



Law Council
OF AUSTRALIA

National Plan to End Violence against Women and Children 2022-32

Department of Social Services

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000¹ lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Acting Chief Executive Officer of the Law Council is Ms Margery Nicoll. The Secretariat serves the Law Council nationally and is based in Canberra.

¹ Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

Acknowledgement

The Law Council is grateful to the following Constituent Bodies for their assistance with the preparation of this submission:

- Law Institute of Victoria;
- Law Society of New South Wales; and
- ACT Law Society.

The Law Council also appreciates the guidance of its Family Law Section and Indigenous Legal Issues Committee when preparing this submission.

Executive summary

1. The Law Council of Australia welcomes the opportunity to provide feedback on the draft National Plan to End Violence against Women and Children 2022-32 (**National Plan**), released on 14 January 2022. This submission builds on the Law Council's written submission dated 13 August 2021 in relation to the development of the National Plan,² together with the Law Council and its Family Law Section's participation in the National Summit on Women's Safety in September 2021.
2. The four Foundation Principles within the draft National Plan rightly emphasise the need for timely action and proper implementation, including resourcing, monitoring and oversight of initiatives under the National Plan, once finalised. Effective implementation must involve substantial and sustained resourcing across multiple sectors, including legal, health and social. This will ensure that long-term programs can be implemented and the immediate needs of women and children at risk of, and experiencing, family and sexual violence, can be met.
3. The Law Council particularly welcomes the National Plan's recognition that there is a need to ensure victim-survivors have access to appropriate survivor-centred justice responses.³ The Law Council considers that additional funding for the legal assistance sector is critical in meeting this goal, particularly in relation to child protection matters and cases involving family violence.
4. The Law Council also supports the draft National Plan's focus on consistency in legal definitions and terminology across jurisdictions. As a minimum, the Law Council endorses the need for a consistent definition of family violence across Australia's national and state or territory jurisdictions to improve the accessibility of legal protection and promote efficiency in the family law jurisdiction. However, the Law Council is cognisant of the difficulties in creating uniformity across jurisdictions which have developed existing and unique legal approaches. The efficacy of a national family violence definition relies on consistency, flexibility, and comprehensiveness.
5. The 'pillars' contained in the draft National Plan promote a holistic and considered approach to the proposed framework, and the Law Council reiterates its view that actions and measures developed under this structure are centred on and informed by the diverse lived experience of victim-survivors, widespread and continuing consultation is essential.
6. This is particularly important in the context of efforts to end violence against Aboriginal and Torres Strait Islander women and children under the National Plan. The Law Council is generally supportive of the draft National Plan's commitment to a specific Aboriginal and Torres Strait Islander Action Plan, however reiterates the need for such a plan to be truly self-determined. Such a process must allow Aboriginal and Torres Strait Islander women and community-controlled organisations and services to self-design strategies for the safety of these communities.
7. Importantly, the development of the National Plan follows the release last year of the report by the House of Representatives Standing Committee on Social Policy and

² Law Council of Australia, '*Developing the next National Plan to Reduce Violence against Women and their Children*' (13 August 2021), <<https://www.lawcouncil.asn.au/resources/submissions/developing-the-next-national-plan-to-reduce-violence-against-women-and-their-children>>.

³ Australian Government, *Draft National Plan to End Violence Against Women and Children* (January 2022) 37.

Legal Affairs (**SPLA**) on its inquiry into family, domestic and sexual violence.⁴ The Law Council welcomed several aspects of the SPLA report, including:

- the proposal for a uniform national definition of family, domestic and sexual violence;⁵
 - the proposal that Federal, state and territory governments develop shared principles to guide any future offences targeting coercive and controlling behaviour;
 - the suite of recommendations calling for additional funding to legal assistance services to assist victims of family violence, and engage more social workers experienced in family violence, child protection and family law matters; and
 - the recommendation that there be a commitment to increasing the overall baseline funding for specialist family and domestic violence service providers.⁶
8. The proposed National Plan reflects these key priorities, and as such, the Law Council is broadly supportive of the content of the National Plan, subject to the below comments for consideration during the next stage of settling the document.

⁴ House Standing Committee on Social Policy and Legal Affairs '*Inquiry into family, domestic and sexual violence*' (Report, March 2021), <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024577/toc_pdf/Inquiryintofamily,domesticandsexualviolence.pdf;filetype=application%2Fpdf>.

⁵ For the purposes of this submission, the term 'family violence' will also be used to refer to domestic and family violence and abuse, which includes sexual violence and captures non-physical forms of abuse, including that which is technology-facilitated.

⁶ Law Council of Australia, '*A national response to family, domestic and sexual violence is needed*', (Media Release, 6 April 2021) <<https://www.lawcouncil.asn.au/media/media-statements/a-national-response-to-family-domestic-and-sexual-violence-is-needed>>.

The importance of measurable targets

9. The draft National Plan must progress the achievements of the previous plan to reduce violence against women and children, including the need for appropriate monitoring and evaluation tools to ensure targets are achieved. To this end, it is important that the draft National Plan expressly sets out what has and has not worked effectively from the last strategy, to ensure it can build on (or learn from) the previous approach.
10. Many of the issues raised by the Law Council in its previous submission to the Department of Social Services reflect the approach set out in the National Plan's four Foundation Principles and are consistent with the broad focus areas within the National Plan, namely Prevention, Early Intervention, Response and Recovery. The Law Council is supportive of this broad framework, however, emphasises the critical importance of specific measures and targets to track progress against these goals.
11. To this end, the Law Council appreciates that the National Plan commits the Commonwealth and state and territory governments to developing and implementing clear indicators that monitor outcomes across the National Pillars, as well as the need to evaluate and report on system responses.
12. The Law Council emphasises the critical nature of this 'Outcomes Framework', and the importance of consulting closely with civil society, especially those communities identified within the draft National Plan, in the development of appropriate targets and progress measurements. The Law Council and its Family Law Section would welcome the opportunity to be a part of these further consultations.

Access to legal support

The need for survivor-centred justice responses

13. The Law Council welcomes the National Plan's recognition that there is a need to ensure victim-survivors have access to appropriate survivor-centred justice responses.⁷ The Law Council considers that additional funding for the legal assistance sector is critical in meeting this goal, particularly in relation to child protection matters and cases involving family violence. The prevalence of these matters has increased substantially in recent years (in part due to increased reporting/improved awareness and as a consequence of the additional pressures arising from the impact of the COVID-19 pandemic), which has subsequently increased demand for legal assistance services.
14. While the importance of access to legal assistance is clear, essential frontline support services remain chronically underfunded and unable to meet the needs of those affected by family violence. The Law Council has long advocated for additional funding to the legal assistance sector to enable the provision of timely, specialised assistance and support to clients.⁸
15. The Law Council commends the Fourth Action Plan for its focus on improving support and service system responses, including access to suitable and safe accommodation,

⁷ Australian Government, *Draft National Plan to End Violence Against Women and Children* (January 2022) 37.

⁸ Law Council of Australia, 'Submission to the Joint Select Committee on Australia's Family Law System' (25 September 2019) <<https://www.lawcouncil.asn.au/resources/submissions/joint-select-committee-on-australias-family-law-system>> [98].

as well as trauma-informed support. The \$340 million investment over three years made by the Australian Government in 2019 to implement that Plan is also welcome.⁹ More recently, the Law Council has welcomed the announcement for the 2021-22 Federal Budget of \$416.2 million over four years to support women and families experiencing family and domestic violence.¹⁰ These proposals form the Australian Government's transitional strategy ahead of the finalisation of the National Plan.

16. The Law Council is hopeful that the portion of funding which provides a range of further legal assistance resourcing under the National Legal Assistance Partnership is, particularly, a recognition by the Australian Government of the positive return on investment into the legal assistance sector.¹¹

Legal assistance providers

17. The Law Council notes that legal assistance providers, such as legal aid commissions (**LACs**), community legal centres (**CLCs**), Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) and Family Violence Prevention Legal Services (**FVPLS**),¹² remain subject to strict resourcing limitations that reduce their capacity to provide support throughout the advisory and litigation process. Even where initial legal advice is obtained, funding constraints often means that ongoing assistance is not available.
18. For those who cannot obtain legal representation as a result of these resource limitations, the process of self-representing and engaging with authorities in matters involving family violence can be stressful and traumatic. Stress, trauma and inexperience can impede evidence gathering and the conduct of the matter before the court. In addition, families will often deal with multiple courts and systems, and navigating these complex processes without legal advice and representation can add to delay and increase risk for the most vulnerable.
19. These challenges highlight the numerous important benefits to being able to access timely legal assistance, which can also prevent or reduce the escalation of conflict. In addition, an understanding of legal avenues and supports can assist victims in making better informed choices and can improve their and their children's safety. Similarly, appropriate and timely legal services can assist respondents in making better informed choices and enhance the safety of families.
20. Even without paying for a lawyer, the costs associated with legal proceedings – including filing fees, costs of copying material produced under subpoena, process server fees and costs when issue subpoenas – can also be prohibitive. Together, these barriers within the legal system can prevent those affected by family violence from receiving effective legal remedies. The National Plan must, for these reasons,

⁹ Commonwealth of Australia, *Overview of the Fourth Action Plan 2019-2022, National Plan to Reduce Violence against Women and their Children 2010-2022* (5 August 2019) <https://www.dss.gov.au/sites/default/files/documents/08_2019/overview-commonwealth-key-initiatives-under-fourth-action-plan-5-august-2019.pdf>.

¹⁰ Law Council of Australia, *'New money for domestic and family violence a step in the right direction'* (Media Release, 12 May 2021) <<https://www.lawcouncil.asn.au/media/media-statements/new-money-for-domestic-and-family-violence-a-step-in-the-right-direction>>; Commonwealth Attorney-General, *'Enhanced Legal and Workplace Services to support Australians'* (Media Release, 11 May 2021) <<https://www.attorneygeneral.gov.au/media/media-releases/enhanced-legal-and-workplace-services-support-australians-11-may-2021>>.

¹¹ Law Council of Australia, *'Funding Boost Welcome for Legal Services'* (Media Release, 12 May 2021) <<https://www.lawcouncil.asn.au/media/media-releases/funding-boost-welcome-for-legal-services-supporting-women-and-those-experiencing-mental-health-issues>>.

¹² See, National Family Violence Prevention and Legal Services Forum, *'Submission to the Inquiry on Developing the next National Plan to reduce Violence against Women and their Children'* (July 2021) 7-8.

have a significant focus on resourcing frontline services to address the immediate impacts of family violence.

21. It is widely recognised that demand upon these services far outstrips the available supply. The strength of the commitment to ending violence against women and children can readily be measured by the willingness of government to immediately increase and ensure forward funding for the range of services (summarised above) which provide immediate protection to and advice for victims of family violence (and the provision of ongoing legal advice and support). The re-traumatising nature of engagement with the legal system and the risk of close and continuing contact with a violent family member heightens risk for victim survivors of violence and ensuring safe, timely and supported access to legal advice is essential.
22. The draft National Plan refers to changes to the family law system over the last decade and the more recent changes to the family law courts, including the commencement of the Federal Circuit and Family Court of Australia (**FCFCOA**) and new responses to family violence being trialled in certain registries.¹³ The impact of most of these recent reforms upon women and children experiencing or at risk of experiencing family violence is not yet known. While the Law Council acknowledges the stated intention of the Australian Government to improve the experiences of women and children who are exposed to the family law system, it is not yet possible to assess if the nominated reforms will achieve that outcome.
23. It is clear that the number of matters before the family law courts involving family violence is greater than had previously been understood.¹⁴ While the creation and support of responses like the Lighthouse Project are welcomed by the Law Council, more needs to be done and sustained Commonwealth funding for courts and services associated with family law and family violence legal responses is essential. It is noted that the Lighthouse Project is not yet available in all registries of the FCFCOA. As a result, thousands of cases annually must proceed before the FCFCOA where serious family violence is alleged and where parties must navigate the 'usual' case management pathway.
24. For those who cannot afford private legal representation in their family law or family violence proceedings, they may turn to a legal aid body or other provider in the community assistance sector. As discussed above, inadequate and insecure funding in this sector immediately impacts upon women and children who are vulnerable.
25. Under the new case management pathway required for family law matters in the FCFCOA, additional steps prior to commencing court proceedings are required, along with additional documents to be filed. The Law Council is aware from its members and the legal assistance sector, that legal costs have increased significantly as a consequence of these added steps and documents. There has been no additional funding from the Australian Government under the National Legal Assistance Partnership to meet these increased costs.
26. One of the consequences of these increased costs in family law proceedings is that legal aid bodies (without additional funding) will have no alternative than to offer fewer grants of aid (so more women victims of family violence will not receive assistance). Those private legal practitioners who undertake legal aid work (at a level of

¹³ Australian Government, *Draft National Plan to End Violence Against Women and Children* (January 2022) 21.

¹⁴ See, Federal Circuit and Family Court of Australia, 'New court initiatives help uncover higher prevalence of family violence and other risks' (Media Release, 10 November 2021).

remuneration significantly less than private market rates) may decline to continue to engage in legal aid work as a consequence of this increasing funding gap.

27. The Law Council endorses the SPLA's call for sustainable funding for community legal centres and legal aid programs that help those who are at risk of family violence to build independent lives,¹⁵ including funding under the National Legal Assistance Partnership and the Family Advocacy and Support Service.
28. This lack of funding available to legally aided clients places an enormous burden on pro bono services. Many litigants are self-represented, and may lack the requisite knowledge, experience and skills to successfully advocate for themselves and navigate the court system (which also adds to the resourcing pressures upon the courts when dealing with increasing numbers of self-represented parties). The Law Council acknowledges the valuable and considerable work of LACs and Women's Legal Services in providing legal advice to vulnerable individuals and families, often with insufficient funding to meet demand.

Consistency in legal definitions

29. The Law Council is pleased with the draft National Plan's focus on consistency in legal definitions and terminology across jurisdictions. There is a need for clear and consistent national definitions of the different forms of violence so that all parties within the family law system can work from a consistent understanding.
30. In particular, the Law Council strongly supports the need for a consistent definition of family violence across Australia's national and state or territory jurisdictions to improve the accessibility of legal protection and promote efficiency in the family law jurisdiction. However, the Law Council is cognisant of the difficulties in creating uniformity across jurisdictions which have developed existing and unique legal approaches. The efficacy of a national family violence definition relies on consistency, flexibility, and comprehensiveness.
31. To further this work, the Law Council has developed and adopted a model definition of family violence during 2021 following extensive consultation with its membership and other stakeholders.¹⁶ This definition accurately reflects the features and dynamics of family violence, in addition to a non-exhaustive list of examples of prohibited behaviours. In particular, the model definition highlights the threatening, controlling and/or coercive dynamics which exist in family violence relationships, allowing for exhibited behaviours to be interpreted through the perpetrator's intention or the outcome on the victim. The model definition also widens the meaning of 'family member' to take into account other intimate relationships, such as between a person with a disability and their carer.
32. The Law Council will continue to liaise with the Australian Government in relation to the implementation of a nationally consistent definition of family violence, and endorses the use of the its model definition to facilitate dialogue on how best to achieve a harmonised approach, supported by overarching frameworks such as the National Plan.

¹⁵ House Standing Committee on Social Policy and Legal Affairs '*Inquiry into family, domestic and sexual violence*' (Report, March 2021), <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024577/toc_pdf/Inquiryintofamily,domesticandsexualviolence.pdf;filetype=application%2Fpdf> [8.184].

¹⁶ Law Council of Australia '*Model Definition of 'Family Violence'*' (27 November 2021) <<https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/model-definition-of-family-violence>>.

Resourcing the family law system

33. The Law Council notes the important role played by the court system in helping to reduce the risk of family violence, and submits that the need for a properly resourced family law system should be included as a focus area within the National Plan.

Identifying and addressing risk factors

34. In family law proceedings, it is common that one or both parties will make allegations of family violence.¹⁷ Not all separating couples require the assistance of lawyers and/or the court process to resolve family law disputes between them, however research conducted by the Australian Institute of Family Studies reveals that of those who require legal assistance, their experiences will routinely include some of the following additional complexities and risk factors:

- allegations of family violence;
- allegations of sexual abuse of children;
- drug and alcohol dependence or addiction; and
- mental health challenges.¹⁸

35. The Law Council submits that a fundamental policy shift is required from government to prioritise the protection of women and children who have experienced family violence and ensure that the family law system receives resourcing appropriately directed to supporting and assisting them. The FCFCOA must be fully resourced to deal properly with allegations of family violence in a systemic and prompt fashion, assessing and prioritising those families considered to be at high risk, and ensuring more generally that all users of the courts can be confident that their matters will be dealt with in a timely manner and by judicial and other personnel who are sufficiently trained in identifying and responding to family violence.

36. In the context of those who have experienced or are at risk of family violence, and who are required to have contact with the family law system, it is crucial to ensure that they receive the necessary and proper protections to be safe from further risk of harm.

Court delays

37. The funding of state and territory courts, along with the family law courts, has failed to keep pace with the increased demand and complexity of matters coming before the courts involving serious family violence and with the crushing workloads on judges and court staff, thereby adding to court delays.
38. While the recent changes to the family law system and case management responses in the FCFCOA posit shorter time frames for the determination of matters before the courts, it is premature to offer a view about the success of those changes. Other challenges are being experienced by users of the courts under the new system, and it is uncertain if those will be resolved in the immediate short term. Timely access to the court when a judicial determination is required is essential for the protection of women and children who have experienced family violence.

¹⁷ See, Australasian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (2018) 10.1.7.

¹⁸ Rae Kaspiew et al, 'Court Outcomes Project' (October 2015) *Australian Institute of Family Studies* <<https://aifs.gov.au/sites/default/files/efva-courtoutcomes.pdf>> 47.

39. Delays in the family law system are of great concern, given that the hearing and determination of important issues by the courts often involves the assessment of risk and how to keep children and parties safe. Delays are widely recognised as one of the great additional burdens for those using the family law system. The consequences – that urgent issues may not be addressed, and that inadequate parenting arrangements and violence and risk dynamics may continue – are too serious to be ignored.
40. The Law Council understands that in some registries, even under the new system, urgent matters are not being listed before a judicial officer for an extended period of time. This may allow the continuation of sub-optimal or, in some instances, dangerous arrangements for children and others at risk of family violence.
41. When interim hearings do occur in the family law system, they are an abridged process with no cross examination of witnesses. In such hearings, judges and registrars are asked to make essential decisions, often about the safety of women and children, in over-subscribed duty lists where little time can be allocated to each matter. The careful assessment of the evidence and considered review of risk is difficult in such pressured circumstances.
42. If timely and appropriate engagement with allegations of family violence cannot occur because of overburdened court lists, there is a corresponding increase in risk for those turning to the courts for assistance in resolving interim parenting matters. In some cases, a delay occurs in circumstances where a child has been removed from their usual carer by the other party, and risk considerations which would normally inform the urgent prioritisation of that matter are over-ridden by the simple reality that the court does not have a Judge or Senior Judicial Registrar with time available to hear the matter.
43. Once interim matters have been determined, it was common for the final hearing of applications before the family courts to occur two to three years after filing. It is not known to what extent the time frames between commencement and final hearing under the new case management system of the FCFCOA will be an improvement. The burdens and risks attached to delays, where serious matters of family violence have been alleged, are unacceptable.

Improved information sharing systems

44. In line with the draft National Plan's foundation principle positing that the diverse lived experiences of victim-survivors inform policies and solutions, the Law Council supports reform initiatives which improve the process for information sharing between jurisdictions and organisations to protect parties experiencing family violence or child abuse. The Law Council has previously advocated for an improved information sharing framework between the family law, family violence and child protection systems to enhance responses to family violence in family law matters.¹⁹

The impact of inconsistent communication

45. Concerns have been raised by the Law Council's membership regarding inconsistent channels of communication which have resulted in inadequate outcomes for individuals. This is especially the case for vulnerable clients, including victims of family

¹⁹ Law Council of Australia, *'Operationalising the National Strategic Framework for Information Sharing Between the Family Law and Family Violence and Child Protection Systems'* (20 August 2021) <<https://www.lawcouncil.asn.au/resources/submissions/operationalising-the-national-strategic-framework-for-information-sharing-between-the-family-law-and-family-violence-and-child-protection-systems>>.

violence, who have concurrent proceedings in the FCFCOA, as well as for children within the child protection system.

46. In this regard, the Law Council refers to its submission to the 2020 consultation on *Information sharing between the family law and criminal justice and child protection systems*.²⁰ In that submission, the Law Council noted that the National Framework for Information Sharing between the family law, family violence and child protection systems will be an important tool to co-ordinate ongoing input and consultation on this very significant aspect of the lives of so many families.
47. The Law Council continues to support measures that will improve interaction and information sharing between the Family Courts and other agencies as a means of enhancing the capacity of the FCFCOA to properly assess the risk of family violence. Crucially, the success of these initiatives will depend upon adequate and sustained resourcing of agencies at both a Federal and state/territory level. This vulnerability is a significant factor which informs the viability of these initiatives. Insufficient resourcing of these services renders them ineffective, thereby inexcusably increasing risk for some people.
48. Information sharing processes must adequately balance privacy concerns and protect sensitive information. The use of judicial discretion is essential to prevent litigants utilising the information sharing framework for the purposes of fishing, breaching the other party's privacy unnecessarily or causing undue stress, on the basis of unfounded allegations.

Interaction with common law principles

49. The Law Council also notes that any proposed information sharing framework must consider the impact on established common law principles, such as the *Harman*²¹ undertaking to the court. The *Harman* undertaking is an obligation owed to the court which prohibits documents or information produced under compulsion from being used for a collateral or ulterior purpose unrelated to the proceedings in which they were produced.
50. In 2020, *Featon v Featon*²² highlighted that leave is required from the court to rely on this information in another state court or for any purpose which is collateral to the proceedings, unless the material has been received into evidence and is therefore in the public domain.
51. The Law Council submits that information sharing processes should be consistent with the established *Harman* undertaking and any proposed amendments to the Family Law Rules ought to consider the impact on the implied undertaking.

Violence against Aboriginal and Torres Strait Islander women and children

52. Understanding the social, political, economic and historic context around violence against Aboriginal and Torres Strait Islander women and children is critical and necessary to inform the development of a response to violence against them. As

²⁰ Law Council of Australia, '*Information sharing between the family law and criminal justice and child protection systems*' (27 November 2020) <<https://www.lawcouncil.asn.au/resources/submissions/information-sharing-between-the-family-law-and-criminal-justice-and-child-protection-systems>>.

²¹ *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.

²² *Featon v Featon* [2020] FamCA 1061.

recognised in the draft National Plan, the drivers of violence against Aboriginal and Torres Strait Islander women and children are complex and intersectional, and these women can experience more severe forms of violence as compared to other women.

53. Furthermore, the United Nations (**UN**) Human Rights Council has stressed the need for states to respect, protect and fulfill the right of Indigenous women to a life free from violence. This requires not only strategies to respond to the violence, but also effective prevention measures aimed at ‘addressing underlying discrimination and marginalisation [and] eliminating structural and institutional discrimination and harmful stereotypes’.²³
54. In 2017, the UN Special Rapporteur on the Rights of Indigenous Peoples, on her visit to Australia, observed ‘a disturbing pattern of violence against Aboriginal and Torres Strait Islander women’. This was fostered by ‘discrimination on the grounds of gender, race and class [that] is structurally and institutionally entrenched’. The Special Rapporteur also noted the ‘lack of culturally appropriate measures to address the issue’ and observed that for Aboriginal and Torres Strait Islander women, ‘family violence is an intersectional concern that overlaps with homelessness, poverty, incarceration, health and removal of children’.²⁴
55. The Law Council notes that care must be taken with considering the definition of violence against Aboriginal and Torres Strait Islander women and children. Aboriginal and Torres Strait Islander women can also experience violence in a non-family and non-intimate context, such as from colleagues, classmates and strangers.²⁵ Furthermore, legal and policy responses must recognise that domestic and partner violence against Aboriginal and Torres Strait Islander women can be perpetrated by men from any cultural background.²⁶
56. While the draft National Plan does, as discussed, provide some recognition of intersectionality, it also slips early into generalised language around the drivers of violence. Care should be also taken to ensure a true commitment to reflecting and respecting intersectional experiences and identities.

Aboriginal and Torres Strait Islander Action Plan

57. Noting the need for a fundamental reconsideration of the approach taken to ending violence against Aboriginal and Torres Strait Islander women and children, the Law Council is generally supportive of the National Plan’s commitment to a specific Aboriginal and Torres Strait Islander Action Plan (**Action Plan**), however reiterates the need for such a plan to be truly self-determined. Such a process must allow Aboriginal and Torres Strait Islander women and community-controlled organisations and services to self-design strategies for the safety of these communities.
58. The Action Plan should be urgently developed (without forsaking the need for self-determination as set out above), and the Australian Government must provide

²³ Human Rights Council, *Annual Full-Day Discussion on the Human Rights of Women*, 32nd sess (15 June 2016) 1; Human Rights Council, *Accelerating Efforts to Eliminate Violence Against Women: preventing and responding to violence against women and girls, including indigenous women and girls*, 32nd sess, Agenda Item 3, UN Doc A/HRC/RES/32/19 (19 July 2016) 4 [7].

²⁴ Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, 36th sess, Agenda Item 3, UN Doc A/HRC/36/46/Add.2 (8 August 2017) 16.

²⁵ Our Watch, *Changing the picture* (Background paper, 2020) <<https://media-cdn.ourwatch.org.au/wp-content/uploads/sites/2/2020/09/20231756/Changing-the-picture-Part-1-AA.pdf>> 19.

²⁶ Ibid.

sufficient, sustainable and reliable resourcing to support the successful implementation of the standalone Action Plan.

59. Aboriginal and Torres Strait Islander individuals and their community-controlled organisations should be at the forefront of both designing the Action Plan, and leading program design and delivery. Such community-controlled organisations should not be expected to absorb this work into their current programming, and it will be necessary to properly and sustainably resource these community-controlled organisations to build the requisite capacity to undertake this work, at least throughout the lifetime of the National Plan and Action Plan.
60. The Law Council is pleased to note that the National Plan acknowledges the relevance of truth-telling and reconciliation work to address intergenerational trauma as a driver of the violence against Aboriginal and Torres Strait Islander women and children. The draft National Plan also identifies as a focus area the importance of empowering Aboriginal and Torres Strait Islander voices, however, does not refer to the Uluru Statement from the Heart and the recommendations of the Referendum Council as they relate to a Voice to Parliament enshrined in the Australian Constitution. In the Law Council's view, such a structural shift will play a critical role in ensuring responses to violence against Aboriginal and Torres Strait Islander women and children are driven through a process of self-determination and consistent with the principles set out in the UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**).²⁷
61. The UNDRIP, which was endorsed by the Australian Government in 2009, sets out the right to self-determination in article 3, as a fundamental principle underpinning that instrument. Article 3 states that:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
62. While the Law Council welcomes the National Plan's proposed alignment with the work done under the National Agreement on Closing the Gap, there remains a need for a truly self-determined approach to addressing violence against Aboriginal and Torres Strait Islander women and children as set out above. The UNDRIP should be specifically referenced by the National Plan in driving this approach – the National Agreement on Closing the Gap is not a self-determination framework.
63. However, it is acknowledged that meeting the structural reform agenda set out under the National Agreement on Closing the Gap will clearly also be critical to ending violence against Aboriginal and Torres Strait Islander women and children.
64. More specifically, the Action Plan should include consideration of long-term investment in specific projects and Aboriginal and Torres Strait Islander community-controlled organisations to achieve Closing the Gap Target 13, together with consideration of all targets in the Closing the Gap framework. Ad hoc and short-term approaches to funding are detrimental to the ability of organisations to plan and deliver culturally safe and targeted services, and there is a critical need to better identify the resourcing needs of Aboriginal and Torres Strait Islander communities to arrive at a funding model that allows communities to adequately respond to domestic and family violence. There are also, obviously, serious impacts on women and children experiencing violence when such services no longer exist, or exist only in a significantly restricted way, or

²⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex.

rely heavily on unpaid voluntary work undertaken by overstretched communities. There has been insufficient focus paid to collecting data on this issue.

Anonymous complainants

65. The National Plan notes that governments are exploring alternative pathways and strategies to address violence where victim-survivors are apprehensive to engage directly with law enforcement or the formal court process and may wish to remain anonymous.²⁸
66. The Law Council understands that an 'Alternative Reporting Option' is available in Queensland, which provides survivors of sexual assault the opportunity to provide police with the full circumstances of their assault with the option of remaining anonymous.²⁹ While the Alternative Reporting Option does not involve any judicial process, it can be a useful healing strategy for survivors and can also be used as an investigative strategy to solve reported offences of a similar nature.
67. The Law Council is broadly supportive of diversionary processes which have the effect of limiting interactions between both victim-survivors and perpetrators, and the court system. However, caution should be exercised where anonymous complaints involve an investigation into the conduct of the accused person, as that person has a right to know who is accusing them (in the interests of being able to understand and meet the allegations made). Additionally, if a record is kept or a finding is made against the accused person, the circumstances in which that conclusion was reached must be sufficiently transparent.

Continuing Professional Development

68. The Law Council welcomes the inclusion of a focus area in the draft National Plan related to the need to increase and enhance training and awareness for police, lawyers and the judiciary.³⁰ Legal professionals must be equipped to identify family violence in order to break the cycle and provide appropriate intervention or support resources.
69. The Law Council, together with its Family Law Section, have long supported the benefits of training for legal practitioners in family violence, whilst acknowledging that Continuing Professional Development (CPD) programs are the primary responsibility of state and territory bodies.³¹
70. Family violence dynamics can be identified in client interactions across a range of legal services, including the purchase of property, business transactions and guaranteeing loans. While most lawyers are aware of family violence as a legal concept, there is limited mandatory training for lawyers in order to identify if their clients are experiencing family violence, particularly for lawyers practising in areas other than family law.

²⁸ Australian Government, *Draft National Plan to End Violence Against Women and Children* (January 2022) 22.

²⁹ See, Queensland Police, *Alternative Reporting Options* (2021) <www.police.qld.gov.au/units/victims-of-crime/support-for-victims-of-crime/adult-sexualassault/alternative-reporting>.

³⁰ Australian Government, *Draft National Plan to End Violence Against Women and Children* (January 2022) 37.

³¹ Law Council of Australia, '*Inquiry into family, domestic and sexual violence*' (7 August 2020) <<https://www.lawcouncil.asn.au/publicassets/62f541ea-87e2-ea11-9434-005056be13b5/3855%20-%20Inquiry%20into%20family%20domestic%20and%20sexual%20violence.pdf>> [251].

71. In response to options presented in late 2020 by the Attorney-General's Department (**AGD**) during a targeted consultation process on options to enhance the family safety competency of legal practitioners, the Law Council formed the preliminary view that of the options presented by AGD, it would be preferable to pursue an approach whereby all members of the legal profession are strongly recommended to undertake at least one unit of CPD in family safety each year.
72. In support of this position, on 26 May 2021, the Law Council hosted a virtual roundtable to explore family violence awareness, education and training in the legal profession. Roundtable participants represented Law Council Constituent Bodies, the legal assistance sector (including Women's Legal Centres and Family Violence Prevention and Legal Services), and family violence prevention and survivor support organisations.
73. A key point of discussion at the roundtable was the importance of the legal profession as a whole being able to adequately identify and respond to family violence. Throughout the dialogue, there was strong support for the encouragement of all legal practitioners to complete regular training on family violence, especially those who practice in family or criminal law, or who practice in areas of law (such as wills, property law etc) or with victims that may raise family violence issues.
74. Accordingly, in June 2021, the Law Council Directors resolved to invite its Constituent Bodies to consider that CPD rules should strongly recommend that all practitioners, especially those who practice in family or criminal law, or who practice in areas of law (such as wills, property law etc) or with victims that may raise family violence issues, complete at least one CPD unit in relation to family violence per annum.
75. The Law Council notes that training in trauma-informed lawyering for responding to family violence should provide practitioners with skills to do the following, amongst other things:
- recognise the indicia of trauma and its effect on family violence-affected clients;
 - build trust and the perception of safety in trauma-affected clients;
 - minimise the re-traumatisation of clients in their engagement with the legal system;
 - minimise the risks of physical danger and vicarious trauma to themselves and their colleagues; and
 - respect the client's autonomy and right to self-determination.³²
76. The Law Council will continue to encourage the development and take-up of CPD programs that promote awareness in the above areas.

³² Examples of this type of training include the Law Society of New South Wales' continuing professional development programs, which incorporate skills-based training in areas such as family violence and 'fundamentals' for family law practitioners. The Law Council understands that Legal Aid NSW also offers comprehensive training for panel solicitors, and that private consultancies offer training on trauma-informed practice.