



## **Submission by Eastern Community Legal Centre 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”**

14 June 2017

*This submission is prepared by Eastern Community Legal Centre.*

*The Eastern Metropolitan Region Regional Family Violence Partnership (EMR RFVP) endorses this submission.*

*The Eastern Metropolitan Region Regional Family Violence Partnership are a partnership of organisations who are committed to working together in the Eastern Metropolitan Region of Melbourne to address family violence. The partnership’s goal is to provide an integrated and coordinated family violence response to support women and children’s safety and accountability of perpetrators. For more information please see [www.easternfamilyviolencepartnership.org.au](http://www.easternfamilyviolencepartnership.org.au).*



Eastern Community Legal Centre (ECLC) is located in the Eastern region of Melbourne and serves the Cities of Whitehorse, Boroondara, Manningham, Maroondah, Knox and the Shire of Yarra Ranges. ECLC offers free legal advice from its offices in Box Hill, Boronia and Healesville during the day, at night and also through various outreach locations across the East, with a priority being given to those who are disadvantaged. Having operated for over 40 years, the ECLC is one of Australia's most established community legal centres.

The Eastern Region has a number of areas of significant disadvantage. Healesville, in the Shire of Yarra Ranges, is home to the second most populous indigenous population in Victoria. The cities of Whitehorse, Maroondah and Knox host large communities of migrants to Australia, particularly from the Horn of Africa and Burma.

In addition to direct legal services, ECLC also focuses on community development and education activities that empower clients, workers and the general community. It raises awareness of its service, new legal developments and human rights through various projects.

ECLC welcomes the opportunity to be able to provide its views on this area of the law that directly impacts upon our communities. ECLC has operated a family violence intervention order duty lawyer service at the Ringwood Magistrates Court for fifteen years. ECLC assists applicants and respondents of family violence intervention orders to provide advice, negotiation and representation on mention days in the family violence list. The Centre also provide advice and casework to family violence victims and respondents outside of the court mention days. Since 2012, ECLC has provided family law and/or family violence assistance to over 7000 clients through its generalist legal program.

One of ECLC's main priorities is to advocate against family violence, particularly as it affects women and children. Apart from the generalist legal program, ECLC also manages a number of family violence specific programs. The programs include:

**MABELS Program** - Mothers and Babies Engaging & Living Safely

MABELS is a multi-disciplinary collaboration working in the Maternal & Child Health setting. The program is a partnership collaboration between the community legal, mainstream and Aboriginal family violence and community health (local government) sectors. The aim of this program is to intervene and respond to family violence within the Maternal and Child Health context by improving the responses of maternal and child health, legal and support services in a

co-ordinated and integrated manner, with a focus on mothers engaging with Maternal and Child Health services.<sup>1</sup> ECLC is the lead agency in this program.

### **SAGE** - Support, Advice, Guidance & Empowerment

SAGE is innovative in its approach to integrated and holistic service delivery, based on learnings from Health Justice Partnerships both in Australia and internationally. Women experiencing family violence often face barriers to accessing services. They also rarely receive a co-ordinated response that addresses their intertwined health, social and legal needs in seeking safety from family violence. SAGE strives to increase accessibility and engagement for women by providing an intensive, wraparound service that is integrated with specialist services. SAGE utilises a co-case management approach combining the skills and experience of a family violence lawyer and family violence advocate to work with women to increase their safety and capacity to pursue their legal options when responding to family violence.<sup>2</sup>

SAGE also works to build strong partnerships with specialist organisations in order to provide a service that provides a better response to the diverse needs of women and their children. For example, SAGE is not only co-located but integrated with Boorndawan Willam Aboriginal Healing Service. This means that ECLC are not only seeing appointments on site at the healing centre and participating in community events but the program is also committed to achieving cultural safety and trust so that SAGE is responding appropriately to the needs of Aboriginal families.

This submission will address the Terms of Reference in this Inquiry and is informed by ECLC's direct service provision experience.

### **How the family law system can more quickly and effectively ensure the safety of people who are or may be affected by family violence, including by:**

- a. **Facilitating the early identification of and response to family violence; and**
- b. **Considering the legal and non-legal support service required to support the early identification of and response to family violence; and**

### **How the capacity of all family law professionals- including judges, lawyers, registrars, family dispute resolution practitioners and family report writers can be strengthened in relation to matters concerning family violence.**

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<sup>1</sup> MABELS program is funded by the Legal Services Board. For more information see: [www.lsb.vic.gov.au](http://www.lsb.vic.gov.au)

<sup>2</sup> SAGE is funded by the Commonwealth Government's Women's Safety Package managed by the Attorney-General's Department

In relationship breakdowns, family law litigation is the least preferred course of action and often is precluded by many attempts by parties to resolve disputes separately (and often without legal intervention). However, by the time the matter is before the family law courts, parties have reached a stage where generally their positions are intractable.

In circumstances where family violence exists, it is ECLC's experience that there are numerous times when family violence could have been identified earlier so that parties (especially the party experiencing the family violence) could have pursued support services earlier and therefore been appropriately supported and assisted to advocate their position in the family law system.

In ECLC's intervention order duty lawyer program, there are many occasions when a woman experiencing family violence is actually *unaware* that she has been experiencing family violence until she seeks advice from a duty lawyer.<sup>3</sup> This is often because she has been experiencing family violence for so long and has felt ashamed to disclose what she has been experiencing to her family and friends.

ECLC's duty lawyers who have been trained to identify family violence are able to make direct referrals to the support services (including specialist family violence services) at the local Magistrates' Court at the time of seeing the client. However, it is ECLC's contention that the identification of and response to family violence at this stage is not early enough.

Often, by the time women experiencing family violence have come to the attention of ECLC's duty lawyers it can be difficult for referrals to support services to be made as it may be the first time that a woman has been confronted with the information that she has been experiencing family violence. This information in the context of court proceedings can be extremely confronting and shocking to absorb. In addition, the pressure of having to make decisions about the immediate court proceedings can act as a disincentive for clients to accept direct referrals to support services when the court proceedings appear to be urgent. In order for family violence identification and response to be effective for victims of family violence, they require the ability to act upon referrals and support within a reasonable timeframe and in a space where information can be safely understood.

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<sup>3</sup> ECLC often has this experience when women are considered respondents in the intervention order process. During the interview with an ECLC duty lawyer, it is disclosed that the woman has actually been experiencing family violence, generally over a prolonged period. In these situations, it is ECLC's experience that the police are called to a home to investigate an alleged family violence incident, and due to the power dynamics within the home, the man is able to represent to the police that he (and sometimes the children) have been 'victims' of family violence perpetrated by the woman.

For example:

*Sophie had been experiencing family violence perpetrated by her husband Jack for three years. The family violence took the form of emotional, psychological and verbal abuse. Sophie was constantly harangued by Jack about her appearance and Jack criticised her workplace so much that she felt that should quit her job as it appeared to be causing damage to her relationship. Over the duration of the relationship, Sophie became extremely unconfident about all aspects of her life. When she expressed an opinion, Jack told her that she was too stupid to have an opinion and that everything she said made her 'look dumb'. Sophie felt unable to speak to her family about what had been happening because she did not think that they would believe her. Since she had been in a relationship with Jack, she rarely saw her family and her parents who were elderly. She did not want to worry them and therefore didn't want to tell them what was happening. Jack often drank alcohol and when he got drunk he would become more abusive at Sophie. Sophie became very frightened of Jack's increasingly erratic behavior.*

*Jack came home from an event one night extremely drunk. It was 1.00am. He woke Sophie up and told her that she had to leave the house because he was 'sick of seeing her stupid fat face all the time.' Sophie begged to stay and held onto his arm as he dragged her outside. In a drunken attempt to get Sophie out of the house, Jack tried to kick her off and he ended up kicking the glass door and it shattered. Jack was bleeding from his foot. Neighbours heard the altercation and called 000.*

*Jack was furious when he realised that the police were coming. He told Sophie it was her fault that the police had been called. When the police arrived, Jack told them that Sophie was angry with him for coming home late and had pushed him through the glass door. He told the police that he had attempted to resist by putting his foot up and it crashed through the glass, hence his foot was bleeding. Jack pointed to his arm (where Sophie had been hanging on) which was red and a little scratched. He told the police that Sophie had been scratching and violently hanging onto his arm as a form of physical violence against him.*

*Sophie was shocked at Jack's version and found it difficult to speak to the police about her version of events. It did not occur to her to speak to the police about the constant haranguing and bullying family violence that she'd been subjected to because she didn't think that the police would believe her. When she tried to explain some of the background to the police, they told her that she 'could sort it out tomorrow in court.'*

*Sophie felt defeated and bewildered by this turn of events. She went to stay with her parents overnight who were then alerted to the fact that Sophie's relationship with Jack was having difficulty.*

*At court the next day, when Sophie spoke to the duty lawyer about her version of events, the duty lawyer advised Sophie that she had been experiencing family violence for a long time. Sophie could not understand what the duty lawyer was telling her about her experience of family violence and found the information challenging to absorb as she also needed to engage in the legal process related to her intervention order. The duty lawyer attempted to introduce Sophie to the family violence support worker based at the court. Sophie politely refused to speak to the family violence support worker because she 'just wanted to get out of court.'*

*The duty lawyer spoke with the police at court about her concerns that Sophie was actually a victim of family violence. In doing so, the duty lawyer could not disclose to the police what Sophie had told her (as Sophie had not provided permission). However, the duty lawyer pointed to a number of matters raised in the allegations and also informed the police that she had attempted to make a referral to the family violence support worker. Due to the relationship of organisational trust built between the various support services at court, the police were prepared to trust the duty lawyer's assessment of her concerns about Sophie. The police agreed to postpone the finalisation of the matter so that a risk assessment could be undertaken over a period of four weeks to assess if Jack was actually at risk of harm from Sophie. In the meantime, Sophie could return to the matrimonial home, provided she agreed to a condition in her order that she not commit family violence against Jack.*

*Over the four-week period, Sophie thought about what the duty lawyer had tried to tell her. As she was not immediately facing the court process during this period, Sophie felt that she had the emotional space to undertake some research on family violence and to contact the family violence support service that she'd been referred to. Sophie realised over this period that she had indeed been experiencing family violence.*

*When Sophie returned to court four weeks later, she spoke to the duty lawyer about her experiences and also requested the support of the family violence support worker. Sophie had had enough time also to speak to her family about what had been happening at home and she was feeling supported by her parents in relation to any prospective family law/separation developments. She also felt more familiar with the court process because she had attended previously. She was less nervous, and therefore able to hear about her legal options.*

*The police agreed to a limited final order with Sophie agreeing to not commit family violence against Jack without admitting any family violence had occurred. This order lasted for two months. The police agreed that Jack was not at risk of harm from Sophie and two months was the only time period they would agree for the order to last. Sophie received advice from the duty lawyer about making an application against Jack, which she chose not to pursue at this stage. She assured the duty lawyer that if she did feel that she wanted to make an application against Jack, then she would know to contact not only ECLC, but also the family violence support service.*

The reason that 'Sophie' was able understand and exercise her options better the second time she attended court was due to the time provided to her between the first and second court dates. This could only occur if:

- a) the person to whom Sophie disclosed family violence was cognisant of how to screen for family violence;
- b) the relationship of trust between the support services at court which enabled the suspicion of family violence to be disclosed without jeopardising any confidential information;
- c) the police supporting an adjournment of the court process so that they could undertake a risk assessment; and
- d) the court supporting the adjournment so that the risk assessment could be undertaken and time afforded for Sophie to engage with family violence and other support services.

This particular example was effective for Sophie because all services associated with the court are trained in family violence screening and understand the dynamics and nuances associated with the experience of family violence.

In Victoria, the Royal Commission into Family Violence has recommended that all universal services be trained in family violence screening. This is in recognition of the vital role that the education and health services play in keeping communities safe. Considering the close and often inter-related relationship between the family law system and experiences of family violence, it is beyond question that all personnel within all aspects of the family law system should be trained in appropriate family violence screening. This would include any personnel who are involved in the family law system who are involved with client service provision. In terms of the Family/Federal Circuit Court personnel, this would include

everyone from information desk staff to court clerks to duty lawyers and of course, judicial officers.

Family violence screening would not only include identifying potential family violence, but would also include appropriate responses that support family violence victim/survivors and hold perpetrators of family violence accountable.

Apart from court personnel, it is ECLC's submission that family court report writers, family lawyers (and associated support staff) also be mandatorily required to undertake regular and continuous family violence screening training. As the family law system is adversarial, it is ECLC' experience that allegations of family violence are often viewed in a suspicious and oppositional manner. This attitude does not contribute to any sense of safety for victims of family violence, and in fact acts as a clear obstacle for family violence victims to: a) disclose their experiences of family violence and b) even engage in the family law system at all.

'Sophie' engaged in an adversarial system via the intervention order system. However, due to the fact that all services had been trained in comprehensive family violence screening, Sophie was able to be supported throughout the process. It is arguable that should there be a sizeable cultural shift within the family law system (with all aspects of the system being aware of the value of family violence screening), then it is likely that better and safer outcomes for family violence victims (particularly children) will be achieved. However, this cultural shift will take time and will require a whole of system response.

Victoria Legal Aid has very recently received funding to partner with the Family Law Service (auspiced by Women's Legal Service Victoria) and Peninsula Community Legal Centre to provide social workers working with duty lawyers at the Melbourne and Dandenong Family Courts to support people experiencing family violence through the family law system.<sup>4</sup> Whilst this program is a welcome initiative for reaching family violence victims at court, it should not just be the role of one service at court to identify family violence within the family law system. The responsibility should lie with all associated services within the family law system.

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<sup>4</sup> This new program is called the "Family Advocacy and Support Services". It is a pilot program funded by the Commonwealth government until 30 June 2019. For more information refer to [www.lawyersweekly.com.au/wig-chamber/21234-hope-and-help-for-family-violence-victims-in-victoria](http://www.lawyersweekly.com.au/wig-chamber/21234-hope-and-help-for-family-violence-victims-in-victoria)

**The making of consent orders where there are allegations or findings of family violence, having regard to the legislative and regulatory frameworks, and whether these frameworks can be improved to better support the safety of family members, as well as other arrangements which may be put in place as alternative or complementary measures;**

Consent orders are an appropriate solution to formalising parenting (and other family law) matters for parties who have a relationship of equal bargaining power. However, when family violence features in a relationship, it is a **clear** indication that the **relationships of power are unbalanced and unequal**. As a result, the making of consent orders in these circumstances can be unsafe and consequently unworkable. This can be the case even when parties are legally represented.

For example:

*‘Tracy’ had been experiencing violence from her former partner, ‘Todd’ for the duration of their relationship. Tracy experienced anxiety and depression as the relationship progressed. The violence escalated after their child ‘Ashley’ was born, with Todd threatening Tracy that if she ever left him that he would make sure that people knew that she was an “unfit mother” (due to her previous anxiety and depression) and that he would, “Make her life hell.”*

*Despite his threats, Tracy exhibited great courage and left the relationship. Tracy had no intention of depriving Ashley from having a relationship with his father and sought the option of entering into consent parenting orders. Todd refused to engage in any negotiations unless Tracy agreed to his terms including that she be bound to live within a particular suburb of Victoria. Notwithstanding the peculiarity of this condition, Tracy’s private lawyer advised her to accept the conditions in light of Todd’s threats that he would ‘drag her through the courts’ if she didn’t agree. Tracy had minimal funds and was concerned about the possibility of expensive and distressing litigation. She was also very concerned about her mental health issues being disclosed in a public hearing.*

*Tracy had divulged a little of the family violence that she had experienced to her lawyer. However she didn’t feel comfortable disclosing the full extent of the violence as she thought that her private lawyer was not responsive to her disclosures. As Tracy had been fearful of Todd’s reaction if she sought an intervention order, she didn’t do so. Her lawyer told her that without an intervention order, there was no option on the form to disclose the family violence she was alleging against Todd.*

*Finally, Tracy was conscious that the lawyer charged ‘by the hour’ and was concerned about how long it may take for her to discuss the years of family violence she experienced.*

*The consent orders were subsequently made and whilst this prevented Tracy from having to endure potentially harrowing court proceedings, it did not prevent her from continuing to be intimidated, threatened and controlled by Todd due to the onerous conditions in the consent orders.*

*Tracy found a job far from her home and tried to change the consent orders so that she and Ashley could move closer to her workplace. She was advised that as she had consented to the orders, she was not going to be successful in changing them. Tracy argued that she didn’t give ‘true consent’ because she was experiencing family violence from Todd. However, as she could not indicate on her application form that she experienced family violence, then this would not be something she could rely on to change the orders.*

Consent orders are often viewed as an ideal option for parties to consider in entering into an agreement without needing to pursue litigation. However, in matters where one party has experienced family violence from the other, consent orders can be used as a tool to further perpetrate and entrench family violence as illustrated in ‘Tracy’s’ example.

The current consent order application form requests parties to inform the court of any pending or former legal proceedings including, inter alia, family violence matters.<sup>5</sup> However, family violence can obviously occur without the presence of legal proceedings. There is no provision on the existing application form to identify (from at least one party) if family violence exists.

The current consent order application form details a number of questions that address each party’s views in relation to financial and non-financial contributions.<sup>6</sup> The questions are phrased such that one party may propose a percentage of property distribution and the other party can mark on the application form Agree or Disagree with the other party’s proposal. There is also the option of detailing the reasons why a party would agree or disagree with the other party’s proposal. These questions are phrased in this manner so that the court is able to understand why parties have come to agree to a particular set of orders.

In order to support families in entering into consent orders (and also alleviate administrative burdens on the court), it is recommended that there be an additional question included on the form that may provide parties with the option of indicating that family violence exists/has existed

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<sup>5</sup> Family Court of Australia- Application for Consent Orders Kit., questions 11 and 12.

<sup>6</sup> Family Court of Australia- Application for Consent Orders Kit., questions 64-71.

in the relationship, at least from one party's point of view. The other party has the option of disagreeing with the identification of family violence - however this would not necessarily prevent a consent order from being made. In the event that the box is marked that family violence exists, then if a future application to change the consent orders is made, then the court may be minded to consider ordering changes to the consent orders, particularly if these proposed changes are in relation to the allegations of family violence. This option would also provide the opportunity to refute the allegation in a documented manner.

Whilst it cannot be guaranteed that a judicial officer would allow consent orders to be changed, this option at least provides an opportunity for victim/survivors of family violence to be able to identify that they have/are experiencing family violence. It would also operate as a 'red flag' to alert judicial officers to consider family violence if there are future applications to change consent orders.

Family violence victim/survivors should not be encouraged by the legal system to hide their experiences of family violence out of fear that they will face disadvantage in the family law system. The simple inclusion of this question on the application form (and subsequent consideration by a judicial officer for a change of consent orders in the future) may go some way to shifting cultural attitudes towards family violence within the family law system.

In addition, it is recommended that a standard order in all family law orders includes a prohibition against committing family violence by each party towards the other. This prohibition should be included as standard order on *all* family law orders, notwithstanding any allegations of family violence being made. By including this prohibition as a standard in all orders, the Family Court will send a clear message that the court, as the presiding authority within the family law system does not tolerate family violence. It also sends a clear message that the Family Court regards family violence to be a serious issue. Cultural shifts are most effective when the leaders within a system themselves champion and role model the proposed change.

**The effectiveness of arrangements which are in place in the family courts, and the family law system more broadly, to support families before the courts where one or more party is self-represented and where there are allegations or findings of family violence.**

It is an unfortunate reality that family law proceedings are time consuming and costly. As a result, there are more self-represented litigants in the family law system. Self-represented litigants may have experienced family violence perpetrated by the other party, or the self-represented litigant may have perpetrated the family violence. Litigation can be particularly distressing when family violence features and when there are litigants in person. It is

recommended that the family courts be provided with the facilities to house a range of support services that are available to support parties such as a range of family violence specialist services.

In addition, it is recommended that the Inquiry consider the option of making legal aid funds available for self-represented litigants for the purposes of cross-examination. This option is available in Victoria for family violence matters. However, the commonwealth government has not provided this option for self-represented litigants in the family law system. The prospect of being cross-examined by a former partner, particularly when that partner has perpetrated family violence against you is extremely traumatising. The prospect of cross-examination in this context can in fact act as a strong disincentive to engage in the legal process. It can also operate to force a victim/survivor to 'accede' to the other party's demands. This is an inappropriate use of the legal system to commit further family violence.

If the cultural shifts previously referred to in this submission occur across the whole family law system, then it is also possible that where family violence features in matters where there are self-represented litigants, then judicial officers may consider it appropriate that there be an ability to speak with parties (individually or together) in chambers during proceedings and court security could be alerted quickly and discretely.

### **How the family law system can better support people who have been subjected to family violence recover financially, including the extent to which family violence should be taken into account in the making of property division orders**

Family violence by its very nature creates immense power imbalances within relationships, which make it even more difficult to seek a property settlement. If a victim/survivor has been able to continue with the family court process, it displays immense courage and strength. Family violence can impact upon a person's ability to earn an income/be employed, study and detrimentally on their physical and mental health. In Victoria alone, "[v]iolence is more damaging to the health of Victorian women aged 15–44 years than any other well-known risk factors, including high blood pressure, obesity and smoking."<sup>7</sup>

As family violence has such detrimental affects upon an individual, it is recommended that family violence be considered as a negative contribution towards the property pool and be taken into consideration when calculating the property division for a party's future financial needs. All the characteristics of family violence including the emotional, psychological, physical, sexual and

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<sup>7</sup> VicHealth 2004, "The health costs of violence; measuring the burden of disease caused by intimate partner violence"

financial abuse should all be considered by the court in assessing property division. The court should take into account the numerous qualitative studies on the impact of family violence and consider a party's ability to make financial and non-financial contributions to the relationship had the party not been subjected to family violence by the other. In doing so, the court should consider the fact that parenting and family duties are made considerably more difficult when experiencing family violence. Furthermore, in recognition of the detrimental affects of family violence, the court should also calculate a financial amount for a victim/survivor's future needs pursuant to section 75(2) of the Family Law Act.

**The potential for a national approach for the administration and enforcement of intervention orders for personal protections, however described.**

When an individual who is protected by an intervention order moves interstate, it is possible for her to register her intervention order interstate. However, in order to do so, it incumbent upon the individual to find out the correct process for doing so and this can vary between states and territories. The process of having to re-register an intervention order in a different jurisdiction can be daunting and confusing. The danger of being unprotected whilst in a different jurisdiction is a very real fear for many ECLC family violence clients.

It is recommended that there be an automatic interstate/territory intervention order registration process, which would require all local courts responsible for the intervention orders in their respective jurisdictions to be able to automatically register an intervention order in another state. This would require an injection of resources into the various court systems, particularly additional resources for a comprehensive information technology system.

Thank you for the opportunity to respond to this very important issue, and please do not hesitate to contact Belinda Lo, Principal Lawyer at Eastern Community Legal Centre on [belindal@eclc.org.au](mailto:belindal@eclc.org.au) or call 9285 4822 or 0423 731 821 if you have any further queries in relation to the matters raised in this submission.

**Box Hill Office**

Suite 3, Town Hall Hub  
27 Bank Street  
Box Hill VIC 3128  
Tel: (03) 9285 4822  
Fax: (03) 9285 4833  
Monday - Friday

[www.eclc.org.au](http://www.eclc.org.au)

**Boronia Office**

Suite B, 6 Floriston Road  
(PO Box 747)  
Boronia VIC 3155  
Tel: (03) 9762 6235  
Fax: (03) 9762 9751  
Monday - Thursday

ABN 89 833 124 364

**Healesville Office**

Healesville Community Link  
110 River Street (PO Box 79)  
Healesville VIC 3777  
Tel: (03) 5962 1665  
Free call: 1300 79 70 88  
Tuesday - Thursday

Reg. No. A4904N

## Recommendations

1. That all personnel within all aspects of the family law system should be trained in appropriate family violence screening
2. Family violence screening would not only include identifying potential family violence, but would also include appropriate responses which support family violence victim/survivors and hold perpetrators of family violence accountable
3. That there be an additional question included on the consent order application form that provides the option of indicating that family violence exists/has existed in the relationship
4. That the Family Courts be provided with the facilities to house a range of support services who are available to support parties such as a range of family violence specialist services.
5. That the Inquiry consider the option of making legal aid funds available for self-represented litigants for the purposes of cross examination.
6. That family violence be considered as a negative contribution by the perpetrator towards the property pool
7. That family violence should taken into consideration when calculating the property division for a party's future financial needs pursuant to section 75(2) of the Family Law Act
8. That there be an automatic interstate/territory intervention order registration process, which would require all local courts responsible for the intervention orders in their respective jurisdictions to be able to automatically register an intervention order in another state.