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**SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL
AFFAIRS COMMITTEE INTO THE FEDERAL CIRCUIT COURT
AND FAMILY COURT OF AUSTRALIA BILL 2019 AND THE
FEDERAL CIRCUIT COURT AND FAMILY COURT OF AUSTRALIA
(CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL
PROVISIONS) BILL 2019**

Submitted by:	Victorian Women Lawyers Association Inc (VWL)
Submitted:	Online
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About us

Victorian Women Lawyers (**VWL**) is a voluntary association that promotes and protects the interests of women in the legal profession. Formed in 1996, VWL now has over 600 members. VWL provides a network for information exchange, social interaction and continuing education and reform within the legal profession and broader community.

Since 1996, VWL has advocated for the equal representation of women and promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating discrimination against women in the law and in the legal system, to achieve justice and equality for all women.

Details of our publications and submissions are available at www.vwl.asn.au under the 'Publications' tab.

Overview of submission and response

VWL welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee in relation to the Federal Circuit and Family Court of Australia Bill 2019 (**Bill**) and the Federal Circuit Court and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019. Many of VWL's members are legal professionals who practice in family law.

Family law is an important and multifaceted area of law which touches the lives of many Australians. It often deals with emotionally, socially, culturally and legally complex issues, which must be appropriately managed by practitioners and courts to ensure the safety and wellbeing of individuals – particularly those who are most vulnerable such as women, children and those from culturally and linguistically diverse backgrounds.

If the Bill is passed in its current form:

- the Full Court of the Family Court of Australia (**Family Court**) would be abolished;
- the Family Court would become Division 1 of the Federal Circuit and Family Court of Australia (**FCFCA**) (**FCFCA (Division 1)**);
- the current Federal Circuit Court of Australia would become Division 2 of the FCFCA (**FCFCA (Division 2)**);
- the number of specialist family law judges would be reduced; and
- a single person could hold the position as both the Chief Justice of the FCFCA (Division 1) and Chief Judge of the FCFCA (Division 2).



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WOMEN
LAWYERS**

VWL does not support the Bill. In particular, VWL is concerned that:

- the Bill prioritises the efficiency of hearing and resolving family law matters over and above the safety and wellbeing of families and children;
- the Bill seeks to reduce the operating costs of hearing family law matters at the expense of ensuring the appropriateness of judicial outcomes;
- the proposed merger of the Family Court and the Federal Circuit Court lacks sufficient justification weighed against the interests of parties to family law proceedings, and goes against the recommendations of family law specialists.

Efficiency prioritised over the safety of Australian families

A primary justification for the merger of the Family Court and the Federal Circuit Court is to increase the efficiency of family law matters being heard by federal courts and to reduce the financial costs associated with managing their jurisdictions. VWL acknowledges that both of these goals are important, but is concerned that the Bill prioritises these objectives over the safety and wellbeing of Australian families.

VWL understands that the number of family law matters that require court hearings is significant and that the federal law jurisdiction currently faces delays in the hearing and resolution of family law matters.

In support of its proposal to abolish the Family Court, the Federal Government has relied on a commissioned report titled 'Review of the efficiency of the operation of the federal courts' by Price Waterhouse Cooper (**PwC report**). The PwC report estimates that after the restructure of the Family Court and the Federal Circuit Court proposed by the Bill, an extra 8,305 matters could be resolved each year including an extra 3,410 matters as a result of having a 'single court entity' with one point of entry. The recommendations in the PwC report are based on a key assumption – that 'in practice, both the courts hear matters of similar complexity'.¹

This is not the case.

As described in the Practitioner's Guide to Family Law (5th Edition) prepared by The Law Society of New South Wales (New South Wales Young Lawyers Family Law Committee):

The Family Court deals with the most complex and intractable parenting disputes requiring substantial court time. These cases often involve allegations of physical or sexual abuse of children; family violence; mental health issues and substance abuse. Other areas of family law affecting children dealt with by the Family Court include domestic and international relocation; international child abduction and the Hague Convention; and medical procedures requiring

¹ PwC Report, page 3.



**VICTORIAN
WOMEN
LAWYERS**

court authorisation. The Family Court will also deal with those cases involving complex questions of jurisdiction or law.²

Moreover, the characteristics of family law litigants differ significantly to those of parties to commercial disputes. Many of these individuals have experienced traumatic family breakdowns and suffer from acute grief, financial or psychological distress, varying forms of abuse and social or cultural exclusion, all while trying to maintain employment and care for children. Managing individuals who find themselves in these circumstances through the court system requires appropriately designed court rules and procedures. Case management in the family law jurisdiction therefore requires a level of nuance and adaptivity that may not be available in generalist jurisdictions.

The Bill contains a number of provisions which purport to reduce financial inefficiencies in the court's structure, including by:

- reducing the number of Family Court judges hearing appeals from the Federal Circuit Court from three to one;
- providing no guarantee as to the future minimum number of judges in the Family Court;
- providing no guarantee as to the expertise in the appointment of judges; and
- enabling a single person to hold the position as both the Chief Justice of the FCFC (Division 1) and Chief Judge of the FCFC (Division 2).

VWL is concerned that reducing the multiplicity and experience of judicial voices will have an adverse effect on judicial outcomes. Family law issues do not occur in a vacuum. They arise from a variety of circumstances and communities.

As identified by the Queensland Law Society:

Overwhelmingly, it is the experience of our members that a lack of expertise in family law can result in erroneous decisions and poorer outcomes for families. In our view, there is a significant risk that the quality and propriety of family law decisions will be compromised where determinations are made by judicial officers without family law expertise. These decisions are also more likely to be appealed, increasing the demand on court services.³

In particular, a lack of judicial experience in the area of family law could result in increased risks for particularly vulnerable groups such as women and children, including victims of family violence, people with disabilities and those who identify as transgender or gender diverse.

² Practitioner's Guide to Family Law (5th Edition), page 10; available at: <https://www.lawsociety.com.au/sites/default/files/2018-05/The%20Practitioner%27s%20Guide%20to%20Family%20Law%205th%20Edition-ilovepdf-compressed.pdf>. See also Protocol for the division of work between the Family Court of Australia and the Federal Circuit Court published by the Chief Justice of the Family Court and the Chief Judge of the Federal Circuit Court in 2013 which provides guidance to practitioners identifying which court is most appropriate to commence family law matters in, available here:

<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/protocol-for-division-of-work-fcoa-fcc>.

³ Queensland Law Society, Submission to the Legal and Constitutional Affairs Committee Inquiry into the family law courts (28 September 2018), page 2.



**VICTORIAN
WOMEN
LAWYERS**

With regard to the proposal to enable the appointment of a single Chief Justice, the core reason behind this change is to free up 'considerable judicial resources to help reduce delays in family law appeal matters.' Given the often unique and sensitive issues drawn out by family law matters, VWL submits that it is essential to have a wider selection of judges developing family law jurisprudence, to reflect the heterogeneous families coming before the court, and foster a more progressive court system generally. VWL supports funding from the Australian Government which focuses on providing regular and consistent training for all professionals in this jurisdiction, including for family law judicial officers.

VWL echoes the sentiments of the Law Institute of Victoria that:

... any reform must focus on creating a system that can evolve to meet the challenge of continual changes in the social and cultural conceptions of the issues considered relevant to the "family" in our society, as well as the concurrent and continual evolution of our knowledge base and societal expectations.⁴

Bill lacks sufficient justification

The restructure proposed by the Bill is significant and will have broad and far reaching impacts on litigants, their families and the legal profession. Despite some limited independent research supporting the restructure by PWC, there has been overwhelming opposition to the Bill by family law experts and stakeholders, including a vast number of submissions from law societies and legal professionals calling for the Bill to be rejected. The Law Council of Australia has also identified a number of limitations and flaws in the PWC report.⁵

Concluding remarks

VWL does not support the Bill, and echoes the concerns raised by numerous other groups who strongly oppose the dissolution of the Family Court and the watering down of the specialist nature of the family law jurisdiction. VWL considers that the changes proposed by the Bill amount to significant changes that are sought to be made by the Federal Government absent of an appropriate justification. VWL is concerned that these changes would seriously undermine effectiveness of the family law jurisdiction, putting the safety and wellbeing of Australian families at risk, including the most vulnerable members of society including Aboriginal and Torres Strait Islander families, while not necessarily resulting in any marked increases to efficiency.

⁴ Law Institute of Victoria, Submission to the Legal and Constitutional Affairs Committee Inquiry into the family law courts (23 November 2018), page 7; available at: https://www.liv.asn.au/getattachment/Staying-Informed/Submissions/submissions/November-2018/Submission-to-the-inquiry-into-the-family-law-court/20181106_SUB_FederalCourtRestructure.pdf.aspx

⁵ Law Council of Australia, Submission to the Legal and Constitutional Affairs Committee Inquiry into the family law courts (23 November 2018), pages 34 to 44; available at: <https://www.lawcouncil.asn.au/docs/614e0879-cff9-e811-93fc-005056be13b5/3553%20-%20FC%20and%20FCA%20Bill%202018%20Bill%20Consequential%20Amendments%20and%20Transitional%20Provisions%20Bill%202018.pdf>



**VICTORIAN
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Instead, VWL considers that increasing efficiency would be more effectively achieved by improved case management within the current system and holistic structural reform within the Family Court. VWL supports the recommendations contained within the Small Claims, Large Battles report produced by Women's Legal Service Victoria.

Efficiency and reduced delays can be promoted by implementing the recommendations contained within that report including:

- Streamlining court processes for small claims (recommendations 1-3)
- Improving financial disclosure in property matters (recommendation 4)
- Simplifying the superannuation splitting system (recommendations 5-8)
- Dealing with joint debts in the court system more effectively (recommendation 9)
- Responding to family violence in property matters (recommendations 10-12).

VWL calls on the Federal Government to consider adding resources to a system that is already overworked and underfunded, including regular and consistent training for professionals, not seeking to reduce much needed funding to families and communities who are most at risk. VWL also calls for wider consultation with family law specialists and experts before any steps to radically change the current system are made.

Annexure A

Small Claims, Large Battles Research Report, 2018, Women's Legal Service Victoria

Victoria Muravchenkov

VWL, Co-Chair Law Reform Committee

Eispeth McConaghy

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|



Achieving economic
equality in the family
law system

A Women's Legal Service Victoria report

March 2018

PROJECT PARTNERS

Victorian Legal Services
BOARD + COMMISSIONER
Funded through the Grants Program



HERBERT
SMITH
FREEHILLS

Lander & Rogers
Lawyers

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LEGAL SERVICES BOARD + COMMISSIONER

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AUTHORSHIP

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OUR PRO BONO PROJECT PARTNERS

We thank our project partners:

- Lander & Rogers
- Herbert Smith Freehills

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The recommendations in this report were developed through consultation with expert members of the *Small Claims, Large Battles* Advisory Committee:

- Her Honour Judge Bender, Federal Circuit Court
- Alexandra Judd, CareSuper
- Anna Mandoki, Financial Ombudsman Service Australia
- Professor Belinda Fehlberg, Melbourne Law School
- Elizabeth McNess, Australian Securities and Investment Commission
- Helen Matthews, Women's Legal Service Victoria
- Jenny Peachey, Financial Ombudsman Service Australia
- Katia Sanderson, Consumer Action Law Centre
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CONTENTS

Executive summary	4
The women we represented	4
Streamlining court processes	4
Improving financial disclosure	5
Superannuation	5
Dealing with joint debts	5
Responding to family violence	6
Improving access to property settlements	6
Summary of recommendations	7
About Women’s Legal Service Victoria	9
About the Small Claims, Large Battles project	12
Methodology	12
Eligibility and intake	12
Client intake and legal representation	13
About the clients	13
Emerging themes	13
Client Interviews	13
Feedback from our pro bono partners	14
Women’s financial insecurity following separation	15
Pathways through the family law system	15
Women facing barriers to justice	16
The impact of delay for Small Claims clients	18
The impact of property settlements on the economic wellbeing of Small Claims clients	18
Streamlining court processes	20
A separate court process for small claims	20
Quantifying a small claim	21
Concurrent but separate parenting matters	21
Improving financial disclosure	22
Duty to disclose information in family law property settlements	22
Small Claims and disclosure	22
Cost and complexity of subpoenas	23
Consequences of a failure to disclose	23
Superannuation	25
Why the focus on superannuation?	25
Superannuation can help recovery from family violence	26
Identifying a former partner’s superannuation	26
The current process for splitting superannuation is costly and complex	27
Legal complexity	27
The problem of multiple superannuation funds	28

Joint debt	29
Joint debts and economic abuse	29
Current approaches to dealing with joint debts	30
Negotiating with a creditor	30
Importance of industry responses	31
Legal frameworks should support industry responses	31
Responding to family violence	32
Clients' experiences of family violence	32
Effect of family violence on property settlement	33
Consideration of family violence in property settlements	34
Limitations of the Kennon approach	34
A legislative approach	35
Screening for family violence in the family law courts	36
Improving access to property settlements	37
Legally assisted Family Dispute Resolution (LAFDR) for property matters	37
LAFDR for property matters should be increased	37
The cost of legal representation	38
The importance of legal representation	38
Legal Aid for property matters is limited	39
Role of state and territory courts	40
Increased resources and training must match increased jurisdiction	40
Transfer of property and enforcing orders	42
REFERENCE LIST	44
APPENDIX A – participant information and consent form	48
APPENDIX B – interview questions / run sheet	52

ACRONYMS AND ABBREVIATIONS

ATO	Australian Taxation Office
FDR	Family Dispute Resolution
Family Law Act	Family Law Act 1975 (Cth)
FLC	Family Law Council
LAFDR	Legally assisted Family Dispute Resolution
NPALAS	National Partnership Agreement on Legal Assistance Services
Parliamentary inquiry into a better family law system	Parliamentary Inquiry into a better family law system to support and protect those affected by family violence
SRO	State Revenue Office
VLA	Victoria Legal Aid
WLSV	Women's Legal Service Victoria
WLSA	Women's Legal Services Australia



EXECUTIVE SUMMARY

For women experiencing disadvantage, the risk of poverty, homelessness and ongoing financial insecurity is heightened by the lack of fast, affordable pathways to resolve family law property disputes. Many women are simply walking away from their entitlement to a fair division of property.

Women's Legal Service Victoria (WLSV) established the Small Claims, Large Battles (Small Claims) project to investigate the barriers to fair financial outcomes in the family law system for vulnerable and disadvantaged women, many of whom had experienced family violence. The project was a collaboration between WLSV, Lander & Rogers and Herbert Smith Freehills.

Lawyers at WLSV and Lander & Rogers provided free legal representation to women with limited assets or significant debt. Herbert Smith Freehills lawyers and the WLSV project coordinator interviewed these clients about their experience in the family law system. Both Lander & Rogers and Herbert Smith Freehills generously contributed their time and expertise to the project pro bono.

This report details our findings and makes recommendations for reform to law and policy to improve access to fair property settlements for disadvantaged women.

THE WOMEN WE REPRESENTED

We focused on representing women who had a small amount of property to divide after separation. These women also experienced other disadvantages, which impacted their access to justice. In determining eligibility for assistance through the project, we considered material wealth, existing power imbalances, the size and type of assets the potential clients had to divide, as well as their prospects of success

The majority of women represented had experienced family violence, including economic abuse. Many women were from culturally and linguistically diverse backgrounds, and a number of clients had disabilities or cared for someone who did. Some women were from rural

or regional areas and a significant proportion of women were at risk of poverty and homelessness. We represented women with few assets, no assets, superannuation as their only significant asset, or women who were struggling with joint debts from their relationship.

We provided legal representation to 48 women through the Small Claims project. We also included the stories and interviews of four WLSV clients whose matters concluded before the commencement of the project. At the time of this report, 20 matters were finalised (including the four prior matters) and 18 were ongoing, with the prospect of a property settlement outcome. Fourteen matters out of the 48 ceased to meet our eligibility criteria for the project.

The women assisted through the project were most in need of access to a fair property settlement because of the financial hardship and other disadvantages they experienced. Without the free legal assistance provided, their limited finances and other vulnerabilities would have made a settlement difficult to obtain in the present family law system.

STREAMLINING COURT PROCESSES

Women in our project found the family law process complex and daunting, and the delay they experienced in resolving disputes exacerbated the financial hardship and stress they were experiencing.

'For one year I had to do the paperwork myself. I [couldn't] understand anything. [In] one ... hand I was holding [a] dictionary. In the other hand, I was trying to figure out what to do.' **Priya**

'... and I think the delays too were about getting at me a couple of times during this whole process. The stress was causing me to have a lot of hospital admissions; I think he was kind of playing on that as well.' **Wendy**

There is broad support amongst legal and community organisations for a separate streamlined system for small property matters.¹ A case management process, available upon application to the court, with simplified procedural and evidentiary requirements would improve vulnerable women's access to fair, expedited and cost-effective property settlements, reducing their risk of post-separation financial hardship.

'... there needs to be a sample form available, you know, a completed one with some different scenarios for people like me to navigate and go "Oh that's what they mean".' **Briony**

'... so I then made an attempt on my own to try and make an application in the Family Court and I did all the paperwork and got down there and for some reason my paperwork was non-compliant.' **Angela**

The average size of settlements received by women in the Small Claims project was \$71,447. Eligibility for a small claims process should be based on a party's potential share of the asset pool as opposed to the total size of the pool. Eligibility requirements might also take into account the party's financial vulnerability, the particular issues in dispute and the nature and value of assets. A small claims process should include rules or guidelines for determining when a property settlement can occur, despite parenting issues remaining unresolved.

IMPROVING FINANCIAL DISCLOSURE

There is an obligation on parties to family law proceedings to make full and frank disclosure of their financial position.² Failure to comply with this obligation can lead the court to apply penalties or exercise its discretion adversely to the non-disclosing party when deciding property settlements.³

For women in our project, however, issues with obtaining proper financial disclosure arose before matters reached adjudication, causing delay and inhibiting effective negotiation. Over two-thirds of clients experienced delay caused by difficulties obtaining full financial disclosure from their former partner. Many clients were forced to initiate court proceedings where they otherwise might have negotiated a property settlement.

There are few effective disincentives for non-disclosure, and alternative information-finding processes, such as issuing subpoenas, are costly and not guaranteed to return the required information.

Strengthening mandatory disclosure, through more intensive case management, greater use of registrar powers, or by permitting courts to obtain information about parties' assets from sources such as the Australian Taxation Office (ATO), would improve the speed and fairness of property settlements for vulnerable parties.

SUPERANNUATION

Particularly for low-income households with few assets, superannuation can sometimes comprise the greatest share of the property pool because of compulsory contributions. For 21% of women in the Small Claims project, superannuation was the only significant asset, and in 39% of all Small Claims cases there was a superannuation split.

The Family Law Act 1975 (Cth) (Family Law Act) recognises superannuation as a relationship asset, but the process for obtaining superannuation splitting orders is too complex for vulnerable parties to navigate.

First, without a former spouse voluntarily disclosing the name of their superannuation fund, there are no other mechanisms by which an individual can find the fund of their former partner. Second, the complex, legalistic format of orders and procedural requirements make it extremely difficult to obtain superannuation splitting orders without legal assistance.

There have been recent calls to make family violence a ground for early access to superannuation.⁴ However, without first considering whether superannuation splitting is practically accessible to women in family law property disputes, allowing early release for family violence could serve to further financially disadvantage women. If women are unable to obtain a share of their former partner's superannuation after separation, early release of superannuation on the grounds of family violence could further diminish the small amount of property many women in violent relationships often walk away with.

An administrative mechanism to find the name of a former partner's superannuation fund should be made available and a simplified form for superannuation splitting should be available to unrepresented parties.

DEALING WITH JOINT DEBTS

Despite the family law courts' powers to alter or transfer debts under section 90AE of the Family Law Act, orders are rarely made pursuant to this section. Instead, it is more common for courts to require one party to be solely responsible for repayment of a joint debt and to indemnify the other party in relation to that debt.

1. House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (2017) 169 [5.28].

2. *Federal Circuit Court Rules 2001* (Cth) r 24.03(1)(a); *Family Law Rules 2004* (Cth) r 13.04.

3. See Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2015) 513.

4. HESTA, Submission to The Treasury, *Review of the early release of superannuation benefits*, 2018, 6.



Building on WLSV's Stepping Stones project from 2015, the Small Claims project presented further opportunity to examine the issue of joint debts amongst women in the Small Claims project. Non-payment of joint debt was a means by which further economic abuse was perpetrated. Additionally, there were a number of women who were dealing with the ongoing stress of debts accrued in their name by a former partner.

WLSV notes that since the Stepping Stones report was published there have been a number of positive industry responses to the issue of joint debt in the form of guidelines, approach documents and reviews of industry codes. The Small Claims project highlighted, however, that these responses should be supported by legal frameworks. Steps need to be taken to ensure that practical effect can be given to section 90AE.

In cases of joint debt in our project the courts took the common approach outlined above. Instead of severing liability, the court required the former partner to be solely responsible for the debt and indemnify our client. There was no formal legal alteration of parties' liability, and as was the case for one client, creditors could still choose to enforce the debt against the indemnified person, and negatively report on their credit rating. To enforce the indemnity, further costly proceedings would need to be initiated.

RESPONDING TO FAMILY VIOLENCE

The majority of women in our project (87%) experienced some form of family violence, including economic abuse. In addition to physical and psychological effects, family violence can have ongoing financial repercussions.⁵

These clients were also at a distinct disadvantage in navigating the legal system. Economic abuse left the women with limited financial resources to take action to seek a property settlement, while power imbalances and ongoing violence or intimidation made them fearful of seeking their share of property through the family law system. Obstructive former partners also continued their abuse through the family law system by delaying or frustrating efforts to resolve property disputes.

Our project confirmed the view that family violence is only rarely taken into account in determining property settlements. Family violence is not a specific factor for consideration by the courts in determining property matters under the existing legislation. The case law, led by Kennon⁶ which provides precedent for property settlements which take account of family violence, is careful to avoid introducing the notion of fault based determinations. Reviews of case law have shown this precedent has been narrowly applied. In practice the "Kennon argument" in negotiations is not particularly persuasive. The Family Law Act should be amended to reflect current understandings of the impact of family violence on victims by directing courts to consider family violence in making property divisions.

IMPROVING ACCESS TO PROPERTY SETTLEMENTS

For some women in the Small Claims project, greater availability of legally assisted Family Dispute Resolution (LAFDR) might have broadened the options available to obtain timely, fair property settlements. Structured mediation, involving trauma-informed mediators and lawyers, conducted using mechanisms such as shuttle conferences, can provide a cost-effective but safe process to resolve property disputes.

For other women in the project, less formal pathways and direct negotiation to obtain a property settlement were often inappropriate or had been explored without success. They required the assistance of lawyers to negotiate with their former partner and to navigate the family law system. Lawyers assisted women to overcome power imbalances and to deal with legal and procedural complexity.

The cost of private legal representation often outweighs projected settlement amounts in small property matters. A short survey conducted by WLSV with legal professionals found that many would not accept a matter involving property less than \$50-100,000 in total. Without legal representation it is difficult to obtain a property settlement in the family law system and grants of legal aid for property matters are very limited.⁷ If not for our project, it would have been impossible for the women we represented to pay for private lawyers. For example, for one client, legal fees represented 126% of her property settlement. For other women, with settlements of less than \$30,000, fees represented between 50-104% of what they received as a settlement.

5. Rochelle Braaf and Isobelle Barrett Meyering, 'Seeking Security: Promoting Women's Economic Wellbeing Following Domestic Violence' (Australian Domestic & Family Violence Clearinghouse, March 2011) 3; See also Amanda George and Bridget Harris, 'Landscapes of Violence: Women Surviving Family Violence in Regional and Rural Victoria' (Report, Centre for Rural Regional Law and Justice, Deakin University School of Law, 2014) 35; Emma Smallwood, 'Stepping Stones: Legal Barriers to Economic Equality after Family Violence' (Report, Women's Legal Service Victoria, 2015) 6; National Council to Reduce Violence Against Women and Their Children (Australia), *Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and Their Children, 2009-2021* (Dept. of Families, Housing, Community Services and Indigenous Affairs, 2009) 44; Ilsa Evans, *Battle-Scars: Long-Term Effects of Prior Domestic Violence* (Centre for Women's Studies and Gender Research, Monash University, 2007) 24.

6. *Marriage of Kennon* (1997) 22 Fam LR 1.

7. Victoria Legal Aid, Submission No 60 to the Standing Committee on Social Policy and Legal Affairs, *Parliamentary Inquiry into a Better Family Law System to Support and Protect Those Affected by Family Violence*, May 2017, 24; House of Representatives Standing Committee on Social Policy and Legal Affairs, above n 1, 163 [5.10].

SUMMARY OF RECOMMENDATIONS

STREAMLINING COURT PROCESSES

> RECOMMENDATION 1

The Australian Government, in consultation with the Federal Circuit Court and Family Court of Australia, promote early resolution of small property disputes through a streamlined case management process available upon application to the court, with simplified procedural and evidentiary requirements.

> RECOMMENDATION 2

The Australian Government, establish eligibility for the streamlined case management process with reference to the financial vulnerability of parties, the particular issues in dispute and the nature and value of assets.

> RECOMMENDATION 3

Any streamlined case management process adopted be available to eligible parties who may have concurrent unresolved parenting matters.

IMPROVING FINANCIAL DISCLOSURE

> RECOMMENDATION 4

The Australian Government, in consultation with the Federal Circuit Court and Family Court of Australia, consider how best to strengthen mandatory financial disclosure that will enable family violence victims and decision makers to access the necessary financial information needed to resolve small claims matters efficiently and fairly, including consideration of:

- a. Broadening the role of registrars to increase interim case oversight to check compliance with disclosure and encourage greater use of registrar powers to make orders for disclosure;
- b. Encouraging banks and government agencies, such as land titles offices, to reduce fees associated with processing family law subpoenas or title searches consistent with existing fee reduction regimes in the family law courts;
- c. Providing a mechanism for family law courts to be provided with information by the Australian Taxation Office for the purposes of determining if full financial disclosure is being made;
- d. Amending the Family Law Act 1975 (Cth) to enable courts to order forfeiture of assets by one party and redistribution to the other for failure to comply with financial disclosure obligations;
- e. Amending the Family Law Act 1975 (Cth) to encourage greater exercise of courts' discretion to make adverse adjustments to property divisions for parties who do not make full and frank disclosure.

SUPERANNUATION

> RECOMMENDATION 5

The Australian Government provide an administrative mechanism for the release of information about the identity of a former partner's superannuation fund and its value.



> RECOMMENDATION 6

The Australian Government encourage superannuation funds to reduce fees for processing requests for information and for family law superannuation splitting orders, so that fees represent cost recovery only.

> RECOMMENDATION 7

The Australian Government reduce the procedural and substantive complexity associated with superannuation splitting orders, by allowing unrepresented parties to complete a simplified form for superannuation splitting which is submitted to superannuation trustees and which can satisfy procedural fairness requirements

> RECOMMENDATION 8

As an interim measure, the Australian Government enable registrars at the family law courts to provide assistance to unrepresented parties to draft orders for a split of superannuation

DEALING WITH JOINT DEBTS

> RECOMMENDATION 9

The family law courts work with relevant industry bodies to implement procedures to ensure that court powers to make orders to split, alter or transfer unsecured joint debts can be given practical effect, including in matters involving smaller claims and/or economic abuse.

RESPONDING TO FAMILY VIOLENCE

> RECOMMENDATION 10

The Australian Government amend the Family Law Act 1975 (Cth) to enable courts to:

- a. have regard to the effects of family violence on both parties' contributions;
- b. Include the effects of family violence in the list of s75(2) factors relevant to determining property interests and awarding spousal maintenance.
- c. Make orders which ensure that no party financially benefits from family violence they have perpetrated.
- d. Improving access to property settlements

> RECOMMENDATION 11

The Australian Government fund an expansion of existing models of legally assisted Family Dispute Resolution, to give greater access to vulnerable parties seeking property settlements.

> RECOMMENDATION 12

The Australian Government resource Legal Aid Commissions to broaden availability of funding for priority clients to pursue small property matters.

ROLE OF STATE AND TERRITORY COURTS

> RECOMMENDATION 13

The Australian Government:

- a. Adequately fund state and territory courts exercising increased family law property jurisdiction to manage greater demand; and
- b. Ensure adequate and ongoing family law training is available to state and territory courts exercising increased family law property jurisdiction; and
- c. Work with state and territory Governments to encourage appointment of specialist judicial officers with family law practice experience to state and territory courts.

TRANSFER OF PROPERTY AND ENFORCING ORDERS

> RECOMMENDATION 14

The Australian Government ensure that the Family Law Act 1975 (Cth), in particular the provisions relating to the transfer of property and enforcement of property orders, recognises and ensures compatibility with state and territory electronic systems associated with the transfer of property.

> RECOMMENDATION 15

As an interim measure, state and territory Governments immediately facilitate the provision of alternate processes by affected agencies to parties transferring property pursuant to family law orders.

ABOUT WOMEN'S LEGAL SERVICE VICTORIA

Women's Legal Service Victoria (WLSV) is a state-wide service that provides free legal advice and representation to women in relation to issues arising from relationship breakdown and violence against women.

We focus our most intensive legal services on assisting women who experience severe barriers to accessing justice and whose cases could lead to systemic change.

Our staff include lawyers with expertise across family violence law, family law (parenting and property) and child protection law. Our service model is holistic, including a financial counsellor, a social worker and a family violence support worker who provide additional support to our clients as they navigate their legal issues.

In addition to assisting individual women with their legal issues, WLSV builds the capacity of other professionals and the community to identify and respond to legal need, and advocates for law and policy that respects and promotes the rights of women. We are also leading work in the legal and justice context on primary prevention of violence against women and on community organising.

WLSV works alongside women, promoting 'power with' or 'power for' our clients, rather than being complicit in a legal system that maintains 'power over' our clients.



RESPONDING TO FAMILY VIOLENCE



87% of Small Claims clients had experienced some form of **family violence**



84% of Small Claims clients had experienced **economic abuse**

IMPROVING FINANCIAL DISCLOSURE

Without adequate financial disclosure, our clients had no way of knowing their entitlements



TWO-THIRDS of women in the project experienced problems **WITH NON-DISCLOSURE** by the other party

STREAMLINING COURT PROCESSES



THE SAME COURT PROCESS APPLIES

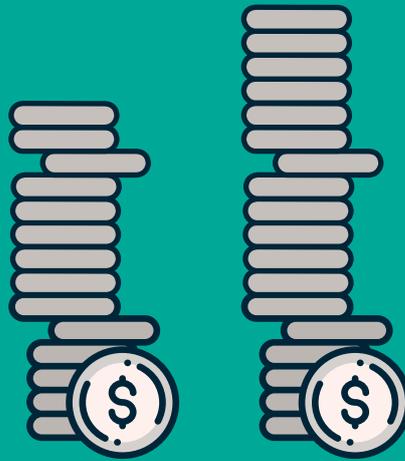
for splitting an asset pool worth

\$10,000

as for a pool worth

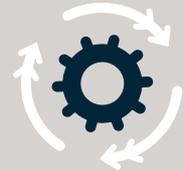
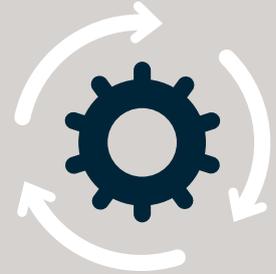
\$10,000,000

IN ONE CASE,
**NOTIONAL
LEGAL COSTS
REPRESENTED 126%
OF THE ENTITLEMENT WON**



ENTITLEMENT WON

LEGAL COSTS



A streamlined case management process for small claims is needed

SUPERANNUATION

FOR 21%

of matters in the Small Claims project
SUPERANNUATION WAS THE ONLY SIGNIFICANT ASSET



Access to

**A PARTNER'S
SUPERANNUATION
FUND INFORMATION**

SHOULD BE MADE EASIER



ABOUT THE SMALL CLAIMS, LARGE BATTLES PROJECT

We established the Small Claims, Large Battles project to promote the economic recovery of vulnerable women after relationship breakdown. Through providing legal representation, conducting research interviews and engaging in advocacy we aimed to deepen current knowledge and develop strategies to improve access to family law property settlements for women with small claims.

In 2015, WLSV conducted the Stepping Stones project, which provided legal representation and financial counselling assistance and illuminated the issue of economic abuse.⁸ Among other findings, the project highlighted challenges that victims of economic abuse face in the family law system while seeking a property settlement. That project was a key inspiration for Small Claims, Large Battles and its focus on vulnerable women's access to the family law system.

The Small Claims project targets women at risk of poverty and disadvantage, who have few assets, no assets, or have joint debts arising from their past relationship. Their share from any property settlement will not be sufficient to pay for private legal representation, and yet, because of their financial vulnerability, they are the most in need of urgent access to a fair property settlement following separation.

METHODOLOGY

WLSV coordinated the Small Claims project which consisted of two interlinked components: legal representation and research.

WLSV lawyers and lawyers from Lander & Rogers Family and Relationship Law team, acting pro bono, provided legal representation to the clients, seeking property settlements, whether through negotiations, mediation or court proceedings. This was complemented by WLSV's financial counselling and social work support where required.

Research included a literature review and qualitative interviews with clients to explore the women's personal experiences with relationship breakdown and financial hardship as well as to document their

journey through the family law system. Interviews were conducted by the WLSV project coordinator and lawyers from Herbert Smith Freehills and were transcribed by the Herbert Smith Freehills' document production team, also acting pro bono.

In some cases we invited former WLSV clients, who were assisted prior to the commencement of the Small Claims project and whose matters fell within our research focus, to participate in an interview.

Women's stories and their voices are a core component of our research.

ELIGIBILITY AND INTAKE

A set of guidelines were developed at the beginning of the Small Claims project.

We initially identified five overlapping legal issues to explore. They were:

- superannuation splitting
- joint debt matters
- adjustments for family violence
- applications for spousal maintenance
- injunctions to preserve cash or assets in the context of small property pools

There was no specific cap on the size of the property pool in a client's matter. In deciding whether to take on a matter, we took an approach which considered material wealth of parties, power imbalances, size and type of assets, additional disadvantages women were facing, as well as their prospects of success.

Client intake was through WLSV's outreach services. These included our duty lawyer services at Melbourne Magistrates' Court and at the Federal Circuit Court, as well

8. Smallwood, above n 5.

as our Link virtual outreach program, our appointments service and our evening phone advice line.

CLIENT INTAKE AND LEGAL REPRESENTATION

Client intake was through WLSV's outreach services. These included our duty lawyer services at Melbourne Magistrates' Court, the Melbourne registries of the Family Court of Australia and the Federal Circuit Court, as well as our Link virtual outreach program, our appointments service and our evening phone advice line.

The project guidelines were applied to determine whether a client's matter was appropriate for the Small Claims project. In addition, WLSV's standard case intake guidelines were applied which require consideration of the impact of assistance on the individual client and for wider systems change as well as the barriers to access to justice faced by the particular client.

There was no specific cap on the size of the property pool in a client's matter. We took an approach which considered both material wealth of parties, relative power imbalances and additional disadvantages which particular women were facing, to determine whether to take on their matter.

ABOUT THE CLIENTS

Lawyers from WLSV and pro bono lawyers from Lander & Rogers provided legal representation to 48 clients. Four women who were previous clients of WLSV with matters that finalised before the start of the project were also included in the project with their consent.

There were 38 clients, including previous WLSV clients, whose matters had progressed or were progressing to a reportable outcome for the project. This included clients where there were no practical legal options available, who received advice only. There were 14 clients who were not provided ongoing legal representation because their matters were ultimately found to be no longer eligible for the project.

At the time of writing this report, 20 matters had been finalised, including where women were given advice only, and 18 matters were ongoing. In seven of these proceedings had been issued, three clients were intending to issue proceedings, and eight clients were negotiating with their former partner through their lawyer.

Just under 40% of women were at risk of homelessness or were experiencing homelessness. Eighty-seven percent of clients had low or no income.⁹ Around 87% of the women had experienced family violence.

The median age of women in our project was 39, and 74% of those in our project had dependent children. Among the women we represented, 63% were born outside of Australia, 37% spoke a language other than English as their main language and 21% did not speak English well, and around 10% were from a rural, regional or remote area. Thirteen percent were recorded as having a disability at the client intake stage.

In this report, all statistics about our clients are drawn from the pool of 38 clients whose matters progressed or were progressing to a resolution for the Small Claims project.

EMERGING THEMES

The Small Claims project was responsive to specific issues which began to dominate the cases that were taken on.

For example, there were few clients for whom applications for spousal maintenance were able to be pursued. In cases where our lawyers did initially seek an order for spousal maintenance, these applications were withdrawn after the other party was able to demonstrate that his outgoings exceeded his income.

Matters in need of urgent injunctions also did not frequently arise. At a reflection meeting held partway through the project, and in discussions with our Advisory Committee, we hypothesised that this may be because women were not accessing our services early enough to seek

injunctions over assets. Future work may be required to investigate whether there is a need for improved early intervention to assist women to prevent dissipation of assets.

In contrast, there were many clients whose asset pools included superannuation. At the same time, parliamentary reports have recently focused attention on the disparity in women's retirement savings compared to men's.

Experiences of family violence were common amongst our clients as were challenges with obtaining full and frank disclosure from their former partners. A few matters also illustrated challenges in dealing with joint debt.

We therefore prioritised investigation of superannuation issues, difficulties with obtaining disclosure in the family law system and the challenges of joint debt. We also documented our clients' experiences of family violence and its impact on both their journey through the family law system and the final property settlement outcome.

CLIENT INTERVIEWS

When clients were asked to participate in the Small Claims project we informed them about the interview component. Interviews were completely voluntary. We provided new clients with a consent form which explained the project and the exchange of information between WLSV, Lander & Rogers and Herbert Smith Freehills. To protect our clients' legal professional privilege, on the advice of counsel, pseudonyms were used when communicating background information about a client to the pro bono interviewers.

Interviews were conducted by pro bono lawyers from Herbert Smith Freehills and the project coordinator, who were not family lawyers. This provided an advantage, in that interviews were less focused on legal details and instead concentrated on clients' personal experiences navigating the family law system. WLSV engaged an external counselling service in case clients needed

9. 'Low income' was defined as any amount up to \$400-599 per week income range.



immediate or ongoing support during or after the interviews took place.

Interviews were guided by a structure and set of questions. However, there was also scope to explore other themes raised by the women interviewed. The interviews first explored the dynamics of women's relationships, including their financial situation, before turning to their experience of the family law system.

In total, 17 interviews were conducted. Of these, seven were in person and ten were over the phone. There was one interview over the phone using an interpreter and one in-person interview with an interpreter.

Interviews were conducted as close to the end of the clients' matters as possible. We conducted nine interviews with clients whose matters had finalised with final property orders. As the project reached the end phases, eight clients with ongoing matters were also referred to Herbert Smith Freehills for interviews. For those clients, we asked them to reflect on their experiences so far in the family law system.

FEEDBACK FROM OUR PRO BONO PARTNERS

This report includes reflections and feedback gathered from lawyers from Lander & Rogers and Herbert Smith Freehills who assisted pro bono in the Small Claims project. At the conclusion of the project a semi-formal feedback session was hosted by Lander & Rogers to discuss their insights into the challenges faced by Small Claims clients in the family law system.

WOMEN'S FINANCIAL INSECURITY FOLLOWING SEPARATION

Women's participation in society and the workforce is greater than ever before, and there is improved awareness of issues such as the gender pay gap and women's representation in workplaces. However, still today, during marriage, men's careers and earning capacity often increase while women occupy unpaid caring roles,¹⁰ impacting their careers and earning capacity negatively.

Women are at greater risk of poverty than men,¹¹ and women are more at risk of post-separation financial hardship.¹² Research by the Australian Institute of Family Studies published in 2014 indicates that 'men who divorce experience a substantially faster rate of increase in income post-divorce than had they remained married'.¹³

Meanwhile, single women, many of whom may be divorced or separated, are at greater risk of housing insecurity,¹⁴ have difficulty entering or re-entering the workforce,¹⁵ and for all women a significant gender gap in superannuation balances creates a disadvantage when they retire.¹⁶

Acute effects of separation for women can include a drop in income, which men do not experience. Indeed, studies have demonstrated that women experience a decrease in income, while men's incomes increase in the first year post-divorce.¹⁷

As Weston and Smyth state, divorce 'often exposes the economic vulnerability of women (and children) hidden by marriage'.¹⁸

PATHWAYS THROUGH THE FAMILY LAW SYSTEM

There are a number of options available for resolving property disputes. They are:

- a. Negotiated settlement, followed by an application to the court for consent orders to be made;
- b. Negotiated settlement while the matter is ongoing on at court, reflected in consent orders;
- c. Judicial determination of an appropriate division after a court hearing;
- d. Negotiated settlement with a dispute resolution or mediation service, followed by an application to the court for consent orders to be made.
- e. Completely informal negotiated settlement.

10. Grania Sheehan and Jody Hughes, 'The Division of Matrimonial Property in Australia' [2000] *Family Matters* 28; Ruth Weston and Bruce Smyth, 'Financial Living Standards after Divorce' [2000] *Family Matters* 10, 10.

11. Australian Council of Social Service, 'Poverty in Australia 2014' (Report, Australian Council of Social Service, 2014) 17–18.

12. Human Rights and Equal Opportunity Commission, *Striking the Balance: Women, Men, Work and Family*, Discussion Paper (2005) 54; Rosalie McLachlan et al, 'Deep and Persistent Disadvantage in Australia' (Staff Working Paper, Productivity Commission, 2013) 141; Weston and Smyth, above n 10, 15; see also Australian Council of Social Service, above n 11, 18.

13. David de Vaus et al, 'The Economic Consequences of Divorce in Australia' (2014) 28(1) *International Journal of Law, Policy and the Family* 26, 42.

14. Chris Ketter and Sam Dastyari, 'A Husband Is Not a Retirement Plan: Achieving Economic Security for Women in Retirement' (Australian Senate Economics Reference Committee, 2016) 120.

15. Ibid 34; Braaf and Barrett Meyering, above n 5, 11.

16. Ketter and Dastyari, above n 14, 67.

17. de Vaus et al, above n 13, 32–34.

18. Weston and Smyth, above n 10, 10.



At the time of this report, 24% of matters in the Small Claims project had resolved with consent orders after proceedings had been initiated in the family law courts. Half of those matters were resolved at a conciliation conference. A further 11% of all matters had negotiated consent orders without issuing proceedings.

Over 13% of matters were resolved with final orders by judicial determination. For 26% of matters there were either proceedings on foot or there was a strong likelihood of issuing proceedings, and 21% of clients were negotiating with the other party or at the stage of seeking financial disclosure.

WOMEN FACING BARRIERS TO JUSTICE

The accessibility and fairness of the family law system relates directly to women's financial hardship following separation. Delay, complexity and cost in the current family law system are well recognised problems. For women in the Small Claims project, who face multiple layers of disadvantage, these problems exacerbate their risk of poverty and financial hardship. Research suggests 'a minority of the separating population apply to the family law courts for final property orders', and an even smaller proportion receive adjudicated final orders.¹⁹

Many women assisted in the project had low or no income, were reliant on Centrelink benefits, were from culturally or linguistically diverse backgrounds, had a disability or were a carer for someone with a disability, or were at risk of homelessness. A majority of clients had experienced family violence, including economic abuse, which compounded with their existing disadvantages in accessing the family law system.

The time it takes to secure a property settlement and the complexity of the process intersect with existing barriers to accessing justice, and have a damaging effect on short- and long-term financial wellbeing.

'Everyone told me to avoid going through the system because it is very daunting, and it is truly daunting.' **Leisha**

Cost and complexity impede women's access to the family law system. This inaccessibility results in them experiencing financial instability, including being responsible for joint debts or other liabilities, for longer periods. When family law matters are protracted or unresolved, women are reliant on welfare and support services for longer.

Reliance on Centrelink benefits

For many Small Claims clients, Centrelink was their only financial resource after separation.

Kumiko described receiving a minimal amount of financial support from Centrelink because of her migration status: 'With Centrelink payments—I am receiving the family tax benefit which is \$212 every fortnight. That amount has been really difficult for me.'

Jessica reported 'I don't have much income so Centrelink has [been] helping me a lot ... I have the parenting payments, single parenting payments, which is a big help. That has been my survival mode. Yeah at the moment and I don't expect it to be here forever so I'm grateful.'

Katia expressed how receiving Centrelink was part of her financial recovery process, '... first of all when I went to the Women's refuge the first thing the support worker did was to put me on Centrelink benefits ... and then later on we started receiving ... child support money as well and so all of a sudden I found myself in a position that I did have money and also was accommodated in transition housing ... so I seem to be able to manage my financial affairs quite well.'

Women with disabilities or caring for a person with disabilities

A number of women in the Small Claims project either had disabilities themselves or were carers for children with disabilities.

Caring responsibilities would often impact women's ability to work, and costly medical care created additional financial stress.

For example, Angela is the primary carer for her four children and cares for her brother who has severe disabilities. In addition, she is recovering from a serious accident that occurred in 2015 which limits her ability to work.

Thu experienced chronic illness which not only impacted on her ability to work, but also affected her capacity to negotiate with her former husband for a property settlement.

Some women's disabilities or illnesses were a result of family violence. For example, Leisha, Annisa and Shanti all experienced mental health impacts as a result of family violence, as well as physical injury.

Employment

Women's ability to remain in secure employment following separation was often closely tied to their experiences of family violence. Practical, physical and psychological effects of family violence may leave long-lasting health problems that make it more difficult to engage in paid labour.²⁰

Annisa and Leisha were forced to take time off work due to their violent relationships. Annisa told us, '... due to domestic violence I had to leave ... everything, because my family day care was ... in that house [and] I didn't have a place to open again. So ... I didn't go to work.'

Women may take time off work to deal with medical issues resulting from their experience of family violence. Attending court events, including for intervention orders and family law matters, also impacts women's ability to work and sustain an income.²¹

Women from culturally and linguistically diverse backgrounds

Many of the clients in the Small Claims project were immigrant or refugee women.

19. Fehlberg, above n 3, 477.

20. Nicola Sharp, 'What's Yours Is Mine: The Different Forms of Economic Abuse and Its Impact on Women and Children Experiencing Domestic Violence' (Report, Refuge, 2008) 9.

21. Ibid.

Being from a culturally or linguistically diverse background added additional barriers to their post-separation financial wellbeing, particularly if they were leaving a violent relationship.

While the forms of violence experienced by immigrant or refugee women were similar to those experienced by non-immigrant or refugee clients, a range of factors can influence and heighten immigrant and refugee women's risk of experiencing family violence.²² These include: cultural pressures and community attitudes; issues around gender roles; social isolation and financial insecurity; women's visa status and; immigration policies.²³

These issues can impact on women's ability to access the family law system, including their ability to seek a property settlement.

'He came first [to Australia, and] I came after. So he experienced to tell me "white people don't like us so you'll never get any help here" ... which was wrong because when I needed help I went to different offices and [people helped me]. They helped me so much.' **Roshini**

'[For] one year I was very isolated by my husband and his family members, you know. So I was in a shell and ... I didn't know that I ... have rights. I had no clue, nothing.' **Kumiko**

'At first, like yeah it's like not understanding the system, it is a very big thing because we

don't know so many things and there are so many loopholes that we don't know.' **Azar**

Annisa left her violent relationship with nothing and reported experiencing extreme stress from the housing uncertainty created by her visa status: '[A family violence support service] gave me crisis accommodation but every morning they [would] always say to me "you don't have any Centrelink, [so] we can't give you refuge".'

Housing

Women who are already financially disadvantaged are at risk of homelessness and housing insecurity following separation. Victims of family violence are at a heightened risk of homelessness when they leave relationships.

In the 2015–2016 financial year, 59% of those accessing homelessness services were women.²⁴ Of those, 38% reported their main reason for doing so was due to domestic and family violence. This rate rose to 40% in the 2016–2017 financial year.²⁵ Recent data also indicates that the rate of women accessing homelessness services for reasons of domestic violence is also on the rise.²⁶

Experiences of family violence

In the Small Claims project, around 87% of women had experienced family violence, and of these, 84% had also experienced economic abuse. In total, 75% of our clients reported experiencing economic abuse.

Where there is family violence, women's risk of financial disadvantage is increased. The physical and psychological costs of violence can be significant and long-term for women.²⁷ Family violence can also impact property settlement outcomes. In one study, women who reported experiencing severe abuse were approximately three times more likely to receive less than 40% of the property pool.²⁸

More recently recognised forms of family violence, such as economic abuse, relate very directly to women's post-separation experience of economic hardship. Broadly defined, economic abuse involves 'behaviours that control a woman's ability to acquire, use, and maintain economic resources, threatening her economic security and financial independence'.²⁹

Economic abuse is also a means by which perpetrators limit a victim's abilities to escape violence and become independent.³⁰ Economic abuse can be a way to keep victims tied to their abusers when other forms of control are no longer at the disposal of the perpetrator.³¹

Women in the Small Claims project experienced economic abuse both during and after their relationships had ended. At times, economic abuse was perpetrated through the family law system. Intentionally causing delay in property negotiations, failing to service joint debts and failing to disclose assets are some examples of post-separation economic abuse.

22. Cathy Vaughan et al, 'Promoting Community-Led Responses to Violence against Immigrant and Refugee Women in Metropolitan and Regional Australia' (Report, Issue No 12, ANROWS October 2015, 2015) 18.

23. Ibid 21–29.

24. Australian Institute of Health and Welfare, *Specialist Homelessness Services Support Services National* (23 May 2017) Australian Institute of Health and Welfare <<https://www.aihw.gov.au/reports/homelessness-services/shsc-data-cubes/contents/data-cubes>>.

25. Australian Institute of Health and Welfare, *Specialist Homelessness Services Annual Report 2016–17* (12 February 2018) Australian Institute of Health and Welfare <<https://www.aihw.gov.au/reports/homelessness-services/specialist-homelessness-services-2016-17/contents/client-groups-of-interest/clients-who-have-experienced-domestic-and-family-violence>>.

26. Ibid.

27. Sharp, above n 20, 9.

28. Grania R Sheehan and Bruce Smyth, 'Spousal Violence and Post-Separation Financial Outcomes' (2000) 14(2) *Australian Family Law Journal* 102, 11.

29. Adrienne E Adams et al, 'Development of the Scale of Economic Abuse' (2008) 14(5) *Violence against women* 563.

30. Sharp, above n 20, 10.

31. Owen Camilleri, Tanya Corrie and Shorna Moore, 'Restoring Financial Safety: Legal Responses to Economic Abuse' (Report, Good Shepherd Australia New Zealand and Wyndham Legal Service, 2015) 12.



Even after having fled an abusive relationship, victims may be subjected to further abuse by perpetrators during family law matters. Former partners of women in our project delayed proceedings by failing to respond to letters, signing forms incorrectly, vexatiously appealing decisions, and failing to provide full and frank financial disclosure.

The Parliamentary inquiry into a better family law system to support and protect those affected by family violence (Parliamentary inquiry into a better family law system) reported on the breadth of evidence presented to it on systems abuse in family law proceedings.³² Perpetrators of family violence often use the family law system to continue abuse; dragging out proceedings to force the other party into a settlement the perpetrator wants.³³

'Systems abuse' is described in the Stepping Stones report as the exploitation of 'rules or processes' within financial and legal systems to control, financially damage or abuse a victim.³⁴ It includes vexatious behaviour by the other party, controlling women 'through the emotional and economic toll of ongoing court proceedings'.³⁵

THE IMPACT OF DELAY FOR SMALL CLAIMS CLIENTS

Difficulties in accessing the family law system can have particularly significant consequences for vulnerable women. When property settlements take a long time, or when court processes are difficult to navigate without legal representation, the financial hardship already experienced by clients is exacerbated.

For example, without the certainty of a property settlement, women spend longer in unstable housing, they are more reliant on welfare and may struggle to enter or return to the workforce. Their financial independence and ability to recover from the abusive relationship are impeded.

Women may continue to struggle with joint debts and other liabilities which remain unresolved.

Of 38 cases ongoing and finalised, 63% experienced some form of delay while seeking a property settlement. Delay was recorded based on file reviews and reports from lawyers providing legal representation. Delay included unreasonable periods waiting for correspondence or documents, as well as long waits between court events.

There were a number of causes for the delays experienced by women in the Small Claims project. For some women, negotiations and legal proceedings were drawn out intentionally by uncooperative former partners. This included failure by a former partner to make proper financial disclosure, failure to respond to correspondence or the making of unreasonable offers which meant our clients needed to initiate proceedings. In some cases this appeared to be a result of parties, who had the means to do so, deliberately not obtaining legal representation.

Miriam's ex-husband Mark initially failed to provide full and frank disclosure, making it difficult to provide comprehensive legal advice. WLSV assisted Miriam for several years, and after finally obtaining a property settlement by consent, Miriam faced further obstacles when Mark failed to transfer the property into her name. The delays caused by Mark increased the size of the debt owing on the property. Miriam was required to obtain further legal representation to enforce consent orders. There were significant delays in finalising the enforcement proceedings as a result of the bank not responding in a timely manner to requests to confirm the balance of the shortfall. Miriam was required to take additional time off work for court hearings at which Mark repeatedly requested adjournments.

Ali discussed the difficulties her lawyer had in obtaining information from her former partner: 'The whole time he's been very difficult and my lawyer didn't want to go to court. She tried everything and yeah he didn't provide the documents that she was asking [for].'

Wendy described how her partner refused to engage lawyers to avoid costs: 'he would say to me often "if I have to provide this I have to provide it through the lawyers and it's going to cost me", so he—a lot of the delays were about him ringing me on the side, trying to get me to do things behind the scenes ... And so they were a lot of the delays and I think the delays too were about getting at me a couple of times during this whole process. The stress was causing me to have a lot of hospital admissions; I think he was kind of playing on that as well.'

For some clients delays were a result of under-resourced courts. Last year, delays in appointing judges to vacancies led to a significant case backlog in the family law courts. **Shayma** and **Leisha** faced multiple adjournments with several months between them. In the property settlement obtained by Leisha, she was required to pay her former husband for his share of the equity in their property, the value of which increased as proceedings were drawn out.

THE IMPACT OF PROPERTY SETTLEMENTS ON THE ECONOMIC WELLBEING OF SMALL CLAIMS CLIENTS

A fair property settlement can be a step towards greater economic independence and financial security for women. Of the 20 matters that were finalised in the Small Claims project, 18 matters resulted in a settlement outcome. Property settlements included superannuation splits, proceeds from the sale or the transfer of real estate, the transfer or retention of personal property, and cash payments.

32. House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, above n 1, 64–65 [3.42]–[3.43].

33. Camilleri, Corrie and Moore, above n 31, 40–41.

34. Smallwood, above n 5, 42.

35. Ibid 42–43; See also Braaf and Barrett Meyering, above n 5, 57; George and Harris, above n 5, 36.

While the varying amounts of economic relief Small Claims clients experienced by no means resolved all their issues, access to cash and other financial assets allowed them a new measure of control over their lives.

Azar's property settlement meant that she was able to meet unexpected costs, such as a tutor for her child with a learning disability. She was also looking forward to taking her children on a holiday, which she could not previously have afforded.

Jessica explained that after her property settlement she was happy to have control over her debts. 'Yeah, sometimes it's a ... tight budget ... but ... I feel more comfortable now. At least I know what kind of debts I have and I am a good administrator with money.'

Some clients, like Roshini, reported using their new economic independence to provide their family with home furnishings, including beds and mattresses for her children. '[The property settlement made] a very big difference ... for the ... kids. If you see them now they are happy because we bought a TV, I bought beds, I bought mattresses.'

Other clients were able to secure childcare, which in turn enabled them to job-seek or recommence working. **Katia**, for example, described how she planned to join the workforce after learning English. **Jessica** was also looking forward to finishing her studies so she could start work in her profession. Others, like **Thu**, used the money to make a new start: 'Oh, instead of having nothing I'll have money to start again. I won't be able to buy a house which is unsettling, but I'll be able to get by for a while, yeah.'



STREAMLINING COURT PROCESSES

A relatively small proportion of people use lawyers or the court to resolve property issues. However, for vulnerable women, and especially for victims of family violence, a formal court process is more likely to be required to achieve a property settlement. For example, many of our Small Claims clients were assisted to start negotiations with their former partner, but were forced to issue proceedings to seek proper financial disclosure or to encourage a more reasonable outcome than the offers being made.

'[... there] wasn't any commitment from my husband, he is quite a hard person to deal with and the lawyers saw that too, [so] threatening to go to court was the only [way to get] him to answer.' **Jessica**

In Leisha's property negotiations she made offers to her former husband to pay him for his equity in the home and was eventually required to initiate proceedings. '[The] lawyers [were] negotiating [for] the last four years and it never [resolved], ... every time we agreed [to] his offer [it] went ... up.' **Leisha**

The overwhelming majority of clients in the Small Claims project had left violent relationships, and many faced ongoing violence and intimidation after separation. Court processes, including conciliation conferences with court registrars can offer important protections against vulnerable women agreeing to unfair settlements. Engagement in court processes, however, by vulnerable women is difficult without legal representation.

A SEPARATE COURT PROCESS FOR SMALL CLAIMS

At present, the same process applies for splitting a property pool worth \$10,000 as for a pool worth \$10,000,000. However, complexity and delay are often more of a deterrent to pursuing a property settlement in small pool matters. A simplified, streamlined court process should be available.

There is broad support amongst legal and community support services for a separate system for small property matters.³⁶ Women facing multiple layers of disadvantage and who need to negotiate with obstructive, uncooperative or controlling former partners over a small pool of assets would benefit from recourse to a user-friendly but formal court process.

'I think the whole system was personally [difficult, because of] the demand. It's very long and you're waiting [a long time] for someone to help you.' **Jessica**

Increasing demand for family court services needs to be met with new measures to reduce delay. In the 2016–2017 financial year, the Federal Circuit Court's family law workload increased slightly, while performance regarding the timely resolution of cases decreased. In 2016–2017, only 68% of final order applications were disposed of in less than 12 months, a decrease from 70% in 2015–2016.³⁷

Parties accessing the family law courts at present are confronted by complicated rules and confusing forms and applications. In addition to an initiating application with proposed orders, parties must file affidavit material and complete a financial statement setting out assets and liabilities. Self-represented litigants can have difficulty understanding what evidence is required to be put before the court, and detailing their contributions and future needs.

36. House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, above n 1.

37. 'Federal Circuit Court: Annual Report 2016-17' (Annual Report, Federal Circuit Court, September 2017) 43–45; 'Federal Circuit Court: Annual Report 2015-16' (Annual Report, Federal Circuit Court, September 2016) 46–47.

'... so I then made an attempt on my own to try and make an application in the Family Court and I did all the paperwork and got down there and for some reason my paperwork was non-compliant.' **Angela**

A less adversarial system which focuses on early resolution of property matters could provide a speedier pathway to resolving small pool property disputes.³⁸

A streamlined process for small property matters should be based on a case management model which is enlivened upon application to the court, as opposed to a pre-filing requirement. Adding additional steps prior to accessing courts risks placing extra obstacles in the way of vulnerable women seeking property settlements. A referral pathway could be established between the federal family law courts and state and territory courts dealing with family violence issues.

More intensive case management could provide opportunities for earlier decision making. For example, there would be greater oversight of compliance with disclosure, and the opportunity to make further procedural orders for full and frank disclosure for non-compliant parties. The process could involve a registrar meeting with parties, similar to a conciliation conference, using a simplified form completed by parties. A registrar could give an early indication of an appropriate resolution and make referrals to attend Family Dispute Resolution (FDR).

> RECOMMENDATION 1

The Australian Government, in consultation with the Federal Circuit Court and Family Court of Australia, **promote early resolution of small property disputes** through a streamlined case management process available upon application to the court, with simplified procedural and evidentiary requirements.

The small claims list for industrial disputes in the Federal Circuit Court aims to reduce the number of court events to finalise matters. In their submission to the Parliamentary Inquiry into a better family law system, Victoria Legal Aid (VLA) suggested that a small claims list could operate like the current divorce list, including by using simplified plain English forms.³⁹

QUANTIFYING A SMALL CLAIM

There was no ceiling for the 'small' pools in our project. Instead, the amount the client was likely to obtain had to be modest, but this was considered alongside other barriers to accessing justice which clients may have been experiencing. For example, we recognised that, even if a pool was over \$200,000, the entitlement of the woman might still be modest. Furthermore, if a woman is leaving a violent relationship with little or no cash resources, limited English or primary caring responsibilities, her ability to achieve a property settlement without our assistance would be restricted. The average amount received by women in the project was \$71,446.

For the establishment of a streamlined small claims process some kind of financial threshold will be necessary. Building on recommendations made in WLSV's Stepping Stones report, Women's Legal Services Australia's Safety First in Family Law plan calls for 'streamlined case management process at court' for matters under \$100,000.⁴⁰ We believe that eligibility for an alternative process should be based on the applicant's projected share of a property pool as opposed to the total size of the pool.

> RECOMMENDATION 2

The Australian Government, establish **eligibility for the streamlined case management process** with reference to the financial vulnerability of parties, the particular issues in dispute and the nature and value of assets.

CONCURRENT BUT SEPARATE PARENTING MATTERS

Courts and mediation services often prioritise parenting issues over resolving property disputes which can contribute to delays in dividing property. In some cases parenting arrangements are relevant to the division of property, but this should not be the default position for a small claims process. Victoria Legal Aid, Legal Aid NSW and National Legal Aid all supported the concurrent but separate resolution of parenting and small property matters in submissions to the Parliamentary Inquiry into a better family law system.⁴¹

Particularly, where the property in dispute is small, the influence of parenting arrangements on the division of assets is likely to be minimal. A more efficient property settlement might be more advantageous for vulnerable clients than waiting for the resolution of parenting issues which will have limited influence on property negotiations.

A small claims process should include rules or guidelines for determining when a property settlement can occur despite parenting issues remaining unresolved.

> RECOMMENDATION 3

Any streamlined case management process adopted be **available to eligible parties who may have concurrent unresolved parenting matters**.

38. Smallwood, above n 5, 40.

39. Victoria Legal Aid, above n 7, 24.

40. Women's Legal Services Australia, *Safety First in Family Law: Five Steps to Creating a Family Law System That Keeps Women and Children Safe* (May 2016) Women's Legal Services Australia <http://www.womenslegal.org.au/files/file/SAFETY%20FIRST%20POLICY%20PLATFORM.MAY%202016_FINAL.pdf>.

41. Standing Committee on Social Policy and Legal Affairs and Sarah Henderson et al, above n 1, 170 [5.32]-[5.33].



IMPROVING FINANCIAL DISCLOSURE

A majority of clients we assisted in the Small Claims project faced obstacles or delay because of the failure of their former partner to make full and frank disclosure. Of the matters which were both finalised and ongoing at the time of this report, two-thirds had experienced issues of non-disclosure by the other party.

Without an accurate picture of the assets, income and liabilities of a former partner, a woman cannot be assured a fair property settlement. The current processes available to parties for finding information if a person fails to comply with disclosure obligations are costly and are not guaranteed to be successful. The mechanisms available to the court to encourage disclosure, such as fines or imprisonment, are ineffective or inappropriate in the context of small pools.

DUTY TO DISCLOSE INFORMATION IN FAMILY LAW PROPERTY SETTLEMENTS

There is an obligation on parties to family law proceedings to make full and frank disclosure of their financial situation.⁴² This duty is absolute, and whether non-disclosure is wilful or accidental is not relevant.⁴³

The Family Law Rules impose obligations of disclosure at the pre-trial stage, and therefore apply to processes such as mediation. There are no 'pre-action procedures' in the Federal Circuit Court Rules. Disclosure obligations are therefore only technically enlivened when parties initiate proceedings.⁴⁴

When a party makes full and frank disclosure, they commonly produce documents which show their assets and liabilities. This could include bank account statements, loans and loan applications, mortgage statements, superannuation statements, recent payslips, tax returns,

and any market appraisals or valuations of properties.

The scope of the obligation is broad, especially given the wide interpretation of 'property' in the context of the *Family Law Act*.⁴⁵ However, the Australian Law Reform Commission has highlighted that the main concern regarding disclosure in the family law courts is that 'there is too little disclosure, rather than too much'.⁴⁶

SMALL CLAIMS AND DISCLOSURE

The property pools in dispute for our clients were not large and most women were seeking disclosure about a combination of bank accounts, debts, income and superannuation. Some women sought disclosure of information related to their former partner's small business. Others faced challenges in obtaining information about how their partner disposed of assets after separation.

Failure to make proper disclosure can be wilful. Obstructive former partners might withhold information about their financial situation to delay proceedings, elevate stress and increase legal fees.

For some of our clients disclosure was made by the other party but it was incomplete. They may have failed to provide statements for all accounts in their name, or they may have provided bank or superannuation statements for the incorrect period.

42. *Federal Circuit Court Rules 2001* (Cth) r 24.03(1)(a); *Family Law Rules 2004* (Cth) r 13.04.

43. *Kannis v Kannis* [2002] FamCA 1150.

44. Hugh PK Kopsen and Robyn Carroll, 'The Importance of Full and Frank Disclosure in Family Law Financial Proceedings and the Many Consequences of Non-Disclosure' (2017) 45 *Federal Law Review* 97, 103.

45. *Ibid* 106.

46. Australian Law Reform Commission, *Managing Discovery: Discovery of Documents in Federal Courts*, Final Report (2011) 130 [5.140].

As well as inhibiting our clients' ability to achieve a fair property settlement, financial non-disclosure places pressure and strain on a former partner by protracting negotiations and litigation. It can be a form of systems abuse.

Tara's partner Gareth was physically and emotionally abusive towards her and their three children throughout their relationship. He was financially controlling of Tara and secretive about his income and finances. Within months of their relationship ending Gareth withdrew around \$63,000 of savings from his account, of which Tara had no knowledge.

With the help of lawyers, Tara sought an injunction to prevent Gareth from making further withdrawals. She also obtained procedural court orders for Gareth to make full and frank financial disclosure and account for the money he withdrew. For eight months Gareth, who had legal representation, failed to provide documents by way of financial disclosure. No negotiations or agreement could occur at a conciliation conference because Gareth's financial situation was not known.

Tara was forced to make an urgent application for property orders for her to receive 100% of the balance of Gareth's savings. Tara, who had care of their three children, received the meagre balance of Gareth's account which was known to her, being around \$28,000.

NON-DISCLOSURE PUSHES PARTIES TO LITIGATION

Issues with disclosure often lead women to initiate what can be lengthy and costly legal proceedings where they otherwise might have been able to negotiate a property settlement without litigating.

Jessica's former partner, Anjelo, would not engage in mediation through a family dispute resolution service and, after months without contact from Anjelo's lawyers, Jessica was forced to commence litigation.

After finalising her divorce, Casey's lawyer contacted her former partner to ask for financial disclosure. After he failed to respond to a number of letters for several months, Casey was left with no option but to initiate proceedings in the Federal Circuit Court.

Casey's matter is ongoing. After initiating, the Federal Circuit Court rules will apply and her former husband will be obliged to make full and frank disclosure. However, as in Tara's situation, even then he might resist making complete disclosure of his financial situation and Casey will have to negotiate or litigate with only limited information.

Angela is under considerable stress as the sole carer for her brother who has significant disabilities, as well as for her four children. She is also recovering from a serious accident in 2015 which limits her ability to work. After her relationship ended with her husband Chris she tried to commence negotiations for a property settlement herself. She had substantial issues with obtaining information about Chris' current financial circumstances. Chris claimed to have lost his job, but Angela understood from friends that he was working overseas. At the time of initiating proceedings the only asset over which orders could be sought was Chris' superannuation. Angela does not have the funds it would take to subpoena the information she knows Chris has not disclosed about his employment, bank accounts and other properties.

COST AND COMPLEXITY OF SUBPOENAS

If a party is not forthcoming with complete information, one option is to subpoena information directly from banks or employers. However, this is unsatisfactory for a number of reasons, especially for women with low incomes or facing other barriers:

- Proceedings must be on foot. This assumes access to legal representation or the capacity to self-represent

- Subpoenas can be costly. Costs include conduct fees and the cost of legal representation to draft subpoenas. Institutions such as banks and employers will also often charge administrative fees for complying with subpoenas.
- There is no guarantee that the subpoenas will result in accurate or complete information about a former partner's finances. For example, subpoenaing one employer might reveal only one of several superannuation accounts that a party has.

Lawyers from Lander & Rogers at the project feedback session commented that other parties tended to slowly filter information to them. In some cases subpoenas were issued to try to find information from other sources. However, lawyers noted that a commercial decision had to be made about what was worth pursuing through costly subpoenas.

Women who have experienced family violence and financial abuse, may not have information about where a partner works or who they bank with, making the use of subpoenas not viable. Even if a woman has some idea of where assets might be, the more subpoenas are required, the more costly the process.

One source of centralised information about bank accounts, employment records and superannuation accounts, the ATO, cannot be subpoenaed for court proceedings other than those related to taxation matters.⁴⁷

CONSEQUENCES OF A FAILURE TO DISCLOSE

If a person engages with the court process but fails to make full and frank disclosure the court can exercise their discretion in a way that is adverse to that person, including by imposing penalties.⁴⁸ Responding to an Australian Law Reform Commission review of discovery and disclosure regimes, the Family Court has submitted that it is adequately equipped to deal with recalcitrant parties who fail to

47. Taxation Administration Act 1953 (Cth) Division 355 of Schedule 1.

48. See Fehlberg et al, above n 3, 513.



make proper financial disclosure.⁴⁹ This could include staying or dismissing a non-compliant party's application, or making orders for costs against that party.⁵⁰

In practice, however, where there is a small amount of property in dispute, the court is unlikely to impose such penalties. To do so may reduce the available property pool. A fine, or time in prison could jeopardise mortgage repayments or servicing other debts. Staying or dismissing an application would prolong the financial relationship between separating parties who are trying to divide assets.

If a court suspects full and frank disclosure has not been made, it may also exercise its discretion and 'err on the side of generosity' towards the party who might otherwise be disadvantaged by the lack of disclosure'.⁵¹ This may benefit some clients. However, it relies on enough evidence being available to support a reasonable suspicion of non-disclosure. The assets or financial resources hidden by the non-disclosing party could still outweigh the pool that they have disclosed and that is, therefore, able to be divided.

> RECOMMENDATION 4

The Australian Government, in consultation with the Federal Circuit Court and Family Court of Australia, consider how best to **strengthen mandatory financial disclosure** that will enable family violence victims and decision makers to access the necessary financial information needed to resolve small claims matters efficiently and fairly, including consideration of:

- a. **Broadening the role of registrars** to increase interim case oversight to check compliance with disclosure and encourage greater use of registrar powers to make orders for disclosure;
- b. **Encouraging banks and government agencies, such as land titles offices, to reduce fees associated with processing family law subpoenas**

or title searches consistent with existing fee reduction regimes in the family law courts;

- c. **Providing a mechanism** for family law courts to be provided with information by the Australian Taxation Office for the purposes of determining if full financial disclosure is being made;
- d. **Amending the *Family Law Act 1975 (Cth)*** to enable courts to order forfeiture of assets by one party and redistribution to the other for failure to comply with financial disclosure obligations;
- e. **Amending the *Family Law Act 1975 (Cth)*** to encourage greater exercise of courts' discretion to make adverse adjustments to property divisions for parties who do not make full and frank disclosure.

Improved mechanisms to manage disclosure in family law disputes would reduce delay for parties and the courts, promoting faster negotiations and earlier resolution of disputes. If processes for encouraging disclosure were available at an earlier stage, it may even reduce recourse to litigation.

Better discovery would also improve fairness of property settlement outcomes. Parties would have a proper understanding of the relationship asset pool and could negotiate effectively. Proper financial disclosure might also assist even where a former partner has ceased to engage in negotiations. The matter may proceed as an undefended hearing, with a judgment being made if the court has sufficient information about the assets and finances of the parties.

49. Family Court of Australia, Submission No DR 23 to the Australian Law Reform Commission Inquiry, *Managing Discovery of Documents in Federal Courts*.

50. Ibid [7.1].

51. *Chang v Su* [2002] FLC 93-117.

SUPERANNUATION

Our research highlighted superannuation as an important asset in small pool property disputes, particularly where there were no other assets. The project demonstrated some of the challenges vulnerable women face in accessing a superannuation split. Women's access to superannuation in property settlements is impacted by many of the issues associated with parties failing to make full and frank disclosure. The legal and administrative complexities associated with obtaining orders over superannuation also inhibit women's access to it after separation.

Reforms to improve access to information and reduce complexity in superannuation splitting matters are supported by recommendations made by the report of the Parliamentary Inquiry into a better family law system, in December 2017.⁵²

WHY THE FOCUS ON SUPERANNUATION?

Superannuation is an increasingly important source of wealth in Australia.⁵³ Superannuation was the largest financial asset of Australian households in 2015–16,⁵⁴ and continues to grow in coverage and size of accounts.⁵⁵ For low-income families in particular, superannuation can sometimes comprise the greatest share of the property pool because of compulsory contributions.⁵⁶

However, there is a huge disparity in superannuation savings between women and men, at all points of the socio-economic scale. In 2015–2016 the average

account balance for men was \$111,853 while for women it was \$68,499.⁵⁷ Reasons for this include women spending greater time out of the workforce and occupying more part-time or lower paid roles.⁵⁸ Unpaid carer work is not recognised by the retirement income system.⁵⁹

Separating women with already low or non-existent superannuation balances often walk away from their spouse's super which would otherwise have been available to support them during retirement. Relationship breakdowns should therefore be added to the list of causes of gender disparity in superannuation, alongside a persistent gender pay gap and time out of the workforce.

For 21% of matters in the Small Claims project superannuation was one of the only significant assets, if not the only asset in the property pool. In three matters, the woman's former partner had withdrawn the majority or all of their

52. House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, above n 1, 179–180.

53. Grania Sheehan, April Chrzanowski and John Dewar, 'Superannuation and Divorce in Australia: An Evaluation of Post-Reform Practice and Settlement Outcomes' (2008) 22(2) *International Journal of Law, Policy and the Family* 206, 207.

54. Australian Bureau of Statistics, 'Household Income and Wealth, Australia, 2015-16' (Cat No. 6523.0, ABS, 2017); See also Australian Bureau of Statistics, 'Household Wealth and Wealth Distribution, Australia, 2011-12' (Cat No. 6554.0, ABS, 2013) 4.

55. ASFA Research and Resource Centre, 'Superannuation Account Balances by Age and Gender' (Report, Association of Superannuation Funds of Australia, October 2017) 5.

56. Sheehan, Chrzanowski and Dewar, above n 53, 218.

57. ASFA Research and Resource Centre, above n 55, 8.

58. ASFA Research and Resource Centre, 'An Update on the Level and Distribution of Retirement Savings' (Report, Association of Superannuation Funds of Australia, March 2014) 1, 14; Sheehan, Chrzanowski and Dewar, above n 53, 207; Ketter and Dastyari, above n 14, 68.

59. Ketter and Dastyari, above n 14, 60.



superannuation just prior to proceedings commencing. In each of those cases, super would have been the most significant asset.

In 39% of the Small Claims project matters there was a superannuation split, regardless of whether it was the most significant asset. However, in 15 matters which had adequate disclosure, this number increased to 52%. The average amount received in a super split for six clients with a finalised outcome was \$47,711. Two of these clients, where super was a major asset, were assisted by Lander & Rogers and the nominal legal costs represented 126% of the amount of super the client received in the split for one matter and 50% for the other.

Angela was left with nothing when her relationship with Chris ended. Chris had taken their car and emptied a joint bank account. His subsequent failure to disclose information about his income or current assets and liabilities meant that the only asset over which Angela could seek property orders was his superannuation.

'And that superannuation is the only thing that I might see having walked away from my marriage basically... I didn't even have a bed. Didn't have a bed, didn't have a car. I took my clothes. I took all the crappy furniture from the kids' TV room and the kids' beds and that's all I took when I left [...].'

SUPERANNUATION CAN HELP RECOVERY FROM FAMILY VIOLENCE

For our clients in particular, access to superannuation is not just related to retirement wellbeing. Women leaving violent relationships might have few financial resources on which they can rely.

For Annisa her recovery from family violence has been assisted by property orders for a modest split of superannuation, where there were no other significant relationship assets.

'I didn't know that I have a right to [his] superannuation ... They look at all the property which we have, like we had a family car and everything and some bank accounts he had. They tried a lot, but we finalised on superannuation. So I got [a] half portion of his superannuation ...'

For women who do receive super through family law property settlements, some will be able to apply for its early release on the grounds of hardship. The appropriateness of early access to super will depend on individual circumstances. If a woman is at risk of ongoing poverty and unlikely to have access to significant paid employment (often because of continuing trauma and effects of family violence) then early super release can be an important aide to her immediate recovery.

IDENTIFYING A FORMER PARTNER'S SUPERANNUATION

Two-thirds of the clients from the Small Claims project for whom we have complete data faced delays caused by the failure of the former spouse to make financial disclosure. This included failure to reveal the name or names of their superannuation funds. As a result of economic abuse and financial control by a partner, women might have a limited knowledge of their partner's super interests.

The phenomenon of people with multiple superannuation accounts further complicates the exercise of obtaining an accurate picture of someone's superannuation. The ATO reports that at 30 June 2017 approximately 40% of people with superannuation accounts have more than one account.⁶⁰ With voluntary disclosure as the only means of locating superannuation, it is impossible to know if all of the accounts in a party's name have in fact been disclosed.

Wendy's partner had nine superannuation accounts in his name and it was only with sustained pressure from lawyers that an accurate picture of this asset was obtained.

'... because they were on his back to get this information, they were relentless which is great and so them giving it to me and saying this is what he's got,... it made it very clear what we were dealing with and I always knew that he was sketchy about his finances ...' Wendy

Regardless of whether there is a superannuation split in the ultimate property settlement, it is important to know the size of each party's superannuation interest so it can be accounted for in the property pool and offset against other assets.

There are few ways to discover the name of a former partner's super fund without that person disclosing it. Some options include:

1. Finding letters or documents relating to superannuation on paper around the house. With the trend towards electronic statements, this is becoming less viable.
2. Guessing a former partner's fund based on their employment in a particular industry. Each fund will charge a fee for processing requests for information. Fishing exercises like this can be expensive for those with a low income, and have limited guarantee of success.
3. Subpoenaing personnel records from a former spouse's employer in the hope they contain information about superannuation.

The following issues remain:

1. No guarantee of having the complete picture of all superannuation interests held by the former spouse.
2. Costs associated with searching for information with no guarantee of finding useful information.
3. Lengthy administrative or court processes.

60. Australian Taxation Office, *Super Accounts Data Overview* (9 October 2017) Australian Taxation Office <<https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Super-statistics/Super-accounts-data/Super-accounts-data-overview/?default>>.

An administrative mechanism to give access to superannuation information would improve the operation of the splitting provisions in the Family Law Act; closing a loophole which allows people to hide their assets and providing the most fulsome picture of super interests in a party's name.

Having a single point from which to seek information would reduce costs and delay for both women seeking property settlements and the superannuation funds that are dealing with requests for information.

➤ RECOMMENDATION 5

The Australian Government provide an administrative mechanism for the release of information about the identity of a former partner's superannuation fund and its value.

There are already government bodies, such as the ATO, which hold the most complete records of all individuals' superannuation. The ATO holds information about both the fund and the balance of an individual's super accounts, including any lost or unclaimed super a person might have. The ATO offers services for individuals to locate their own super. This is done through the 'secure environment' of online my.gov accounts which can be linked to the ATO.

THE CURRENT PROCESS FOR SPLITTING SUPERANNUATION IS COSTLY AND COMPLEX

There are many steps to splitting superannuation:

1. The name of the super fund of a former partner is obtained, usually by them making financial disclosure.
2. An application may be made to the fund to confirm the balance of the fund account.⁶¹ The charges for processing

these requests vary for each fund.

If a former partner has multiple funds, an application may be required to be made to each fund, increasing costs.

3. Orders are drafted in terms reflecting the legal requirements and sent to the superannuation fund to provide it 'procedural fairness'.
4. If the fund finds errors in the format or wording of orders, they must be redrafted and resent.
5. If the fund is happy with the draft orders, they are provided to the court to make final orders.

Fees can be charged by funds when a non-member spouse submits a request for superannuation information, as well as when a fund complies with a superannuation splitting order. As part of our research, WLSV sought information from the top 42 of the largest APRA regulated superannuation funds according to the number of member accounts.⁶² The average fee charged for processing requests for information was \$52, and ranged from no fee to \$187. The average fee for complying with super splitting orders was \$64 and ranged from no fee to \$492.

For middle-income earners these fees are not onerous, but for vulnerable women who are at risk of poverty, sometimes experiencing homelessness and facing acute financial hardship, these funds are a significant obstacle in their journey towards a property settlement. Fees charged for requests for information are especially difficult to find money for as they cannot be paid from the superannuation split itself. They are the price of investigating what assets a party holds, with no guarantee of successful results. Lawyers from Lander & Rogers acknowledged at the project feedback session that fees were a huge burden for many clients seeking a super split.

LEGAL COMPLEXITY

Even if a fund name is known, an initial challenge in drafting splitting orders is identifying the trustee's name. The trustee may have a completely different name to the fund's trading name, or there may be a stylised trading name which can cause confusion. For example, the trustee for 'CBUS Super Fund' is United Super Pty Ltd, and the trustee name for 'Care Super' is different to the stylised name 'CareSuper' which is used on the fund's website and other documents.

Orders also require complex and specific legalistic clauses. For example, commonly required elements of splitting orders include:

1. that the trustee is 'to calculate the entitlement of the non-member spouse in accordance with the Family Law (Superannuation) Regulations 2001'
2. 'that the trustee of the X Superannuation Fund do all such acts and things and sign all such documents as may be necessary to ... calculate, in accordance with the requirements of the Family Law Act 1975 and the Family Law (Superannuation) Regulations 2001 the entitlement awarded to the non-member spouse in the immediately preceding clause of this order'⁶³
3. 'notations' for the court to make (as opposed to binding orders) such as 'the value of the non-member spouse's interest is calculated in accordance with the SIS Regulations'⁶⁴

The above elements of the orders will vary depending on what type of fund is involved (i.e. accumulation or defined benefit), as well as the type of split being sought (i.e. a lump sum or a percentage) and whether the fund is in growth phase or payment phase. Very few (if any) funds provide an example of how the draft orders should be set out. Each error in drafting orders increases delay in what can already be a

61. See Family Court of Australia, *Superannuation Information Kit* (10 December 2007) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/forms-and-fees/court-forms/form-topics/financial/kit-diy-superannuation-info>>.

62. Australian Prudential Regulation Authority, 'Annual Fund-Level Superannuation Statistics - June 2015' (Statistics, February 2016) Table 11.

63. See Stephen Bourke, 'Stephen Bourle, "Superannuation Orders" in Robert Glade-Wright and Craig Nicol (Eds) in *The Family Law Book* (Family Law Book, Online ed, 2017).

64. *Ibid.*



protracted process, as every new draft must be provided to the fund to review.

Before applying for a court order to split a superannuation interest, the party seeking the order must provide 'procedural fairness' to the superannuation trustees. That is, they must provide trustees with the draft orders so they can indicate any objections or foreshadow any problems they might have with complying with the orders. If there are errors in the draft order provided to the fund, it must be amended and sent to the fund again for checking, which can cause delay in already lengthy processes.

Clients are asked to provide superannuation funds with procedural fairness each time a new amount to be split is proposed. In practice, however, funds rarely object to the amount of the split being sought and are instead more concerned with reviewing orders for correct legal phrasing. Unlike other third parties in family law proceedings (such as bank creditors) super funds have a very limited practical interest in the substantive impact of orders.

The cost of complexity

Legal and procedural complexity associated with splitting superannuation makes vulnerable parties reliant on legal representation which they often cannot afford. Where superannuation is the only asset, and the parties do not have other liquid assets to meet legal fees, it is difficult to engage a private lawyer to undertake superannuation splitting work. Superannuation cannot be accessed to pay legal fees, unlike the proceeds of sale of a property, for example. A more accessible family law system would remove procedural and legal complexities associated with superannuation splitting.

Information we obtained from superannuation funds about the frequency and size of superannuation splits occurring amongst member accounts demonstrated that splits occur infrequently and with relatively low amounts split into the fund of the non-member.

For the 2016–2017 financial year, there were just 59 family law superannuation

splits in a fund with almost 250,000 members. 86% of those splits occurred over men's accounts. The average amount split from the men's accounts was almost \$63,000. For another major fund with around 240,000 members, there were even fewer family law superannuation splits (48) and the average of these splits was consistent with the first fund, at a relatively modest \$64,000.

This compares to an average of just under \$48,000 received by Small Claims clients from superannuation splits: not a huge difference, given the multiple barriers to legal and economic justice faced by our clients.

While this could benefit from more research, our hypothesis is that superannuation splits are generally not sought by separating parties with higher wealth because they are able to "offset" the value of the superannuation within a broader property division and thereby avoid the need to deal with the complexity of superannuation splitting.

Small Claims clients for whom superannuation is a significant part of a very limited asset pool, or even the only asset do not have this option.

THE PROBLEM OF MULTIPLE SUPERANNUATION FUNDS

An additional barrier to obtaining a superannuation split arises when a former spouse has multiple funds with small balances. The Family Law (Superannuation) Regulations 2001 set out that superannuation interests of less than \$5,000 are 'unsplittable'.⁶⁵ To obtain a super split these funds need to be rolled into one account. A court order will often be required to oblige a former spouse to do this.

If the other party is obstructive or disengaged, the party seeking the super split could seek that a court registrar sign the relevant rollover documents in place of the super account holder. Again, this process can add further delay to family law proceedings and is difficult to navigate without legal representation.

> RECOMMENDATION 6

The Australian Government **encourage superannuation funds to reduce fees for processing requests for information and for family law superannuation splitting orders**, so that fees represent cost recovery only.

> RECOMMENDATION 7

The Australian Government **reduce the procedural and substantive complexity associated with superannuation splitting orders, by allowing unrepresented parties to complete a simplified form for superannuation splitting which is submitted to superannuation trustees and which can satisfy procedural fairness requirements.**

> RECOMMENDATION 8

As an interim measure, the Australian Government **enable registrars at the family law courts to provide assistance to unrepresented parties to draft orders for a split of superannuation.**

The Family Law Act already recognises super as a relationship asset but the process for including it in a property settlement is complex. In a jurisdiction which is supposed to be relatively unbound by legal formalism and where there are increasing numbers of self-represented litigants, those seeking a super split bear the burden of navigating a long and legalistic process, including constructing orders which refer to abstract calculation processes and legislation

When relationships end, many women walk away from super they may be entitled to through the Family Law Act because it is just too difficult. Reforms to simplify this process or to provide assistance to unrepresented litigants would improve women's access to timely property settlements and help protect against post-separation financial hardship as well as poverty in the future.

65. *Family Law (Superannuation) Regulations 2001* (Cth) r 11(1A).

JOINT DEBT

The problem of joint debts was explored in WLSV's 2015 Stepping Stones report. That project illuminated the hardship suffered by victims of family violence and financial abuse when they were pursued for the whole of a joint debt by banks, telecommunications and utility companies.⁶⁶ Of the 170 women we assisted through Stepping Stones, the majority left violent relationships with some form of debt, with 43% affected by joint debt.⁶⁷ The Small Claims project presented another opportunity to examine the issue of joint debts amongst our clients.

Commonly, parties to a joint loan are jointly and severally liable. This means that the creditor can pursue both parties or either one of the parties individually for the entirety of the loan. Where there is a history of family violence the other party may continue their financial abuse by ceasing to make repayments.⁶⁸

Women may be chased by creditors for mortgage repayments, car loans, personal loans and credit card debts, even where they do not have the benefit of the home, the car, the loan monies, or the credit card purchases. To avoid liability for a debt incurred, the contract with the lender would need to be altered, but this cannot usually be done without the consent of the other party and the creditor.⁶⁹ The fear of bankruptcy or a negative credit rating means many women continue to service joint debts even when they have little means to do so.⁷⁰

JOINT DEBTS AND ECONOMIC ABUSE

Many clients in the Small Claims project encountered situations in which their former partner ceased making payments for joint debts, such as mortgages, car loans or credit cards. Of those cases where financial abuse was identified, in around one-quarter the abuse resulted in a significant increase the size of the debt.

Lawyers assisting **Shanti** with her property settlement negotiated with her former husband, Steve, for over 19 months during which time Shanti was forced to service two mortgages under joint names. Both of these debts fell into arrears as Steve dragged out negotiations.

Miriam's former husband, Mark, also stopped contributing to the mortgage when they separated, it fell into arrears and there was a shortfall on the mortgage which Miriam's lawyer sought to protect her from through a property settlement. Miriam's case suffered long delays because Mark incorrectly completed the forms to authorise the sale of their house and then became uncontactable.

Jessica's story

Joint debts were a major source of stress for **Jessica** when her relationship with Anjelo ended. Throughout their marriage, Anjelo often overspent on credit cards in joint names without telling Jessica, who would then have to stretch their tight budget to meet those expenses.

When their relationship ended, Anjelo moved interstate and became uncontactable. Jessica was left to deal with debts which included a mortgage in joint names, credit card debts and personal loans. She was caring for their

66. Smallwood, above n 5, 20, 27.

67. Ibid 16.

68. Ibid 27–34; See also Victoria, The Royal Commission into Family Violence, *Royal Commission into Family Violence: Summary and Recommendations Vol IV* (March 2016) 27.

69. Smallwood, above n 5, 27.

70. Victoria, The Royal Commission into Family Violence, above n 68, 103; Smallwood, above n 5, 27.



three children and surviving on Centrelink payments while debt collectors pursued her.

The main purpose of a property settlement for Jessica was protection from Anjelo's debts. Anjelo had remained in the former matrimonial home without paying the mortgage before moving away. The mortgage equity was diminished by around \$27,000 as a result of Anjelo's behaviour. Most of the equity that was left in the house by the time it was sold went to discharging the mortgage and paying other debts.

'... the amount of things he was [charging] to the credit card was just way too much. Sometimes he [would overdraw] the credit cards ... and I was the one trying to [manage] the little budget [we had] ...

'... the house was under his name but the mortgage was under both names which was my concern at the time ... I was paying off the mortgage, the personal loan and the credit card but it wasn't enough money, so he just paid the mortgage, [which] was the bigger amount, and I paid the credit card, so the personal loan is still under our names ... and I can't afford to pay [it] and he [has decided] not to pay.

'I contacted Women's Legal [Service because] I was desperate because he was dragging me [down] with all his debts... and the lawyers, ... they really helped me.'

Jessica is happy to have more control and clarity over her finances now the relationship is over and there is a final property settlement: 'At least now I know what kind of debts I have and I am a good administrator with money ... I think if I was by myself I would have my own house right now [if not for] all the debts I have paid for him.'

There were also a number of women in the project who were dealing with the ongoing stress of debts accrued in their name by a former partner.

CURRENT APPROACHES TO DEALING WITH JOINT DEBTS

The Family Law Act gives the court powers to make orders which bind third parties such as creditors.⁷¹ This power could require that a third party creditor reappportion debt liability.

When section 90AE was introduced to the Family Law Act it was hailed as a positive reform that would improve courts' ability to deal with joint debts and would assist people who are victims of economic abuse involving joint debts. However, examination of case law indicates that it is not commonly exercised. There are a number of practical impediments to the effective use of section 90AE.

One such barrier is that courts must consider if it is foreseeable that such an order will result in the debt not being paid in full.⁷² Applying for an order under s 90AE also exposes the client to the legal costs of the third party creditor who must be joined to the proceedings, with no guarantee of resolving the debt issue.

The Stepping Stones report highlighted that the family law courts do not routinely exercise their powers under section 90AE to alter responsibility for joint liabilities because banks and other creditors generally oppose such orders.⁷³ The primary reason put forward for opposing orders is that the debt will not be repaid. Also, banks and other creditors assert that severing joint debts creates two new loan contracts and enlivens their responsible lending obligations, requiring them to reassess each party's capacity to repay the loan.

The most common legal solution involves orders being made which do not alter the legal liability as between the debtor and creditor for the debt (as can theoretically occur under s90AE) but rather places the responsibility for payment of the debt on one party and requires that party to indemnify the other in the event of non-payment. This approach is precarious because, if a former partner defaults

on the debt, further legal proceedings are required to enforce the indemnity.

In **Frances'** case this approach was taken in relation to a personal loan held in joint names. Final Orders provided for her former husband, Robert, to be solely liable and indemnify Frances for this loan. The Final Orders also required Robert to repay the loan in full within 18 months.

The shortcomings of dealing with debts in this way were illustrated when Robert stopped making repayments. Lawyers wrote to the finance company and provided them with a copy of the Final Orders. They requested that further non-payments not impact on Frances' credit rating and that Frances' information not be disclosed for the purposes of credit reporting. The finance company responded that they could not remove Frances' name from the loan and that she would still be liable for the loan.

Frances' name will be on a default notice if it is issued, and her credit rating will be at risk. If a default notice is issued, Frances will need to consider applying to the court for an enforcement order or declaration. Practically, it may be less costly to simply pay the debt because the cost of legal proceedings would likely outweigh the outstanding debt.

It is a principle of family law property settlements that they should end the financial relationship between the parties. This has clearly not occurred in the case of Frances and Robert. Instead, Robert's behaviour continues to impact on Frances after their relationship has ended and exposes her to financial hardship.

NEGOTIATING WITH A CREDITOR

At WLSV, a common approach to the issue of joint debt is for our financial counsellor to speak to creditors and persuade them to agree to not pursue our client. If negotiations are successful, a note might be made on their file with the creditor, but this does not legally sever the debt or change the client's

71. Family Law Act 1975 (Cth) s 90AE.

72. Ibid s 90AE(3)(b).

73. Smallwood, above n 5, 29.

legal liability. Clients will still have their name formally attached to the debt. There is still a risk that years later the creditor will contact them again.

Not only does this affect the psychological wellbeing of clients but it can also affect their credit rating and future financial wellbeing.

IMPORTANCE OF INDUSTRY RESPONSES

Increased public and political attention placed on family violence has led to positive responses by some industries and service providers in relation to joint debts. Some examples of recent industry responses include:

a. Industry Guidelines released in November 2016 by the Australian Bankers' Association ('ABA'). The guidelines focus on financial abuse and family and domestic violence policies in the banking sector and set out a framework for a consistent approach to these issues by banks and their staff.⁷⁴ The guidelines also address banks' approach to joint debts. They state that in specific circumstances it may be appropriate to sever or re-apportion a joint debt so that a co-borrower, who is a victim of financial abuse, is only required to pay a portion (or no portion, if appropriate) of the loan.⁷⁵

b. An independent review of the Code of Banking Practice published in January 2017. The review makes reference to the ABA guidelines and recommends that a redrafted Code acknowledge a co-debtor should be able to seek financial difficulty assistance without the consent of the other co-debtor.⁷⁶

c. A Financial Ombudsman Service Approach Document for joint facilities and family violence published in March 2017. The Approach Document sets out that responses to joint debt issues in cases of family violence might include financial services providers waiving or settling a debt with one of the co-borrowers.⁷⁷ In such situations financial services providers should encourage the person receiving the reduction or waiver to seek independent legal and/or financial advice to ensure the benefit of that reduction or waiver doesn't flow to the perpetrator of family violence who is a co-borrower.⁷⁸

LEGAL FRAMEWORKS SHOULD SUPPORT INDUSTRY RESPONSES

Farrah's case, while not one of joint debt, is an example of industry responding appropriately to the experience of family violence where it impacts on the financial resources and property of the victim.

Farrah experienced family violence that involved serious threats to her life and damage to her property. Effective advocacy from community support services and a financial counsellor resulted in a positive industry response. Subsequent court orders ensured that this property became hers alone, so that no benefit was received by the offending party. The lawyer assisting Farrah with her matter commented, 'She'd been through hell and back but [...] it was an example of where the legal system worked [...] Most pro bono clients we get do not have that support around them. She had a social worker, housing assistance... and obviously it was because of the gravity of what she had been through and the violence.'

However, this outcome was due to the extremity of violence that Farrah experienced and consistent advocacy from multiple services supporting her. Many vulnerable women who have experienced family violence and are struggling under the burden of lingering joint debts are unable to advocate to lenders and other service providers to seek reprieve.

> RECOMMENDATION 9

The family law courts work with relevant industry bodies to implement procedures to ensure that court powers to make orders to split, alter or transfer unsecured joint debts can be given practical effect, including in matters involving smaller claims and/or economic abuse.

Industry awareness and guidelines which promote consistent responses to family violence are a welcome development. The law should be amended to bolster these positive advances. For many vulnerable clients, neither party has the capacity to fully repay their joint debts. As a result, the requirement in s 90AE that an order should not result in the debt not being paid in full is a high threshold to overcome. Creditors can rely on this requirement to argue against orders under s 90AE, despite the reality that the debt might not be paid in full, even if the parties remain jointly and severally liable and that the creditor might be prepared to accept reduced payment in satisfaction of the debt as a commercial decision.

74. Australian Bankers' Association, 'Financial Abuse and Family and Domestic Violence Policies' (Industry guideline Version 1.0, Australian Bankers' Association, November 2016) 1.

75. *Ibid* 5.

76. Phil Khoury, 'Independent Review of the Code of Banking Practice' (Final Report, Code of Banking Practice, 31 January 2017) 133.

77. Financial Ombudsman Service Australia, *The FOS Approach to Joint Facilities and Family Violence* (March 2017) 10.

78. *Ibid*.



RESPONDING TO FAMILY VIOLENCE

Family violence can have a considerable and lasting impact on women's physical and psychological health and wellbeing and contributes to women's risk of financial hardship.⁷⁹ Experiences of family violence can also have an immediate-term impact on property settlement negotiations. However, currently the Family Law Act does not specifically direct courts to take family violence into account in determining property settlements.

CLIENTS' EXPERIENCES OF FAMILY VIOLENCE

Eighty-seven percent of Small Claims clients have experienced some form of family violence. In Australia, research suggests around one in four women have experienced intimate partner violence from the age of 15.⁸⁰

Most clients experienced violence throughout the relationship. For many, final separation occurred after a particular violent incident, often following a call to police or an intervention order being made. A number of women in our project continued to be harassed, pressured and even assaulted after separation.

'He was very abusive because every time... you know this time when I called the police he didn't realise that I will do it because for six years he was doing that. He was kicking me out of the house, he was abusing me physically and morally and verbally and I used to go to my parents or I used to ... afraid from him and just sit down and cry. So this time he was really shocked when I called the police.' **Shayma**

The type of violence clients experienced ranged from verbal abuse to physical and sexual assault. Of those who had experienced family violence, 84% had experienced economic abuse. Across all Small Claims clients, 75% had experienced some form of economic abuse in their relationship. Economic abuse and other types of family violence or controlling behaviour were often linked for clients.

'... our problems started with finances and that associated with how I look, what I do, who I am. So it was all connected.' **Leisha**

'I mean from 2008 when the GFC hit that was the first time that he became violent. So he really wasn't coping with the way his world had just overnight come undone and we had these periods ... I mean he was just constantly angry with me and constantly angry with the children ...' **Angela**

'During this relationship, I never received any child payment, I never had a bank account, I never had a credit card, debit card, nothing of the sort, I never received any money, no money at all. But [now my] situation is completely different.' **Katia**

'He ... made sure I didn't have ... many friends in here at all. He isolated me for many years.' **Jessica**

79. Braaf and Barrett Meyering, above n 5, 3; See also George and Harris, above n 5, 35; Smallwood, above n 5, 6; National Council to Reduce Violence Against Women and Their Children (Australia), above n 5, 44; Evans, above n 5, 24.

80. Peta Cox and Australia's National Research Organisation for Women's Safety, *Violence against Women in Australia: Additional Analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012* (Revised ed 2016) <<https://anrows.org.au/publications/horizons-0/pss>> 3; Australian Bureau of Statistics, 'Personal Safety, Australia, 2016' (Cat No. 4906.0, Australian Bureau of Statistics, 2017); Australian Bureau of Statistics, 'Personal Safety, Australia, 2012' (Cat No. 4906.0, Australian Bureau of Statistics, 2013); Victoria, Royal Commission into Family Violence, *Royal Commission into Family Violence: Report and Recommendations Vol I*, (2014–16) 47–51.

The effects of family violence for women in our Small Claims project were wide-ranging and included:

1. Leaving work or taking time out from work to recover from family violence and attend to associated court dates
2. Experiencing physical and psychological trauma, sometimes requiring ongoing treatment
3. Leaving the family home and entering refuge, with consequential effects on their ability to continue employment

'[After] separation, I left the house, I had nothing ... due to domestic violence I had to leave everything ... [and] I didn't go to work ... [and couldn't pay rent] as I wasn't able to start work again. My situation was not good. Annisa

EFFECT OF FAMILY VIOLENCE ON PROPERTY SETTLEMENT

As well as long-term psychological and physical impacts of experiencing family violence, the power imbalance resulting from family violence affects women's ability to negotiate and achieve fair property settlements.

Women who have experienced violence may be more likely to accept unfair property settlements. One study found that those who had experienced severe family violence were three times more likely to receive a minority share of property (being less than 40% of the pool).⁸¹ Violence may create 'a substantial power imbalance between the parties' which puts victims at a disadvantage in negotiating a settlement.⁸² Those who have experienced family violence may be more likely to accept lower settlements due to fear of the other party or wanting to finish property negotiations as soon as possible.⁸³

During Casey's relationship, her husband prevented her from leaving the house without his permission, and would abuse and threaten Casey regularly. After they separated and as their divorce was being finalised, her former husband attended Casey's house to try to force her to sign documents related to property matters. This was despite an intervention order being in place. He threatened to harm her family if she didn't sign.

Shanti suffered significant family violence at the hands of her husband, including verbal, physical and sexual abuse. Shanti describes her husband as 'aggressive' and 'controlling', and that he treated her like a 'slave and animal' from the beginning of their marriage. The physical and psychological impact of her experiences of family violence will be lifelong for Shanti. They have also impacted her pursuit of a property settlement. Shanti has struggled to give instructions to her lawyers and is fearful of her former partner's reaction to being served with court documents. She is reluctant to ask for what is her reasonable entitlement.

Ali spoke about feeling controlled during her relationship and her fear that financial hardship after separation would push her to return to her abusive partner. When negotiating for a property settlement her former partner continued to harass her which caused Ali stress.

'I felt very controlled ... I didn't feel comfortable with it. ... and from the start of the relationship I wasn't comfortable with the set up because he [wanted] to have a joint account but didn't want me to have a separate account and then all my money went to the joint account but I had no control over it. He had both of the accounts and the passports ...

'[After leaving] I didn't know what was going to happen to me and I didn't want to go back to him because of the financial situation but things worked out ... I got NewStart from Centrelink and then they took the rent from that ... and I had a little bit of money every fortnight, like I was really struggling. At one point I had \$7 in my account.'

'... the second most difficult part is the harassment from my ex ... and you kind of feel unsafe again in some way because the contact is very intense ... So I'm going through this and it's very stressful because you keep thinking oh my god when he gets the letter ... what is he going to do? Do you know what I mean? The manipulation is still there even when you are apart for such a long time.'

When **Angela** did not agree to an unfair property settlement proposal from her ex-husband, Chris, he became more aggressive towards her, leading to an intervention order.

'So his account was bigger than mine and his proposal was that he would just take his account and I would keep my account and I said "look you know you've left me with no assets, you kept the car, you've got the furniture. You know I'm not prepared to do that and I won't sign the forms". So then he started to be really quite threatening and so I got an intervention order ... Now he was affronted by that and decided he was going to teach me a lesson so he just started breaching it like every week ... So he harassed me extensively by text. He was texting me 50 times a day ... and he hacked my work email, because he'd set it up for me ... but I got this intervention order, [and] the day after it was made final he went to the bank and convinced the bank to close my account and he took my money.'

81. Sheehan and Smyth, above n 28, 11; Lixia Qu et al, 'Post-Separation Parenting, Property and Relationship Dynamics after Five Years' (Full Report, Attorney-General's Department, 2014) 106 found women who experienced family violence were more likely to have left the family home, and this was associated with receiving a lower share of property; Sheehan and Hughes, above n 10, however, found no association between violence and share of property received, but they note that this may be because the single item measure of violence in the survey did not capture varying degrees of violence.

82. Sheehan and Smyth, above n 28, 9.

83. Qu et al, above n 81, 106.



Lilibeth became homeless while she was being assisted by through the project. After visiting family interstate as a break from the stress of her life in Melbourne she returned to find the locks on her house had been changed. Her partner had been excluded from the home pursuant to an intervention order but had convinced a locksmith to change the locks on the property. With no support networks in Melbourne, Lilibeth had to access crisis accommodation services and the experience had a significant negative effect on her mental health.

Other clients discussed their experience with former partners in the court setting.

'The judge said to him "I'm tired of you" ... He knows how to act, where to act and he's got really strong language. He's very good at fighting ... It was very hard for me to deal with ...' **Priya**

'He raised his voice during their conversation between the lawyers and I could really hear his voice [rising] and that really took me back to the old days and caused quite a lot of worry for me. [...] I was certain [that] the two lawyers were trying [to negotiate] a fair agreement that would do justice [to] both sides, [...] but [...] he was raising his voice and he kept saying, "you're my lawyer".' **Katia**

Isolation in a relationship meant that some clients did not understand what they might be entitled to after separation

'[For] one year I was very isolated by my husband and his family members, you know. So I was in a shell and ... I didn't know that I ... have rights. I had no clue, nothing.' **Kumiko**

'I didn't know that I have a right to take superannuation from him.' **Annisa**

CONSIDERATION OF FAMILY VIOLENCE IN PROPERTY SETTLEMENTS

The Family Law Act does not contain explicit reference to the relevance of violence in deciding property settlements. Instead, the only way in which violence or abuse can be accounted for is through courts making what is known as a Kennon adjustment.⁸⁴ This involves judges considering whether family violence impacted on the contributions made by one party (the victim).⁸⁵ Alternatively, the repercussions of family violence may create future needs which are considered under s 75(2) of the Family Law Act.⁸⁶

In the absence of a legislative provision making family violence a relevant consideration in property matters, it is difficult to argue for an adjustment for family violence in a negotiated settlement.

LIMITATIONS OF THE KENNON APPROACH

Despite the capacity to make adjustments for family violence, research shows that in practice Kennon adjustments are made infrequently and their effect on the ultimate ratio of property received is minor.⁸⁷ Middleton reported in 2002 that where Kennon arguments were made the majority were successful,⁸⁸ yet a more recent study by Easteal et al showed only a 42% success rate.⁸⁹ In this later study, where the percentage adjustment for family violence was specified, the mean adjustment made was 7.3%.⁹⁰

Victims of violence may be able to show that violence has occurred but fail to show its financial impact or how it affected their contributions. Middleton, writing in the immediate post-Kennon era highlighted the lack of clarity over whether the impact on contributions can be inferred or must be specifically pleaded.⁹¹ Again, the study by Easteal et al indicated that in 72% of matters the judge accepted violence had occurred, yet in only 42% of cases an adjustment was made.⁹²

Limited understanding of the multiple forms which violence may take could also affect whether it is considered in property matters. The Middleton study noted that successful Kennon cases involved physical violence.⁹³ Other types of abuse such as psychological, emotional or economic abuse are often still overlooked as a form of family violence.⁹⁴ However, even physical violence which has resulted

84. *Marriage of Kennon* (1997) 22 Fam LR 1.

85. *Ibid*, 24.

86. *Ibid*, 23; *Family Law Act 1975* (Cth) s 75(2).

87. Fehlberg et al, above n 19, 587; Sarah Middleton, 'Domestic Violence, Contributions and s. 75(2) Considerations: An Analysis of Unreported Property Judgements' (2001) 15(3) *Australian Journal of Family Law* 230; Patricia Easteal, Catherine Warden and Lisa Young, 'The Kennon "Factor": Issues of Indeterminacy and Floodgates' (2014) 28(1) *Australian Journal of Family Law* 1, 9; Nell Alves-Perini et al, 'Finding Fault in Marital Property Law: A Little Bit of History Repeating?' (2006) 34(3) *Federal Law Review* 377, 387.

88. Middleton, above n 87, 7, being 17 of 27 cases identified.

89. Easteal, Warden and Young, above n 87, 10.

90. *Ibid* 12.

91. Middleton, above n 87, 3–6.

92. Easteal, Warden and Young, above n 87, 11.

93. Middleton, above n 87, 7.

94. Victoria, above n 80, 27

in intervention orders, may not meet a particular threshold.⁹⁵

The majority of Small Claims clients experienced some form of family violence. In none of these cases was a Kennon adjustment explicitly made.

Lawyers commented on the amount of evidence required for a Kennon argument including medical evidence. Isolation and financial control were extremely prevalent amongst Small Claims clients. As a result, the women had often not sought medical or other assistance for family violence prior to leaving the relationship.

Less tangible losses, and the difficulty of establishing the financial impact of violence were also issues.

'The lack of evidence is a real issue, and ... a lot of the clients didn't work ... not that that's [the] only thing, but it is a bit more tangible, [because] if they had to take a lot of time off work, or they've had this career and they can no longer [work] it's a lot more tangible ... If they've made non-financial contributions it can be quite difficult to have any evidence to show contributions have been reduced because of family violence, or ... if they didn't have an earning capacity then what is the loss other than emotional and personal loss. In terms of anything tangible ... how you calculate that is pretty hard.' Family lawyer, Lander & Rogers

The financial impact of the client's experience of family violence was very apparent in only one matter. The violence perpetrated by the client's ex-husband was extremely egregious and had a direct effect on the value of assets in the pool.

'[In] some ways it was nice to see having seen a sense of the whole legal, commercial community saying they would offer this person support and it was an example of the whole thing coming together. I was on the phone to opposition counsel all the time talking about how we structure things. She got a great result...' Family lawyer, Lander & Rogers

A LEGISLATIVE APPROACH

The purpose of directing courts to consider family violence in property settlements is not to create a proxy compensation scheme. It is not a means to punish family violence perpetrators. Rather, it makes explicit what is already understood and recognised by courts making Kennon adjustments: family violence, including financial abuse and control, significantly impacts women's ability to financially contribute in a relationship and will impact their future financial position. It would also 'convey a powerful social and community message'.⁹⁶

Middleton has suggested a legislated approach to family violence in property settlements which would allow victims of family violence to rely on family violence as a defence to a claim she has made a smaller contribution.⁹⁷ Fehlberg and others note that this approach might address the continued control and coercion many victims of family violence experience while negotiating property settlements after separation.⁹⁸ If a perpetrator knew his violence might be raised as a defence, it might thwart his ongoing control over his victim, without placing on the victim the

positive burden of establishing the impact of family violence on contribution.

For over two decades a number of law reform and advisory bodies have suggested reforms to include violence as a consideration in property settlements. As early as 1994 the Australian Law Reform Commission recommended that the Family Law Act be amended so that judges take family violence into consideration when deciding property matters.⁹⁹ In 1998 the Family Law Council provided a discussion paper to the Attorney General's Department which suggested amending s 79 of the Family Law Act to 'facilitate uniformity of judicial decision making and give legislative emphasis to the seriousness with which violence in the family is viewed'.¹⁰⁰

In 2001 the Family Law Council provided a letter of advice proposing reform to Part VIII of the Family Law Act so as to make violence a consideration in property matters and included arguments that violence be viewed as a 'negative contribution'.¹⁰¹ Women's Legal Services Australia and WLSV have consistently called for family violence to be a consideration in property settlements.¹⁰² In 2017 the Parliamentary inquiry into a better family law system echoed these calls for reform in their recommendations.¹⁰³ To ensure the consideration of family violence is a consistent practice when determining property matters, legislative amendments must require the courts to do so.

95. Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks: Consultation Paper Summary*, ALRC CP1 NSWLRC CP9, (2010) 106.

96. Law Council of Australia, Submission No 85 to the Parliament of Australia, *Parliamentary Inquiry into a Better Family Law System to Support and Protect Those Affected by Family Violence*, 22 May 2017, 28.

97. Sarah Middleton, 'Matrimonial Property Reform: Legislating for the "financial Consequences" of Domestic Violence' (2005) 19 *Australian Journal of Family Law* 9, 11.

98. Fehlberg et al, above n 3, 592.

99. Australian Law Reform Commission, *Equality before the Law*, Report No 69 (1994) Recommendation 9.6.

100. Family Law Council, 'Violence and the Family Law Act: Financial Remedies' (Discussion Paper, Attorney-Generals Department, August 1998) [5.3].

101. Family Law Council, 'Violence and Property Proceedings' (Letter of Advice, Attorney-Generals Department, 14 August 2001) [17]-[21].

102. Women's Legal Service Australia, above n 40; Women's Legal Services Australia, Submission No 6 to the Parliament of Australia, *Parliamentary Inquiry into a Better Family Law System to Support and Protect Those Affected by Family Violence*, 27 April 2017, 10; Smallwood, above n 5, 11.

103. House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, above n 1, 178 [5.67]



> RECOMMENDATION 10

The Australian Government amend the Family Law Act 1975 (Cth) to enable courts to:

- a. **have regard to the effects of family violence** on both parties' contributions;
- b. **Include the effects of family violence in the list of s75(2) factors** relevant to determining property interests and awarding spousal maintenance.
- c. Make orders which **ensure that no party financially benefits from family violence** they have perpetrated.

SCREENING FOR FAMILY VIOLENCE IN THE FAMILY LAW COURTS

There is strong support for early risk assessment and identification of family violence in family law courts.¹⁰⁴

The Federal Circuit Court and Family Court announced in 2016 that a new screening approach would be implemented in family violence cases, which includes pre-interview screening, in all locations at the interim hearing stage.¹⁰⁵ However, it is not clear whether this will address current concerns about consistent and sufficient screening for family violence.

104. Women's Legal Services Australia (WLSA), above n 102, 15; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, above n 1, 84–89; Family Law Council, 'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems' (Final Report, Attorney-Generals Department, June 2016, 12.

105. Federal Circuit Court of Australia, 'Family Law System Needs More Resources to Deal with an Increasing Number of Cases Involving Family Violence' (Media Release, 20 June 2016)

IMPROVING ACCESS TO PROPERTY SETTLEMENTS

LEGALLY ASSISTED FAMILY DISPUTE RESOLUTION (LAFDR) FOR PROPERTY MATTERS

Mediation services such as Family Dispute Resolution (FDR) can provide a cost effective option for parties to negotiate a property settlement in a structured environment. There is a common belief that FDR is inappropriate in cases where there is family violence. However, mediation through FDR is not solely the domain of self-represented litigants.

The experience of WLSV in providing Legally Assisted FDR (LAFDR) is that with the support of trauma-informed mediators and lawyers, potential power imbalances between parties can be addressed. Mechanisms such as shuttle conferences can improve safety and reduce stress for parties involved in the mediation. Legal representation can serve to contain legal and other issues prior to and during mediation, and ensure that parties' proposals are reality-tested and reasonable.

Since 2009 WLSV, through its related organisation, Family Law Legal Service, has offered assistance to individuals with LAFDR, including property related LAFDR. We provide representation in LAFDRs run by FMC Mediation and Counselling, Melbourne Family Relationship Centre and Victoria Legal Aid's Family Dispute Resolution Service (VLA FDRS).

WLSV supports the LAFDR model because it is cost effective and efficient, while adequately protecting vulnerable parties. Those parties are likely to find the experience of litigation more traumatic or avoid litigation altogether.

LAFDR FOR PROPERTY MATTERS SHOULD BE INCREASED

The Parliamentary inquiry into a better family law system supported the availability of LAFDR for matters involving family violence.¹⁰⁶ Focusing on parenting, the inquiry welcomed federal government piloting new LAFDR for vulnerable families, in particular communities.¹⁰⁷ The inquiry also noted the disparity between the number of parties who are issued with s60I certificates (exempting them from compulsory FDR for parenting) and the number who ultimately issue proceedings in court, suggesting this is, in part, due to the prohibitive cost of litigation.¹⁰⁸

If not for the Small Claims project, which provided free legal representation, our clients would be in a similar position to parents with s60I certificates: unable to litigate because of the cost and complexity associated with issuing proceedings, but with no alternative option due, in the case of property matters, to the limited availability of LAFDR services for property matters. Existing models for LAFDR such as VLA FDRS already provide effective FDR for family violence victims. This service should be more widely available to vulnerable parties with property disputes.¹⁰⁹

Despite an increase in demand for property mediation,¹¹⁰ the availability of LAFDR for property matters is limited.¹¹¹ In part, this is because, unlike for parenting disputes, FDR is not a pre-filing requirement. Grants from VLA are available for property issues to be addressed in FDRS if a party meets the VLA funding guidelines. In practice, this restricts VLA-funded FDR to people with a 'live' parenting matter whose property issues fit a restricted criteria.

106. Standing Committee on Social Policy and Legal Affairs and Sarah Henderson et al, above n 1, 151.

107. Ibid 152.

108. Ibid.

109. Women's Legal Services Australia (WLSA), above n 102, 27–27.

110. Family & Relationship Services Australia, Submission No 80 to the Parliament of Australia, *Parliamentary Inquiry into a Better Family Law System to Support and Protect Those Affected by Family Violence*, May 2017, 15–16.

111. Belinda Fehlberg, Bruce Smyth and Kim Fraser, 'Pre-Filing Family Dispute Resolution for Financial Disputes: Putting the Cart before the Horse?' (2010) 16(3) *Journal of Family Studies* 197, 201.



A 'common thread' between legal aid commissions is that parenting tends to take precedence over property disputes.¹¹² In 2009 Legal Aid NSW conducted over 2,500 legally assisted mediations, of which only 35 involved property only and 125 involved both property and parenting issues.¹¹³ When parenting and property issues are in dispute at the same time, resolving the parenting dispute often takes precedence. This is despite unresolved conflict over finances having the potential to negatively affect negotiations about parenting and undermine parents' ability to work cooperatively.¹¹⁴

> RECOMMENDATION 11

The Australian Government fund an expansion of existing models of legally assisted Family Dispute Resolution, to give greater access to vulnerable parties seeking property settlements.

THE COST OF LEGAL REPRESENTATION

Our pro bono partnership with Landers & Rogers gave us access to the nominal cost of legal representation for each client. WLSV is a free community legal service, and does not record nominal costs for client representation.

This data showed that, as property settlement outcomes became smaller, the proportion of the settlement consumed by legal fees increased. This illustrates the significant cost-benefit decision many women face when considering whether to pursue a property settlement.

At the time of this report, there were 11 finalised matters for which we had nominal costs information. For nine of those clients, the property received by our client had a clear dollar value and was able to be compared to the cost of assistance. The cost of legal representation for both finalised and ongoing matters ranged from \$2,658 to \$44,837. The average legal fees for finalised matters was \$15,994.

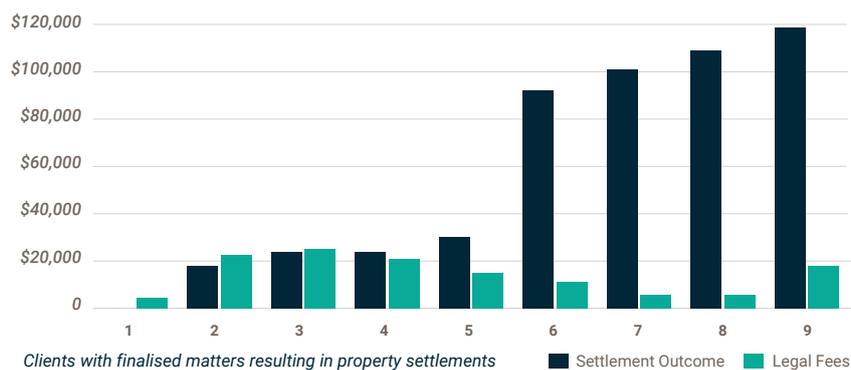
The smallest settlement, which consisted entirely of a superannuation split, was \$18,000 while nominal legal fees were \$22,650, representing 126% of the settlement amount. The next greatest property settlement outcome was received by two clients, being \$24,000. For one of these clients the legal fees were 104% of the outcome, and for the other client the fees were 86%.

The graph illustrates the variation in costs as a percentage of property settlement outcomes. For matters with a settlement under \$30,000 the cost of legal fees represented 50%–126% of what the client received as a settlement.

- Administrative fees charged by organisations for processing subpoenas, such as employers, banks or other lenders. These vary.
- Conduct fees for subpoenas, which also vary.

These fees are payable by the client, even when they are receiving free legal representation. Lawyers from Lander & Rogers confirmed the WLSV experience at the project feedback session that clients sometimes struggled to pay these disbursements. Some clients were living on \$5 a day and stretching their budget to cover these one-off costs was a significant stress.

Comparison of property settlement outcome and legal fees



Legal fees represent the most significant costs for vulnerable women accessing the family law system, but they are not the only financial barrier to resolving a property dispute. Other disbursements and costs women may encounter in pursuing a property settlement include:

- Process server fees which range between \$88 and \$200. If the person being served is uncontactable or avoiding service, fees must be paid for each attempt to serve them.
- Property valuation fees which range from \$600 upwards
- Administrative fees charged by superannuation funds for processing requests for information. The fee is payable to each fund and varies across funds from \$0 to \$187

THE IMPORTANCE OF LEGAL REPRESENTATION

Legal representation was important for Small Claims clients. Not only did lawyers help women navigate the complex family law system, but they also helped to overcome power imbalances between vulnerable women and abusive or controlling former partners.¹¹⁵

'It's just a feeling that you aren't alone in this situation [when] you feel vulnerable. You are bullied in [so many] ways, shapes and forms. So when someone says "Hey, I can help you" oh it meant everything to me.' **Jessica**

112. Ibid 202.

113. Ibid.

114. Ibid 199.

115. See for example Australia and Productivity Commission, 'Access to Justice Arrangements Vol 2' (Inquiry Report, Productivity Commission, 2014), 862–863; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, above n 1, 163 [5.10].

'I wasn't scared [in court] because [my lawyer made] me confident and [...] I feel like she is a protector. [...] The first time when I had court, that night I didn't sleep. But when I came, [...] I remembered what she told me, [that] "you have a right and you have a right to talk and to be protected".' **Roshini**

Legal representation helped women in the Small Claims project to understand their potential entitlements in a property settlement.

'I didn't know that I have a right to take superannuation from him.' **Annisa**

'[...] They] gave me full understanding of what was right and wrong and what were my rights [and what I could] have access to. [There were] many words that I couldn't understand because it was very technical language. [The lawyers] were clear, always very clear.' **Jessica**

'[...] I always had... all [my] questions ... answered and yeah it's good. To understand that I'm entitled to something and I didn't know that.' **Ali**

'[For] one year I was very isolated by my husband and his family members, you know. So I was in a shell and ... I didn't know that I ... have rights. I had no clue, nothing.' **Kumiko**

LEGAL AID FOR PROPERTY MATTERS IS LIMITED

Legal aid commissions and community legal centres receive funding for the provision of legal representation throughout the Commonwealth under the National Partnership Agreement on Legal Assistance Services (NPALAS). The NPALAS lists 'assisting people with property settlement matters if they are experiencing financial disadvantage or are at risk of homelessness' as a family law priority.¹¹⁶

However, there is insufficient legal aid funding to meet the needs of vulnerable women seeking property settlements. As submitted by VLA to the Parliamentary inquiry into a better family law system, without legal assistance it is difficult to obtain a property settlement, but legal aid for property matters is very limited.¹¹⁷ This gap between those who qualify for funding and those who can genuinely afford to pay for legal representation has been described as the 'missing middle'¹¹⁸ by Women's Legal Services Australia and others.

Eligibility requirements for legal aid funding vary between states and territories. Legal Aid Commissions apply means and merit tests to those applying for grants of aid. Means tests assess the income and assets of grant applicants and will often set thresholds for individuals to receive a complete grant of aid or to receive some aid in addition to making contributions.¹¹⁹ Merit tests look at a person's prospects of success and determine whether funding the applicant's matter is an appropriate use of limited public legal assistance funds.¹²⁰

Obtaining legal aid for a property settlement is difficult. In addition to the means and merits tests, the issues in dispute must often satisfy a restrictive criteria.

For example, in Victoria, the Northern Territory, and New South Wales, to obtain a grant of aid for a family law property dispute, a party must also have an ongoing, related family law matter. In Queensland, a minimum relationship duration applies, as well as other timelines based on statutes of limitations.¹²¹

Some commissions include exceptions in their guidelines, such as in New South Wales, where a legal aid grant for property will be made if family violence is present.¹²² In the Northern Territory, grants for property disputes are made, independent of other family law matters, to parties engaging in their FDR service.¹²³

> RECOMMENDATION 12

The Australian Government resource Legal Aid Commissions to broaden availability of funding for priority clients to pursue small property matters.

116. Council of Australian Governments, 'National Partnerships Agreement on Legal Assistance Services' (Attorney-General's Department, 2015) B11.

117. Victoria Legal Aid, above n 7, 24; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, above n 1, 163 [5.10].

118. House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, above n 1, 127 [4.160]; See also Australia and Productivity Commission, above n 115, 716–717.

119. Victoria Legal Aid, *VLA Handbook for Lawyers – Means Test* (10 October 2014) <<http://handbook.vla.vic.gov.au/handbook/12-means-test>>; Legal Aid New South Wales, *Policies: Family Law Matters - When legal aid is available* (20 January 2017) <<https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/5.-family-law-matters-when-legal-aid-is-available/5.6.-property-settlement-matters-after-marriage-or-de-facto-relationship-breakdown>> 5.6.

120. Legal Services Commission of South Australia, *Merit Test*, <https://lsc.sa.gov.au/cb_pages/merit_test.php>.

121. Legal Aid Queensland, *Grants Handbook: Guideline 12 – Property* <<http://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Handbook/What-do-we-fund/Family-law/Interpretation-of-family-law-guidelines/Guideline-12-Property>>

122. Above n 119.

123. Northern Territory Legal Aid Commission, *Commonwealth Law Guidelines Chapter 4* (9 July 2017) <<https://www.legalaid.nt.gov.au/wp-content/uploads/2017/07/Chapter-4-Guidelines.pdf>>.



ROLE OF STATE AND TERRITORY COURTS

The Family Law Amendment (Family Violence and Other Measures) Bill 2017 was introduced to the Senate in December 2017 and is intended to improve the family law system's response to family violence. The bill was referred to the Senate Legal and Constitutional Affairs Committee which will produce a report by April 2018.

Relevant to the Small Claims project are amendments which would increase the jurisdiction of state and territory courts of summary jurisdiction to hear family law property matters in certain circumstances. The current \$20,000 limit contained in the Family Law Act for state courts' jurisdiction would be removed,¹²⁴ and regulations would prescribe a new total property value under which state courts would have jurisdiction to hear family law property matters.

One of the intended purposes of these reforms is to reduce the number of litigants who need to navigate both state and federal court systems, a significant challenge for women experiencing family violence.¹²⁵

Small Claims client Angela commented on the lack of facilitated pathways from the state Magistrates' Court into the family law system.

'Everyone goes oh no, you just don't quite fit within our problem and when you're running across state and federal situations and you're dealing with so many different issues, it's just overwhelming.' **Angela**

INCREASED RESOURCES AND TRAINING MUST MATCH INCREASED JURISDICTION

Women's Legal Services Australia (WLSA) has expressed concern that state and territory courts already experience 'pressing demand ...and a lack of resources'.¹²⁶ These courts may well be unable to provide resolutions to family law matters which are any more timely or effective.

The Family Law Council (FLC) has cautioned that expansion of the jurisdiction of children's and magistrates' courts to deal with family law matters must be supported by professional development for judicial and court staff.¹²⁷ The FLC has further recommended that the National Judicial College of Australia develop a continuing professional development program on family law for state and territory magistrates and children's court judicial officers.¹²⁸

This professional development program should be supported by a family law bench book, which may well need to be tailored for each jurisdiction to reflect intersections with state and territory laws. The appointment of specialist judicial officers with family law practice experience to state courts will also be required.

124. *Family Law Act 1975* (Cth) s 46(1).

125. Attorney-General's Department, 'Amendments to the Family Law Act 1975 to Respond to Family Violence' (Public Consultation Paper, December 2016) [4] and [32].

126. Women's Legal Services Australia, Submission to Parliament of Australia, *Exposure Draft of the Family Law Amendment (Family Violence and Other Measures) Bill 2017* (Cth), 19 January 2017, 6.

127. Family Law Council, 'Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems' (Interim Report, Attorney-General's Department, 2016) 103.

128. Family Law Council, above n 104, 8, 16.

Harriet's matter

*State and territory courts currently exercise their family law jurisdiction infrequently.¹²⁹ However, one Small Claims client, **Harriet**, obtained a property settlement through a magistrates' court. Aspects of her case were indicative of the risks associated with family law jurisdiction being exercised without the requisite expertise.*

***Harriet** came to WLSV after an interim ex parte order was made against her. That order included an award of costs against our client despite legislation which provides that, in family law matters, unless there is exceptional circumstances or egregious behaviour, parties usually bear their own costs.¹³⁰ The consequences of this inappropriate costs order were that Harriet's former partner threatened to enforce the order to apply pressure in the ensuing property settlement negotiations. Harriet was fortunate that, with legal representation, she could resist this tactic.*

In their submission to the parliamentary inquiry for a better family law system, WLSA noted that another common error by state courts exercising family law jurisdiction included omitting standard enforcement clauses which are normally included by the family law courts.

Increasing the jurisdiction of state and territory courts will only be effective if those courts have the practical means and technical expertise to deal with such an increase in family law matters.

> RECOMMENDATION 13

The Australian Government:

- a. Adequately **fund state and territory courts** exercising increased family law property jurisdiction to manage greater demand; and
- b. Ensure adequate and **ongoing family law training** is available to state and territory courts exercising increased family law property jurisdiction; and
- c. Work with state and territory Governments to encourage **appointment of specialist judicial officers** with family law practice experience to state and territory courts.

129. Women's Legal Services Australia, above n 126, 6–7.

130. *Family Law Act 1975* (Cth) s 117.



TRANSFER OF PROPERTY AND ENFORCING ORDERS

Much has been written about the interaction of state and territory family violence systems with the federal family law system.¹³¹ Many of our clients faced difficulties and stress associated with navigating multiple jurisdictions to resolve family violence and family law issues. An additional, unanticipated, cross-jurisdictional obstacle encountered by our clients involved the intersection of family law orders and state administrative processes for transfer of property. We became aware of this issue in relation to transfer of property in Victoria. However, as more jurisdictions adopt 'digital' documentation, we anticipate that similar issues could arise in other states and territories.

The Victorian State Revenue Office (SRO) has recently changed to an online 'digital duties' process for all land transfers. This requires transfers to be stamped 'non-dutiable' through the online system for settlement over property to proceed without stamp duty becoming payable. The digital duties process requires active participation of the transferor, who must register as a user and register for the digital duties process.

The Family Law Act enables registrars to "sign" deeds and instruments on behalf of an uncooperative party, pursuant to family law orders.¹³² Unfortunately, the Family Law Act only contemplates a physical signature on a hard copy document.

Lawyers for Angela were successful in having a family law courts registrar sign the transfer of land form on behalf of Angela's husband, Chris. This was to enforce orders, as Chris refused to sign documents himself. To proceed with the settlement, the transfer needed to be stamped as non-dutiable through the completion of the digital duties process. Chris was incarcerated when settlement took place and he could not participate in the digital duties process.

Following a strict technical approach, settlement would not have been possible for Angela. However, because of their awareness of this emerging issue, Angela's lawyers asked the court to insert a note into the final orders they obtained, requesting that the SRO accept hard copy documents which the registrar could sign instead of participating in the digital duties process. The SRO initially rejected the forms which Angela's lawyers supplied along with the final orders. It was only after continued attempts to contact the SRO that the forms were accepted. No uniform way of dealing with matters of this type has been outlined by the SRO.

For other clients, such as Frances, whose former husband was willing to complete the property transfer and sign all of the forms, there were issues with completing the digital duties form because he was overseas. For self-represented parties, the verification of identity (VOI) component of the digital duties process requires a serial number to be obtained by attending an Australia Post outlet, which Frances' former husband could not do from overseas. At the time of this report, the SRO have continued to confirm that Frances' ex-husband will require the Australia Post serial number.

131. House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of the Commonwealth of Australia, above n 1, 40–41; Victoria, The Royal Commission into Family Violence, above n 68, 187–195; Family Law Council, 'Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues' (Report, Attorney-General's Department, December 2009); Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, Final Report (2010).

132. *Family Law Act 1975* (Cth) s 106A.

> RECOMMENDATION 14

The Australian Government ensure that the Family Law Act 1975 (Cth), in particular the provisions relating to the transfer of property and enforcement of property orders, **recognises and ensures compatibility with state and territory electronic systems** associated with the transfer of property.

> RECOMMENDATION 15

As an interim measure, state and territory Governments immediately **facilitate the provision of alternate processes by affected agencies** to parties transferring property pursuant to family law orders.



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APPENDIX A PARTICIPANT INFORMATION AND CONSENT FORM

PROJECT INFORMATION AND CONSENT FORM (PRO BONO REFERRAL)

CONSENT TO REFERRAL INTO SMALL CLAIMS, LARGE BATTLES PROJECT

Women’s Legal Service Victoria (WLSV) is currently undertaking research around women and financial wellbeing after relationship breakdown. We believe your case highlights some of the problems and challenges women face in obtaining property settlement and division of assets or debt. Therefore, we would like to refer your case into this project so that we can study the barriers and difficulties women in these situations may face.

WLSV is being assisted in this project by two law firms called Lander & Rogers (L&R) and Herbert Smith Freehills (HSF). As part of the project family lawyers from L&R have agreed to assist clients with their legal matter as volunteers of WLSV. In addition, HSF lawyers have agreed to assist as WLSV volunteers by interviewing clients about their experience in the family law system.

If you agree to participate in the Small Claims project your case may be referred to one of the L&R lawyers for legal assistance, and we would like your permission for WLSV to share information, documents and discuss your case with L&R lawyers where required for the purpose of giving you legal assistance.

Women’s Legal Service Victoria respects the privacy of all clients. Further details of how we will maintain the confidentiality of your information are on the third page of this document.

Neither the volunteer lawyers nor WLSV will disclose this information to any person working outside WLSV without your consent. By completing the following section, you are giving WLSV and the volunteer lawyer from L&R permission to share information about your matter as outlined below.

If you have any concerns regarding your participation in the project or your volunteer lawyer, please contact WLSV on **03 8622 8600** to discuss this.

I (name of consenting client)

of.....

..... (address)

authorise Women’s Legal Service Victoria to refer my case to a pro-bono volunteer as part of the Small Claims, Large Battles project and to share information about me for this purpose.

By signing this consent form I authorise WLSV staff to share information in relation to my case as required.

Signature..... Date.....

Witness..... Date.....

PARTICIPANT INFORMATION AND CONSENT TO INTERVIEW

As part of the Small Claims project we are writing a research report. We are seeking to interview 30-40 women about their experience in obtaining a property settlement or financial outcome after separation. The interviews will mainly be conducted by volunteers from HSF.

By participating in this research you will help us better understand the experience of women who seek fair division of property and debt after separation.

We hope to use this research to improve these systems. This research will be published in 2018.

IF I AGREE TO PARTICIPATE, WHAT WILL I BE ASKED TO DO?

We have asked to include your case in the Small Claims project because you are seeking a property settlement or other property and debt related outcome and you require legal assistance.

1. A WLSV lawyer or L&R volunteer lawyer will contact you about your matter and provide you with legal assistance. They will also ask you to sign this consent form.
2. When you sign the consent form, WLSV or a WLSV volunteer lawyer from HSF will contact you for a face-to-face interview in the future. HSF are providing assistance in conducting interviews as part of their support for WLSV's project.
3. You do not need to agree to be interviewed when we contact you.
4. Importantly, agreeing or not agreeing to an interview will not change your relationship with WLSV or any service you might receive from WLSV.
5. We anticipate this interview will take approximately one hour.
6. A follow-up interview may take place approximately two – six months after your participation in an initial interview. This follow-up interview will likely occur by telephone and take approximately 20 minutes.
7. WLSV can organise an interpreter if you require one to participate in the research. Please notify the researcher of your preferred/required language and we will organise an interpreter for you.
8. WLSV can organise aides or other assistance for women with a disability or health issues that make it difficult to participate in this research. Please notify the researcher of your health or personal care requirements.
9. If WLSV interview you for our report we will seek your further consent before including the interview in our report.



HOW WILL RESEARCHERS AND LAWYERS SHARE INFORMATION ABOUT ME?

When you sign the consent form you will be agreeing to participate in an interview with one of our researchers as part of the project. You are agreeing to us communicating and recording information about your case and your story in the following way:

1. Your WLSV volunteer Lawyer from Lander and Rogers will provide a case summary about your matter to the project coordinator and to volunteer researchers from the law firm HSF.
2. This case summary will be anonymised. We will change all names, addresses and ages in your case. We will make all possible efforts to anonymise your story including changing any identifying details where possible. However where details are required in order to describe a systemic issue, details of the story (other than your or your family member's name/s, address and age/s) will need to remain the same.
3. Your case summary will be given a code name which will be connected to your name in a separate and confidential document that will only be available to those involved in the project.
4. WLSV or HSF volunteer lawyers will conduct an interview with you. The audio of the interview will be recorded by the researcher and the recording will be transcribed later by either the researcher or a research assistant. The interview and all research data will be stored on password protected computer systems and in locked cabinets at the WLSV office.
5. At times, a limited number of volunteer researchers may also have access to the recording or transcription. It will be stored at their office on password protected computers and locked cabinets.
6. They will produce a transcript from this interview which is anonymised in the same way as describe in point 2, above.
7. Your transcript will be given the same code name as your case summary and will be connected to your real name in a separate and confidential document that will only be available to those involved in the project.
8. At the end of the project, and after we have connected your transcript and case summary, we will destroy the document which lists the code names and real names of clients.

ARE THERE ANY RISKS IF I PARTICIPATE?

At the time you are interviewed, you may have a family law property case which is in court. If you have or are likely to have in the future family law court proceedings you need to be aware that another party involved in those proceedings may seek to subpoena the interview transcript or the researcher in regards to the interview. Whilst WLSV considers this risk to be very low you need to be aware we can only keep your transcript confidential within the limits of the law.

Further, whilst we will anonymise all research data, there is a risk that a person reading our research will recognise your story. This risk may be increased if it is known you are a client of WLSV.

WHAT WILL HAPPEN WITH MY CASE SUMMARY AND INTERVIEW INFORMATION?

We will not name you in the report, or in any published material. Your interview, or parts of it, may form a part of the published research report. The findings of this study will be published in academic and practitioner journals and reports, and presented at conferences. Evidence, case studies and quotes from the interviews may form part of the public advocacy that WLSV does in the future to promote changes to the legal and financial systems. The material we publish could take the form of tweets, e-bulletins, media releases or other published material.

When you sign the consent form you will be agreeing to WLSV using your real case details, to include our report. We will change all names, addresses and ages disclosed by participants prior to publishing the research. We will make all possible efforts to anonymise your story including changing any identifying details where possible. However where details are required in order to describe a systemic issue, details of the story (other than your or your family member’s name/s, address and age/s) will need to remain the same.

The researcher is available to answer any questions about the research, your participation or other concerns. Contact Estelle Petrie at estelle@womenslegal.org.au or by phone; **03 8622 0639**.

I have read the above information sheet and I understand the purpose of the research, my rights as a voluntary participant and what my information will be used for. I consent to participate in the research:

Signature..... Date.....

Witness..... Date.....

KEY INFORMATION:

- We want to interview you and use your story to demonstrate difficulties with money and property women face after separation
- Information about your case may be used in academic journals, reports, or other published material. We will not publish personal details or information that connects you to the story.
- Your interview transcript will be kept confidential unless legally required in court proceedings.
- All your information will be made anonymous, including your personal details and case summary. Only WLSV or volunteer lawyers involved in the project will have access to your information.



APENDIX B INTERVIEW QUESTIONS/ RUN SHEET

INTERVIEW QUESTIONS

Overarching question: how could systems be improved to prevent short and long-term economic hardship being experienced by women following relationship breakdown?

INTRODUCTORY QUESTIONS

It is hoped that introductory information, such as the length and type of relationship and whether there are any children, will be available to the interviewer through a case summary.

THEME ONE: RELATIONSHIPS AND FINANCIAL SITUATION

1. How would you describe your financial position when you were in your relationship (i.e. comfortable, not well off, just okay)? Why would you describe it like that?
 - Who mainly handled things like bills, money, banking or shopping during your relationship? How did you access money? Did you have credit cards or a bank account (with or without your partner)?
 - (If client's partner mainly managed money) What did you know about how money was being handled by your partner?
 - Did you or your partner work? Where was the money used?
 - Were there any debts you were dealing with? Did you know about these debts before separation?
 - Did you ever feel stressed or worried about money? Why?
2. How would you describe your financial situation after the relationship (i.e. comfortable, not well off, just okay)? Why would you describe it like that?
3. What impact do you think your separation or divorce had on your financial situation?
 - Was there anything that made you stressed or worried when you separated from your partner (i.e. money, accommodation, caring for children, debts, looking for work)?
 - What steps have you taken regarding finances since separating (i.e. approached utility companies or financial institutions, accessed Centrelink, looked for or found a job)
 - Did you have any family or friends you could rely on for support?
4. If client has children, who cares for them currently? How do you pay for the care of your children (i.e. does your former spouse pay child support)?

THEME TWO: THE FAMILY LAW SYSTEM

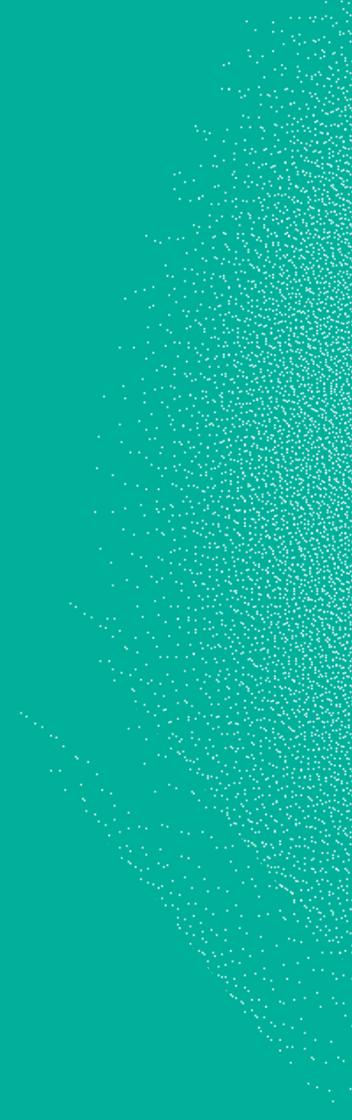
5. What impact do you think legal assistance had on your situation?
 - What did you find most helpful about speaking to a lawyer?
 - Has your understanding of the legal system changed since speaking to a lawyer?
 - What impact has the property settlement had on your financial situation? (i.e. did anything change because of the settlement? Were you able to afford anything you couldn't before?)
6. What did you know about the legal system before speaking to a lawyer?
 - Did you know you could seek legal assistance after you separated?
 - How long before you sought legal assistance? What, if anything, impacted on your decision to seek legal assistance?
7. Had you sought assistance from anywhere else after you separated?
 - How did you find these? Were they helpful?
 - Did you understand what you might be entitled to before speaking to a lawyer? (i.e. that you might be able to access your spouse's superannuation)
 - Are you receiving any other financial support from anywhere else?
8. How long did it take for you to have get a property settlement or outcome?
 - Why do you think it took this long
9. Did you attend court? If so, can you describe that experience and how it made you feel?
 - What impact do you think there was from having a lawyer with you?
10. Looking back on the process now, what has been the most difficult part of using the family law system?
 - Perhaps the process took a long time? Having to face the other party? Not understanding the system?
11. What was the most positive experience for you, going through the family law system?

CLOSING QUESTIONS

12. Is there anything you would like to add to your responses so far?
13. Is there anything you think could be change in the family law system to improve women's financial wellbeing after separation or divorce?



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women's legal
service victoria