutic jurisdiction’ (2010) 20 *Journal of Judicial Administration* 67.

Despite some excellent recent innovations (such as the introduction of the Less Adversarial Trial model<sup>61</sup>), however, the FLS as it currently exists retains few of the therapeutic features that characterised its early manifestation. Conversely, while the therapeutic aspects of the family courts have arguable declined over time, therapeutic jurisprudence-informed problem solving courts have emerged at the state and territory level across Australia. The CIJ would therefore argue that the present day FLS could helpfully look to some of these state and territory based courts for assistance in how to offer a truly therapeutic interaction to people who come into contact with legal systems.

### What are the elements of a therapeutic approach?

According to therapeutic jurisprudence, an encounter with the legal system has the potential to have either a therapeutic or counter-therapeutic effect.<sup>62</sup> This means that practical applications of therapeutic jurisprudence are chiefly concerned with how to maximise the potential for a person's contact with the legal system to be a constructive intervention.<sup>63</sup> Proponents of therapeutic jurisprudence therefore argue that the way in which legal actors – such as police, lawyers, court staff and judicial officers – interact with people plays a key role in determining what kind of effect contact with the legal system ultimately has on someone who is subject to it.<sup>64</sup>

The way that judicial officers exercise their function is seen as particularly important within therapeutic jurisprudential scholarship, and much attention has been devoted to examining how judicial officers can encourage compliance and rehabilitation through therapeutic interaction.<sup>65</sup> The starting point is that judicial officers must treat parties with respect; listen to them; and act in a neutral and consistent way. If they apply these principles, they may create an environment within which parties are more likely to recognise the authority of the court and its orders. However, as Bruce Winick, one of the pioneers of therapeutic jurisprudence, recognised,

*Rehabilitative programs for batterers...are unlikely to succeed absent the motivation of the offender to change his attitudes and behaviour. There is no pill for the treatment of domestic violence... [an offender] may simply comply with the formal requirements of the program, going through the motions, but resisting any genuine attitudinal or behavioural change.*<sup>66</sup>

In addition to creating an environment in which perpetrators are more likely to *comply* with court orders, judicial officers can play a crucial role in motivating perpetrators to engage *meaningfully* in rehabilitation. Winick and his colleagues argue that a judicial officer can:

*...motivate the individual to obtain treatment, facilitate its delivery, monitor compliance, and bolster the individual's self-esteem and self-efficacy, building on existing strengths. The judge functions as a member of the treatment team....*<sup>67</sup>

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<sup>61</sup> The Less Adversarial Trial Model was introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), which came into effect in July 2006. The LAT built on the Children's Cases Program, a pilot program introduced by Chief Justice Alistair Nicholson.

<sup>62</sup> David Wexler, 'An Introduction to Therapeutic Jurisprudence' in David Wexler & Bruce Winick (eds) *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991).

<sup>63</sup> Bruce Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3 *Psychology, Public Policy & the Law* 184.

<sup>64</sup> David Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990).

<sup>65</sup> For example, David Wexler & Bruce Winick (eds) *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003).

<sup>66</sup> Bruce Winick, 'Applying the Law Therapeutically in Domestic Violence Cases' (2000) 69 *University of Missouri–Kansas City Law Review* 33, 34;

<sup>67</sup> Bruce Winick, Richard Wiener, Anthony Castro, Aryn Emmert and Leah Georges, 'Dealing with mentally ill domestic violence perpetrators: A therapeutic jurisprudence judicial model' (2010) 33 *International Journal of Law and Psychiatry*

Where the judicial officer takes on this role, he or she acts as a 'behaviour-change agent'; someone with the potential to help the perpetrator activate his own motivation to change.<sup>68</sup> Winick and his colleagues suggest that judicial officers' use of motivational interviewing is highly effective in this context.<sup>69</sup>

Although more commonly associated with criminal and quasi-criminal cases, in which a guilty plea or acknowledgment of responsibility is involved, a therapeutic jurisprudential approach *can* have application in the family law area, despite the differing features of parties and issues. Arguably, there may be some cases in which the no-fault context of the FLS can enable an acceptance of responsibility for past behaviour without attracting the consequences associated with the criminal jurisdiction. Of course, the consequence that parents in family law proceedings wish to avoid is less time with their children. However, if they are encouraged to accept help for associated issues by a professional team with specialist FV training (where FV is involved) they may see the long term benefits of a therapeutic approach. Parental willingness to engage with this approach is likely to be enhanced where parties experience procedural justice.

Certainly, therapeutic jurisprudence suggests that, when people are treated with respect and their capacity to make decisions about their own welfare is acknowledged, they are motivated to engage in rehabilitation or behaviour change. Courts have at their disposal a range of tools they can use to promote involvement in decision-making. These can include setting goals to be achieved before the matter is finalised and entering into behavioural contracts with the court (and possibly other parties). These tools are available to the courts now, and would not require any legislative change to give them effect.

Of course, the CIJ is aware of concerns from Constitutional lawyers that, as Federal judicial officers, judges sitting in the FLS cannot perform a judicial case management and monitoring role. They will argue that deploying these measures 'can lead to behavioural manifestation of partiality and bias on the part of the problem-solving court judges', blurring the constitutional mandate of judges as impartial arbiters.<sup>70</sup> It is important that those considerations be addressed before new therapeutic measures are introduced into the family courts.

That said, it is worth noting that there are examples of therapeutic jurisprudence being applied outside the criminal sphere. For example, the Family Drug Treatment Court in Victoria, a pilot program of the Children's Court of Victoria deals with cases involving child neglect<sup>71</sup>. To access the court, parents must admit to neglect and drug/alcohol use and be willing to seek help through the program. As a result of this acknowledgement, the court does not need to address issues in dispute but can focus on the rehabilitation of the parent/s.

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428, 436. Note: In the above passage Winick and his colleagues are talking specifically about perpetrators of family violence who also have psychiatric illnesses. When he refers to 'treatment' he is referring to both mental health treatment and participation in behaviour change programs. However, the approach he proposes is relevant to a broader demographic of FV perpetrators who may or may not also have mental health problems, as Winick's other work makes clear. See for example Bruce Winick, 'Applying the Law Therapeutically in Domestic Violence Cases' (2000) 69 *University of Missouri-Kansas City Law Review* 33, 34.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Duffy, J, 'Problem-solving court, therapeutic jurisprudence and the Constitution: If two is company, is three a crowd?' (2011) 35(2) *Melbourne University Law Review* 394.

<sup>71</sup> <https://www.childrenscourt.vic.gov.au/jurisdictions/child-protection/family-drug-treatment-court>

### **Multidisciplinary court-based services**

In addition to developing practices that engage court users in respectful and procedurally fair ways, courts can improve the possibility of a person's contact with the legal system being a positive one by facilitating effective linkages with support services. The CIJ takes the view that courts should ideally be enabled to create these linkages onsite, using a person's attendance at the court venue as an opportunity to connect them directly with services.

An example of this effective approach is the Court Integrated Services Program (CISP) in the Magistrates' Court of Victoria. CISP was first trialled in 2006 and implemented permanently in 2007. CISP offers three levels of service engagement for people charged with criminal offences: referrals to community services (level 1) and in-house intermediate and intensive case management (levels 2 & 3). For accused parties with forensic mental health issues, the Mental Health Court Liaison Service, an element of Forensicare, can provide court reports and intensive case management on a full-time basis at Melbourne and Sunshine Magistrates' Courts and on a part-time basis at Ringwood, Heidelberg, Dandenong, Frankston and Broadmeadows Magistrates' Courts.<sup>72</sup>

The most recent evaluations of CISP demonstrate that, while only a small proportion of referrals to CISP services were through Magistrates, these were the most effective. Equally effective was a practice taken by Magistrates in which they marked themselves as part-heard in cases, allowing them to bring matters back for review. This was dependent on caseload, as was the capacity for broader service provision. Meanwhile, Magistrates considered that the court-integrated nature of the CISP case managers extended the 'chain of accountability between the defendant and the court' in a way that could not be achieved by external providers of support services.<sup>73</sup> By categorising CISP case managers as 'officers of the court' in the same way as a Magistrate or lawyer is, the system imposes dual obligations on support workers, to the client, but also to the court.

The first finding indicates that pro-active judicial referrals may engage unrepresented parties to any comparable service that might be created for the FLS. The remaining findings highlight the critical issue of workforce capacity and development, as well as how potential benefits to the judicial process can flow from having support services integrated in the court, in contrast to the role that could be played by external services or co-located social workers/case managers.

### **Multi-disciplinary practice connected with legal or court responses**

While the family law sector sees high numbers of self-represented litigants, access to multidisciplinary service responses - either prior to court through legal practitioners or at court through other services - can be an effective way to meet people's needs. This is particularly where people have complex support needs that make engaging with legal processes especially challenging. The CIJ is actively involved in the provision of multi-disciplinary legal services, and employs a social worker who is placed within the legal team at the Mental Health Legal Centre. An evaluation of this program is pending, but our experience is that this approach delivers enormous benefits for clients.

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<sup>72</sup> Forensicare (ND) 'Mental health Court Liaison Service', <http://www.forensicare.vic.gov.au/our-services/community-forensic-mental-health-services/mental-health-court-liaison-service/>, accessed 13 June 2018.

<sup>73</sup> Ross, Stuart, (2009) *Evaluation of the Court Integrated Services Program*, The University of Melbourne, [https://www.magistratescourt.vic.gov.au/sites/default/files/Default/CISP\\_Evaluation\\_Report.pdf](https://www.magistratescourt.vic.gov.au/sites/default/files/Default/CISP_Evaluation_Report.pdf), accessed 13 June 2018, p 101.

Further to this, some legal service providers operating in the family law context offer multi-disciplinary responses for clients. For example, Women’s Legal Service Victoria employs a social worker who works alongside the service’s lawyers in order to address the non-legal needs of clients. Operating in the criminal sphere, but with direct view of the impact of family law proceedings, is the Law and Advocacy Centre for Women, described in Part One. Acting for women charged with criminal matters, the LACW also employs a social worker to provide in-house case management and support so as to prevent further offending.

This kind of model of in-house multidisciplinary approaches is increasingly common across the legal context, whether it involves a social worker co-located in a legal practice, or a lawyer co-located in a social service practice. Examples of the latter include legal teams being introduced into the specialist FV women’s service, InTouch Multicultural Centre Against Family Violence, and First Step, a health service directed at provision of mental health and AOD service support. While these kind of multidisciplinary practices are a relatively recent innovation, a 2017 evaluation of First Step’s multidisciplinary response found that legal clients experienced significant benefits flowing from the integrated practice, though tensions between the goals of the legal team versus the practice and goals of the clinical team which did need to be managed.<sup>74</sup>

Some of these tensions arose from clinicians’ sense that the clinical interests of clients were sometimes not in line with the imperatives associated with their legal cases. For example, whereas clients can expect better legal outcomes where they can provide evidence of their commitment to managing mental health and AOD issues via engagement with clinical services and programs, clinicians might be concerned that clients may not yet be in a position to commence or succeed in such programs.<sup>75</sup>

This relates to the discussion in Part One of this Submission in which the CIJ expressed caution about assuming that referral to a ‘program’ (whether an MBCP or otherwise) can be conflated with improvement in behaviour change. That said, interventions which address factors contributing to risk, such as substance abuse or mental health issues, are an important complement to FV interventions. Meanwhile, participation in an MBCP while linked to other case management and legal services can help to increase scrutiny on a perpetrator’s behaviour and information sharing with regard to risk. Where appropriate risk assessments are in place, therefore, and where participation in programs of any kind are overseen by a multidisciplinary team with specialist expertise, this concern may be able to be mitigated to an extent.

To this end, and as noted in the ALRC’s Discussion Paper, the Family Advocacy and Support Services (FASS) initiative appears to be a promising development. Though relatively new and therefore not yet subject to evaluation, this program provides integrated duty lawyer and family violence support services, located in registries of the family courts. The CIJ suggests that this program be available to provide ongoing case management of parties in matters involving FV so as to oversee their participation in relevant services while family law proceedings are on foot, thereby minimising risk to family members while a legal matter is resolved.

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<sup>74</sup> First Step, (2017) ‘First Step Legal: Final Evaluation Report’, [https://d3n8a8pro7vhm.cloudfront.net/firststep/pages/107/attachments/original/1525920080/VLSB\\_Final\\_Evaluation\\_Report-2017.pdf?1525920080](https://d3n8a8pro7vhm.cloudfront.net/firststep/pages/107/attachments/original/1525920080/VLSB_Final_Evaluation_Report-2017.pdf?1525920080), accessed 13 June 2018.

<sup>75</sup> First Step, (2016) Interim Report of Evaluation: First Step Legal Development Project, [https://d3n8a8pro7vhm.cloudfront.net/firststep/pages/107/attachments/original/1525919979/First\\_Step\\_Legal\\_Report\\_LSB\\_evaluation\\_Year\\_1\\_FINAL.pdf?1525919979](https://d3n8a8pro7vhm.cloudfront.net/firststep/pages/107/attachments/original/1525919979/First_Step_Legal_Report_LSB_evaluation_Year_1_FINAL.pdf?1525919979), accessed 13 June 2018, pp 21-24.

## Non-adversarial approaches to resolving disputes

As referred to above, the FLS as originally conceived had many elements of a non-adversarial jurisdiction. Later attempts to direct the bulk of matters away from the adversarial courtroom saw the widespread introduction of Family Dispute Resolution. Now an established component of the FLS, FDR is a valuable opportunity for many separating families to resolve their property or parenting disputes without the cost and formality associated with the adversarial court model.

Given the criticisms associated with the adversarial court approach detailed not only in the review's Discussion Paper, but referred to in Part One of the CIJ's Submission, it could be assumed that FDR was appropriate for cases involving FV. Certainly, an adversarial court approach absent of procedural or therapeutic approaches can be highly re-traumatising for victims of FV.<sup>76</sup>

That said, the existing FDR approach has been the subject of equal criticisms where matters of FV are concerned.<sup>77</sup> While the process is theoretically designed to ensure that cases involving FV do not go through the FDR process, assessments of whether FV is present are not always effectively conducted where staff do not have specialist training. Instead, the imperative to resolve matters quickly and affordably; to appear cooperative, rather than obstructive, to the system; and to minimise the risk that a perpetrator may pose upon separation mean that many victims of FV will simply not report their experience of FV within the FDR context.<sup>78</sup>

This means that victims and perpetrators may find themselves negotiating parenting arrangements with the help of a non-specialist mediator who is unable to recognise the subtle tactics of power and control that many perpetrators may wield prior to and after mediation, or can even wield over their former partners in a public setting without anyone else noticing. For example, a raised eyebrow in the context of a polite conversation may appear completely benign to most witnesses, but imply significant repercussions to a FV victim who has lived with a pattern of coercive control.

This does not mean that parties who have experienced FV should be denied access to more affordable ways of resolving disputes. Rather, it means that parties should be supported by specialist expertise and appropriate risk assessment and management. To this end, the CIJ is aware of a FV informed, FDR approach that was piloted across five family law jurisdictions between 2010 and 2012. Referred to briefly in the ARLC's Discussion Paper, this pilot drew on a number of elements highlighted throughout this submission. As such, the Coordinated Family Dispute Program used a multi-disciplinary, collative and case-managed approach to matters involving past or current FV, including specialised FV risk assessments at four stages, being take evaluations; comprehensive preparation for the mediation; attendance at the mediation; and repeated follow up post-mediation. In keeping with the requirement for behaviour change programs, but also for therapeutic approaches highlighted earlier in this submission, perpetrators of FV were required, at an absolute minimum, to acknowledge that another family member believed that FV had impacted upon the relationship.<sup>79</sup>

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<sup>76</sup> Laing, above n 50.

<sup>77</sup> Rachael Field 'Using the feminist critique of mediation to explore 'the good, the bad and the ugly' implications for women of the introduction of mandatory dispute resolution in Australia' (2006) 20 *Australian Journal of Family Law* 5.

<sup>78</sup> R. Kaspiw, R. Carson, J. Dunstan, L. Qu, B. Horsfall, J. De Maio, S. Moore, L. Moloney, M. Coulson and S. Tayton, *Evaluation of the 2012 family violence amendments: Synthesis report* (Australian Institute of Family Studies: 2015)

<sup>78</sup> Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending – Pathways to Better Outcomes for Victims, Offenders and the Community* (2014).

<sup>79</sup> R Kaspiw, J De Maio, J Deblaquiere & B Horsfall, *Evaluation of a Pilot of legally assisted and supported family dispute resolution in family violence cases*, Final Report, December 2012, Australian Institute of Family Studies.

All professionals were trained in the model and philosophical basis, being a non-adversarial approach and gendered analysis of violence. The collaboration included a representative of a Women's Legal Service or CLC; a FV or DV specialist support service; a Men's Service such as an MBCP provider, and an FDR service provider to coordinate overall service provision. Where relevant, other collaborations potentially included children's specialist workers; immigrant women's support services; Aboriginal and Torres Strait Islander services or disability services. Those responsible for developing the model noted that, while many women seek exemption from FDR, many others are attracted to its affordability, accessibility and the opportunity to be 'given a voice'.<sup>80</sup>

An evaluation of the CFDR program described it as being 'at the cutting edge of family law practice, its coordinated approach contrasting with criticisms of the wider family law system that it works in isolation from other agencies.'<sup>81</sup> The evaluation also noted that each element of the service was crucial in providing the necessary – but complex and resource intensive – support to parties involved and that, although less cases ultimately proceeded to FDR than in the comparison group, more emerged with an agreement.<sup>82</sup>

In keeping with emerging evidence in relation to assessments of the effectiveness of perpetrator interventions, the value of the CFDR pilots was noted to include the ongoing services that it provided to the victim of FV – such as early access to counselling and legal support, as well as to comprehensive risk assessment – even where the perpetrator had not ultimately participated.<sup>83</sup>

While the evaluation found that participants' feedback about the mediation process itself to be somewhat mixed, participants were very appreciative of the support and access to legal advice that they received as a result of their contact with the service.<sup>84</sup>

It is presumably because of the resource intensiveness, noted above, that the model was not continued. However, the CIJ urges the review to consider every opportunity to recommend additional approaches which, rather than ignore the existence of FV in the spirit of a no-fault jurisdiction, keep it firmly at the centre of the legal system's response.

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<sup>80</sup> Ibid

<sup>81</sup> Rachael Field & Angela Lynch 'Hearing parties' voices in Coordinated Family Dispute Resolution (CFDR): An Australian pilot of a family mediation model designed for matters involving a history of domestic violence' (2014) 36(4) *Journal of Social Welfare and Family Law* 392.

<sup>82</sup> Kaspiew et al, above n 81.

<sup>83</sup> Ibid

<sup>84</sup> Ibid

## Restorative justice for victims of FV

Beyond adaptations to the existing adversarial or FDR processes, other justice approaches offer the potential to meet the needs of victims of FV. In this final section of its submission, the CIJ returns to the tension between the no-fault basis of the FLS and argues that the addition of restorative justice conferencing could complement the existing operation of the FLS by creating a context within which FV could be acknowledged and victims' needs could be met.

The CIJ makes this argument from a position of extensive experience concerning the role that restorative justice can play to support mainstream justice processes, including our 2014 report *Innovative Justice Responses to Sexual Offending – Pathways to Better Outcomes for Victims, Offenders and the Community*.<sup>85</sup> Currently, the CIJ is carrying out a project funded by the Victorian Legal Services Board, the 'Restorative Justice Conferencing Pilot Program.' Under this project, we have designed, developed and are now delivering a pilot restorative justice conferencing program designed to meet the needs of people who have experienced a serious motor vehicle collision. Additionally, the CIJ is currently designing and piloting a restorative justice model for the Transport Accident Commission to add to the options available to meet the needs of supported recovery for clients. Further, we are assisting WorkSafe Victoria to examine how they might incorporate restorative justice process when responding to injured workers and their families. In all, the CIJ's work across criminal and civil justice contexts provides us with considerable experience about the ways in which restorative approaches can benefit vulnerable service users.

## Victims' justice needs

Critics of the FLS, such as Lesley Laing, have highlighted the way in which the current FLS causes 'secondary victimisation' in victims of FV subject to family law proceedings.<sup>86</sup> Framed another way, the FLS could equally be criticised as failing to meet 'victims' justice needs'. The concept of victims' justice needs is central to restorative justice scholarship and practice. It recognises that all victims of crime have unique experiences of the harm they have suffered and of the legal system, as well as that there are common themes in what victims are looking for in justice system processes.

Kathleen Daly, a leading scholar in the area of restorative justice, conceptualises these themes as encompassing five elements, being: participation; voice; validation; vindication; and offender accountability.<sup>87</sup> She explains each element as follows:

**Participation:** Being informed of options and developments in one's case, including different types of justice mechanisms available; discussing ways to address offending and victimization in meetings with admitted offenders and others; and asking questions and receiving information about crimes (e.g. the location of bodies, the motivations for an admitted offender's actions).

**Voice:** Telling the story of what happened and its impact in a significant setting, where a victim can receive public recognition and acknowledgement. Voice is also termed truth-telling and can be related to participation in having a speaking or other type of physical presence in a justice process.

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<sup>85</sup> Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending – Pathways to Better Outcomes for Victims, Offenders and the Community* (2014).

<sup>86</sup> Laing, above n 50

<sup>87</sup> Kathleen Daly, 'Reconceptualising Sexual Victimization and Justice' in Inge Vanfraechem, Antony Pemberton & Felix Mukwiza (eds) *Justice for Victims: Perspectives on Rights, Transition and Reconciliation* (Taylor & Francis, 2014) 387.

**Validation:** Affirming that the victim is believed (i.e. acknowledging that offending occurred and the victim was harmed) and is not blamed or thought to be deserving of what happened. It reflects a victim's desire to be believed and shift the weight of the accusation from their shoulders to others (family members, a wider social group, or legal officials). Admissions by a perpetrator, although perhaps desirable to a victim, may not be necessary to validate a victim's claim.

**Vindication:** Having two aspects of the vindication of the law (affirming *the act* was wrong, morally and legally) and the vindication of the victim (affirming *this perpetrator's actions* against the victim were wrong). It requires that others (family members, a wider social group, legal officials) do something to show that an act (or actions) were wrong by, for example, censuring the offence and affirming their solidarity with the victim. It can be expressed by symbolic and material forms of reparation (e.g. apologies, memorialization, financial assistance) and standard forms of state punishment.

**Offender accountability:** Requiring that certain individuals or entities 'give accounts' for their actions. It refers to perpetrators of offences taking active responsibility for the wrong caused, to give sincere expressions of regret and remorse, and to receive censure or sanction that may vindicate the law and a victim.<sup>88</sup>

While Daly is specifically referring to the experiences of victims of sexual offences, her findings are consistent with the research on victim experiences more broadly, and offer a useful template for understanding what victims of interpersonal violence seek from legal system responses. Daly prefers the term 'justice interests' to 'justice needs,' in recognition that the victim is a citizen, as well as someone who may have experienced psychological harm.<sup>89</sup> However, the CIJ uses the term 'justice needs' as more consistent with service users' experiences in its own work.

Returning to other studies in which participants reported feeling that the FV they had experienced was not acknowledged by the FLS, this may be interpreted as these participants expressing a desire for validation which, in their view, was not met. Similarly, victim reports of feeling silenced may be seen as expressions of a desire to exercise voice, and the sense that this was denied to them. According to the theory of victims' justice needs, where victims' needs go unmet, it is likely that they will experience a sense of injustice, as was the case with the participants in Laing's study.

Clearly the justice needs of victims of FV do not sit easily within our FLS - underpinned, as it is, by the concept of no-fault. As a result, family law proceedings do not offer a setting in which a victim of FV is able to tell her story of how the violence has affected her. In fact, one of the *Family Law Act's* key purposes was to put an end to judicial consideration of misconduct within relationships.

As Juliet Behrens has put it, 'the family law system, pre-occupied with 'no fault' rhetoric, simply is not concerned with acknowledging wrongdoing.' This approach seems to shape the courts' response to FV, with courts feeling that they do not tend to emphasise or condemn FV in individual cases.<sup>90</sup>

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<sup>88</sup> Ibid, 388.

<sup>89</sup> Daly, K. (2014). Reconceptualizing sexual victimisation and justice. In I. Vanfraechem, A. Pemberton & F. Ndahinda, with I. Aertsen, V. Jammers, S. Leferink, R. Letschert & S. Parmentier (eds.), *Justice for victims: perspectives on rights, transition and reconciliation* (pp. 378–395). New York: Routledge.

<sup>90</sup> Juliet Behrens 'Meeting the needs of victims of domestic violence with family law issues: The dangers and possibilities in restorative justice' (2005) 1 *International Journal of Law in Context* 215, 226.

Despite significant efforts to reform the way in which the FLS responds to those affected by FV, therefore, more can be done to meet victims' justice needs in ways that conventional legal system mechanisms cannot. That said, the CIJ cautions that this should not involve blanket applications of innovative or alternative responses, but thoughtful and risk assessed applications in circumstances that are determined on a case by case basis.

### **Restorative justice**

The term 'restorative justice' ('RJ') refers to a broad range of practices that seek to repair the harm caused by a crime (or other wrong), by collectively including those with a stake in the wrongdoing in its resolution.<sup>91</sup> The most common RJ practice is RJ conferencing, where those affected by an offence or dispute collectively discuss and resolve how to deal with the aftermath of what has happened and its implications for the future. RJ conferencing usually involves the victim; the wrongdoer; members of their communities; families; supporters and/or representatives at a time when the wrongdoer is prepared to take responsibility for his or her actions, and the victim is ready and willing to participate and unlikely to be further harmed by the process.

Meanwhile, the convenor of the conference is a skilled professional who ensures that the process is safe, respectful and fair for everyone involved. In RJ conferencing the victim is directly involved in the process (participation). The victim has the opportunity to explain the impact of the offending directly to the offender and tell their story in their own way (voice). Being directly addressed by the victim about how the harm has affected their life provides impetus for the offender to gain a full understanding of the impact of their actions (offender accountability). In some conferences, the offender will offer an apology to the victim (vindication).

RJ developed in the context of criminal law and most existing RJ programs that offer conferencing, at least in the Australian context, are connected with criminal legal systems. However, RJ conferencing has been successfully used in a wide range of contexts including in the resolution of workplace disputes and in response to school bullying. The CIJ takes the view that RJ conferencing has the potential to meet the needs of victims of family violence who have family law issues.

### **How is RJ different to family dispute resolution (FDR)?**

The aim of FDR is to assist the parties to reach an agreement regarding arrangements for their children. Parties are encouraged to focus on the (current and future) needs of their children, rather than on past events within their relationship. In contrast, the focus of RJ is the process itself, rather than on achieving a specific outcome. Some conferences result in participants making agreements about actions that one or the other will take in the future, but this is not always the case and is not the primary aim.

Rather, the focus is on creating a safe, supported space to encourage participants to engage in a respectful dialogue. This means that the process is designed to enable past wrongs to be spoken about and appropriately addressed. RJ conferencing has the potential to provide victims of FV something that the current FLS does not offer, being a forum expressly designed to recognise the harm they have experienced.

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<sup>91</sup> See L Sherman and H Strang, 'Restorative Justice as Evidence-Based Sentencing', in J Petersilia and K Reitz (eds) *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press, 2012), 215-243; J Braithwaite *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002); T Marshall, *Restorative Justice: An Overview* (1996) Home Office—United Kingdom, 5.

### How might this work/considerations

Commentators have raised valid concerns about whether RJ conferences are appropriate forums in which to address FV. These concerns have tended to centre on whether the dynamics of FV will continue to play out in a RJ conference, whereby a perpetrator may use the process as a further opportunity to exert coercion and control over the victim.<sup>92</sup>

It should also be acknowledged that expressions of apology and forgiveness, so important within RJ philosophy and practice, are also prominent features of the patterns that characterise FV. It is therefore critical that these concerns are acknowledged, and that any attempts to create avenues for RJ in the context of FV include robust mechanisms for identifying and addressing the power imbalance inherent to relationships involving FV. The CIJ takes the view, however, that it is possible to design a RJ conferencing program that includes such safeguards. We propose that such a program would have the following features:

#### Victim-centred

- The central aim of such an RJ approach must be to meet the victim of FV's needs. While the perpetrator and/or other participants may also benefit, this must not be the primary objective. System objectives (such as reducing court lists or saving costs) must not be the drivers of the program.
- The program must recognise that every victim is different and must be flexible enough to accommodate individual differences.

#### Specialist FV expertise

- The program must be delivered by those with expert knowledge of FV. Program staff, in particular the conveners, must be competent in recognising the dynamics of FV, and be able to address the potential for perpetrators to try to manipulate the process in order to continue the dynamic of coercion and control, or to use it as yet another mechanism for demonstrating their credentials as a 'good father'.

#### Safety

- The principle of 'do no further harm' is a fundamental principle of restorative justice. In practice, this means that a conference cannot go ahead unless all participants will be safe (emotionally and physically). This consideration is even more important in the context of family violence.
- The program must include rigorous specialist FV risk assessment mechanisms. Assessment of risk must also be an ongoing process to assess issues of acute dynamic risk, as described in Part One.

#### Voluntary

- Participation must be voluntary for all participants.
- Participation must not be a pre-condition for accessing other services or justice mechanisms.

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<sup>92</sup> For example see Julie Stubbs, 'Relations of domination and subordination: Challenges for restorative justice in responding to domestic violence' (2010) 33(3) *UNSW Law Journal* 970.

## Complementary

- RJ must be an option that is available for victims in addition to existing processes, not instead of them. It should be a process that is complementary to the existing FLS, rather than an alternative to it.

## Existing RJ programs for FV

While many jurisdictions have been hesitant to date to introduce RJ processes in the context of FV, RJ is mainstream within the New Zealand criminal justice system. Restorative justice conferences are routinely held in cases of FV in that jurisdiction. The ACT also offers a RJ program in the context of criminal cases that accepts FV matters. While the different context of criminal law compared with family law must be acknowledged, examining these programs may be a good starting point for considering how a similar program might operate within the FLS.

Meanwhile, the Victorian Department of Justice and Regulation has also recently commenced a pilot RJ program for victims of FV. This pilot is a response to Recommendation 122 of the Victorian Royal Commission into Family Violence. The pilot program has been designed to operate independently from court processes. However, it is intended to be able to work in a complementary way alongside criminal, intervention order, child protection and family law proceedings.<sup>93</sup> It is hoped that this pilot program becomes a permanent feature of the FV response landscape. If so, the FLS could consider developing referral pathways with this service.

## Restorative justice and broader cultural change

Taking a broader look at RJ approaches, an important theme arising from recent work by the Family Law Council was that key FLS stakeholders saw a need for cultural change within the sector.<sup>94</sup> One of the areas requiring this type of shift, in the views of these stakeholders, was the sector's understanding of FV. To this end, the CIJ believes that RJ practices can be effective drivers of cultural change within institutions, including to issues of gendered violence.

For example, the Defense Abuse Response Taskforce (DART) was established in 2012 in order to respond to allegations of sexual abuse and other forms of misconduct within the armed forces and at the Australian Defence Force Academy. It sought to assist complainants and to improve the culture and practices of the armed forces. A component of DART was the Restorative Engagement program. This program provided a voluntary process for former defence force personnel who had experienced sexual or other abuse during their time in the armed forces.

Complainants who wished to take part in this program were offered the opportunity to participate in a meeting, facilitated with a restorative justice convener, with a currently serving, high ranking defence force officer. Complaints were supported to tell the story of what they had experienced to the currently serving officer. Often the complainants wished to convey how the armed forces had failed to support them after their experience of victimisation. In doing so, they hoped that these senior defence representatives would gain a deep understanding of how these experiences affect people's lives, and therefore develop a genuine commitment to changing defence culture. The program seemed to meet this object.

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<sup>93</sup> Victorian Department of Justice and Regulation, 'Restorative Justice for Victim Survivors of Family Violence – Framework' <<https://www.victimsofcrime.vic.gov.au/restorative-justice-for-victim-survivors-of-family-violence-framework>>

<sup>94</sup> Family Law Council *Families with Complex Needs and the Intersection of the Family Law and Child Systems Terms 3, 4 & 6* (Final report to the Attorney-General 2016) chapter 6.

The taskforce's final report noted:

*The Restorative Engagement Program has clearly had a great impact on the Defence representatives, many of whom will comprise the next one or even two generations of Defence leaders. As a consequence, the program is expected to make a lasting contribution to cultural change in Defence.*<sup>95</sup>

The report also noted that ADF representatives who participated in the program made comments during the engagement process that included the following:

- *You have given me a much deeper understanding of the problem and what it is that needs to be solved*
- *I must admit that it's only now that I really get it*
- *I feel ashamed that I have given my life to an organisation that has done this to you, and*
- *I've learnt more in the last two hours than in my entire career.*<sup>96</sup>

Feedback from the complainants who participated was overwhelmingly positive.<sup>97</sup>

As discussed throughout this submission, victims of FV report feeling that they were not heard by the family courts, and that their experiences of FV were not acknowledged. The FLS may wish to explore a process similar to DART's Restorative Engagement program, whereby victims of FV could be supported to meet with representatives of the court and to explain their experience of feeling that the FV they experienced was overlooked or poorly responded to by the courts. The representatives would not necessarily need to be members of the judiciary, but would need to occupy positions of sufficient seniority within the FLS that they were capable of driving change. Such an approach would be both beneficial to victims of FV, as well as facilitate a deeper understanding of FV within the FLS.

Drawing on the consideration of evidence regarding children's perspectives discussed in Part One – including their need for voice and validation – there may be opportunities to include children in a similar sort of process, or as a way of explaining the decisions that were made about their future care. In a similar way, this would be both beneficial to children as well as facilitate a deeper understanding of their unique and specific needs within the FLS.

### **Training and capability building**

Of course, cultural change cannot occur without appropriate training and capability building. This is different from capacity building, which is concerned with sufficient resourcing. Rather, capability building, as the CIJ frames it here, is about the ability of legal sector players to respond appropriately, fully and with adequate nuance to the complexity of the issues that present to the system. The ALRC's Discussion Paper has rightly noted the concern that countless reviews and inquiries into the FLS have recommended increased specialist training in relation to FV and other matters, with little corresponding action. As with all recommendations concerning training for judicial officers, the principle of judicial independence precludes governments or even those bodies charged with delivering the relevant training from compelling judicial participation.

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<sup>95</sup> Commonwealth of Australia Defence Abuse Response Taskforce Final Report (2016) 20.

<sup>96</sup> Ibid, 51.

<sup>97</sup> Ibid, 50.

This means that individual jurisdictions must direct their member judges to participate in relevant training. To this end the Magistrates' Court of Victoria has required its members to participate in compulsory FV training, though this amounted to a 2 day module which arguably cannot cover the full complexity of FV. As such, even in the Magistrates' Court jurisdiction, the CIJ has heard that only the 'usual suspects' will attend regular and ongoing FV training, being those Magistrates interested in developing best practice in their courtrooms, some of whom take on leadership positions within the FV jurisdiction.

The CIJ will not rehearse the wide range of FV training available for judicial officers, nor the recommendations for its provision in the Australian context. However, it may be worth considering the fact that a range of jurisdictions in the US have instituted mandatory training for all judges, as well as court staff, sitting in cases involving child protection, family violence and/or family law proceedings. While the requirements vary in relation to content, as well as allocation of hours, the requirements are legislatively based. What's more the legislative requirements are quite detailed in terms of the issues that they specify. For example, the legislative requirements in Massachusetts include that training include consideration of the patterns of FV, the increased vulnerability of victims from marginalised backgrounds; dynamics of FV that may indicate increased dangerousness; the content and availability of batterer intervention programs; and the availability of specialist FV refuges amongst other things.<sup>98</sup>

The CIJ therefore urges the ALRC to consider mechanisms by which FLS professionals, including judicial officers, can be required to participate in specialist FV training, including considering recommendations in relation to the level of detail required in some US jurisdictions.

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<sup>98</sup> Resource Center on Domestic Violence, *Child Protection and Custody, a project of the Family Violence and Domestic Relations Program (FVDR) of the National Council of Juvenile and Family Court Judges (NCJFCJ)* 2013.

## Conclusion

Part One of this submission explored some of the emerging evidence and considerations which the CIJ believes that the FLS should be taking into account when interacting with matters involving FV. Part Two of the submission then highlighted some innovative justice approaches which can help to improve the FLS's response to these kind of complex cases, and to meet the FLS's overarching imperative to act in the best interests of children.

The considerations highlighted in this submission are, of course, only a handful of those relevant to improving the way in which the FLS can start to address the needs of parties experiencing FV – not only to make more nuanced and risk-based assessments concerning parenting arrangements, but to increase the likelihood that parties will comply with them; will seek help for associated issues; and potentially have their justice needs met.

After all, it is over forty years since what was then considered to be a revolutionary no fault approach to marriage dissolution was introduced into the Australian legal landscape. Since that time, the jurisdiction has changed in many ways. Formalities have encroached in some respects; alternative dispute resolution pathways have been included; and the balance between the imperative for children to spend time with both parents versus the court's obligation to keep children safe from harm have waxed and waned.

At the same time, the FLS has remained somewhat static and unaffected by certain developments in literature and evidence bases. Most relevantly, the commendable decision to move to a no-fault system for marriage dissolution – the imperative to avoid attribution of blame – meant that the imperative to assess and identify risk was overlooked. These two imperatives, however, are not mutually exclusive. Rather, the CIJ asserts that it is possible to include contemporary and nuanced risk assessments, as well as detailed understanding of FV patterns and perpetration, in the context of a no-fault FLS.

Equally, where FV is acknowledged and responded to in a flexible and risk-informed FLS, innovative approaches to justice - both in and outside the courtroom - can start to turn contact with the FLS into a positive intervention. This is, after all, what the original vision of the FLS was about – a system which helped separating families move to a new stage in their lives without further trauma or recrimination. While this vision was commendable, its implementation has not necessarily kept pace with our growing understanding of the lives of those families who most need this system's help.

This review by the ALRC is an opportunity to bring the original FLS vision into the 21<sup>st</sup> century. Unlike so many other reviews and inquiries into the FLS left patiently waiting for implementation, this opportunity cannot stay on the shelf.