

**Submission to the Australian Law Reform Commission
Review of the Family Law System
Issues Paper (IP 48)**

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1. Introduction

- 1.1. Rape and Domestic Violence Services Australia (R&DVSA) thank the Australian Law Reform Commission (ALRC) for the opportunity to comment on the *Review of the Family Law System – Issues Paper (IP 48)*.
- 1.2. R&DVSA is a non government organisation that provides a range of counselling services to people who have been impacted by sexual, family or domestic violence¹ and their supporters. Our services include the NSW Rape Crisis counselling service for people in NSW who have experienced or have been impacted by sexual violence and their professional or non-professional supporters; Sexual Assault Counselling Australia for people who have been impacted by the Royal Commission into Institutional Responses to Child Sexual Abuse; and Domestic and Family Violence Counselling Service for Commonwealth Bank of Australia customers who are seeking to escape domestic or family violence.
- 1.3. In addition, R&DVSA provides consultation and training services to other organisations and individuals who may come into contact with people whose lives have been impacted by sexual, family or domestic violence. Consultation and training sessions may cover topics such as managing vicarious trauma, responding with compassion, and understanding complex trauma.

2. Endorsement of Women’s Legal Services Australia submission

- 2.1. R&DVSA endorse the Women’s Legal Services Australia (WLSA) submission to this inquiry.
- 2.2. In writing their submission, a representative of WLSA engaged in consultation with members of the NSW Women’s Alliance including R&DVSA and other organisations working against family violence. R&DVSA believe the ALRC should afford significant weight to the WLSA submission as it brings together the combined expertise, knowledge and experience of key players working in the family violence field.
- 2.3. In line with WLSA’s submission, R&DVSA believe there is an urgent need to prioritise reforms aimed at protecting the safety and wellbeing of women and children who have experienced family violence.
- 2.4. In particular, we support WLSA’s recommendations to:
 - 2.4.1. Amend the principles of the *Family Law Act 1975 (Cth)* (FLA) to better recognise the need to protect the safety and wellbeing of women who have experienced family violence² as an integral part of a child-centred approach.
 - 2.4.2. Improve the accessibility of legal advice and representation for women who have experienced family violence in recognition of the high risk that self-representation may lead to unsafe and/or unjust outcomes.
 - 2.4.3. Amend Part VII of the FLA to create a separate and distinct legislative pathway for cases involving family violence which prioritises safety concerns; or, at a minimum,

¹ R&DVSA prefer the term *people who have been impacted by sexual, family or domestic violence* rather than the terms survivors or victims. This is in acknowledgement that, although experiences of violence are often very significant in a person’s life, they nevertheless do not define that person.

² R&DVSA adopt gendered language when discussing family violence in recognition that family violence is predominantly perpetrated by men against women and children. However, we acknowledge that women can also be perpetrators of violence.

remove the presumption of equal shared parental responsibility and overall emphasis in the FLA on equal time and shared parenting.

- 2.4.4. Establish and fund a national legally-assisted family dispute resolution program specifically designed for matters involving family violence, which is supported by specialist lawyers and practitioners who have expertise in risk assessment and trauma-informed practice.
- 2.4.5. Ensure that family law professionals receive specialised and ongoing training in relation to sexual assault, domestic and family violence.
- 2.4.6. Prohibit direct cross-examination by an alleged abuser on individuals who have experienced family violence and fund legal services to conduct cross-examination in matters involving family violence where either party is self-represented.

3. Approach to this submission

- 3.1. Our submission is based on the experiences of our clients. As such, it focuses on the systemic barriers faced by women and children who have experienced sexual, family or domestic violence when accessing the family law system. We do not attempt to answer all the questions raised in Issues Paper 48.
- 3.2. We begin by making brief comments in support of those WLSA recommendations highlighted above. However, in recognition of their legal expertise, we defer to WLSA for recommendations on those points.
- 3.3. We then offer more detailed comments and recommendations in relation to two areas of the family law system which intersect closely with the work of R&DVSA. These are:
 - 3.3.1. Professional wellbeing and managing vicarious trauma; and
 - 3.3.2. The need for greater protections for confidential counselling records.
- 3.4. A summary of these recommendations can be found in the final section of this submission.

4. Objectives and principles

IP 48 – Q 2: What principles should guide any redevelopment of the family law system?

- 4.1. Increasingly, responding to family violence is recognised as the core business of the family law system. This shift in focus – from more traditional priorities like preserving the institution of marriage or, more recently, upholding a child’s right to a meaningful relationship from their parents – reflects two key trends. First, there is growing awareness that family violence arises in the majority of parenting cases that come before family courts.³ Second, changes in community attitudes have led to widespread recognition that women and children have a right to live free from violence.
- 4.2. However, despite growing momentum to address family violence, the needs of women and children accessing the family law system continue to go unmet. In 2015, the Australian Institute of Family Studies found that less than one third (32 per cent) of separated parents

³ Family Law Council. (2016). Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report, 22, referring to: R. Kaspiew, R. Carson, J. Dunstan, L. Qu, B. Horsfall, J. De Maio, S. Moore, L. Moloney, M. Coulson and S. Tayton. (2015) *Evaluation of the 2012 family violence amendments: Synthesis Report*. Melbourne: Australian Institute of Family Studies, 16-17.

perceived the family law system as addressing family violence issues.⁴ This number was even lower for parents who held current safety concerns in relation to themselves and their child (26 per cent).⁵ Thus, it is vital that any redevelopment of the family law system be guided by the need to protect the safety and wellbeing of women and children who have experienced or are at risk of family violence.

- 4.3. Often, the issue of women's safety is portrayed as ancillary to the best interests of the child. However, R&DVSA understand the safety and wellbeing of mothers as inextricably intertwined with the safety and wellbeing of their children. Managing risk for mothers is often critical to managing risk for children in their care. This is because parental violence can have devastating consequences for the safety and wellbeing of children, even where violence is not targeted at those children.
- 4.4. According to a 2016 ANROWS paper, research shows that:
 - 4.4.1. Witnessing parental violence can be just as detrimental to children as being a victim to physical abuse, creating a higher risk of behavioural, physical and mental health problems;⁶
 - 4.4.2. Mothers who are subject to parental violence may experience reduced parental capacity, meaning they are less able to meet their children's physical, social and emotional needs;⁷
 - 4.4.3. Fathers who perpetrate parental violence may also exhibit poor parental characteristics, behaving in authoritarian, under involved, neglectful, self centred or manipulative ways towards their children;⁸
 - 4.4.4. Fathers may involve children in their tactics of abuse, through indirect methods such as undermining the relationship between mother and child, or direct methods such as child abduction or filicide.⁹
- 4.5. Crucially, this research shows that parenting outcomes for women improve once the family violence ends. However, "[t]his healing process may not occur if women and children have regular contact with abusive partners post-separation."¹⁰
- 4.6. Given the close interrelationship between parental violence and children's safety and wellbeing, R&DVSA submit there must be greater recognition in the FLA that protecting the safety and wellbeing of mothers constitutes an integral aspect of a child centred approach.

⁴ Kaspiew, R., Carson, R., Dunstan, J., De Maio, J., Moore, S., Moloney, L. et al. (2015). *Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments)*. Melbourne: Australian Institute of Family Studies, 117.

⁵ Ibid.

⁶ Leesa Hooker, Rae Kaspiew, Angela Taft. (2016). *Domestic and family violence and parenting: Mixed methods insights into impact and support needs: State of knowledge paper*. Sydney: ANROWS, 18.

⁷ Ibid 14-19.

⁸ Ibid 20-22.

⁹ Ibid 23-32.

¹⁰ Ibid 19.

- 4.7. R&DVSA also support the principles identified in WLSA’s five step plan, Safety First in Family Law to:

- Step 1** – Develop a specialist response for domestic violence cases in family courts
- Step 2** – Reduce trauma and support those who are most at risk of future violence and death
- Step 3** – Intervene early and provide effective legal help for the most disadvantaged
- Step 4** – Support women and children to financially recover from domestic violence
- Step 5** – Strengthen the understanding of all family law professionals on domestic violence and trauma.¹¹

- 4.8. These principles should guide the creation of a family law system that keeps women and children safe and supports them to recover both financially and emotionally from the trauma of family violence.

5. Access and Engagement

IP 48 – Q 11: What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?

- 5.1. The limited availability of legal advice and representation are “perennial concerns”¹² for the family law system and affect the full spectrum of family law participants. However, R&DVSA submit that women who have experienced family violence face particular accessibility issues in regards to legal support that warrant consideration by the ALRC.
- 5.2. Women who have experienced family violence often face financial barriers to accessing legal support as a result of perpetrators’ tactics of financial abuse and/or impacts of trauma that may reduce their earning capacity. As a result, women who have been impacted by family violence often find themselves in the “missing middle” between those who are eligible for legal aid and those who can afford to pay a private lawyer.¹³ As the Victorian Royal Commission into Family Violence stated in their final report:

Limited [legal] services are particularly concerning in the context of family violence, when the parties may have unequal access to resources and legal processes can be used by the perpetrator to continue dominating the victim. Victims may also endure significant financial hardship to engage legal representation, including depleting their savings, incurring debt and selling or mortgaging property and assets. Yet these assets and resources may be a protective factor, and their depletion may inhibit a victim’s autonomy and increase their vulnerability to further violence.¹⁴

- 5.3. Further, where women access the family law system without legal representation, there is an unacceptable risk they will be disadvantaged as a result. We acknowledge that self-representation has the potential to disadvantage any litigant. A 2003 Family Court report on self-represented litigants stated that judges and registrars reported that lack of

¹¹ Details of proposed actions for each step are at <https://safetyinfamilylaw.org.au/the-solutions/>.

¹² State of Victoria. (2014-16) *Royal Commission into Family Violence: Report and recommendations*. Vol III, Parl Paper No 132, Ch 16, 169.

¹³ Women’s Legal Services Australia cited in House of Representatives Standing Committee on Social Policy and Legal Affairs, A better family law system to support and protect those affected by family violence final report, December 2017, paragraph 4.160.

¹⁴ State of Victoria. (2014-16). *Royal Commission into Family Violence: Report and recommendations*, Vol III, Parl Paper No 132, Ch 16, 169.

representation disadvantaged self-represented litigants in 59% of cases.¹⁵ However, this risk is amplified for women who have experienced violence because:

- 5.3.1. The impacts of trauma may inhibit a woman's ability to advocate effectively for herself and her children. The specific impacts of complex trauma are explored in further detail below.
 - 5.3.2. Matters involving family violence are often highly complex and require self-represented litigants to compile extensive documentary evidence. In a 2016 report, the Family Law Council found that cases involving unrepresented litigants were 'significantly less likely to contain the kind of evidence needed to determine matters involving child safety concerns – such as evidence of child protection notifications and family violence protection orders – than cases where the parties are represented or partially-unrepresented'.¹⁶
 - 5.3.3. Perpetrators may continue to perpetrate violence throughout family law proceedings, often misusing legal processes in order to exert ongoing power and control.
 - 5.3.4. Women may feel unable to directly cross-examine their alleged perpetrator, meaning that the perpetrator's evidence goes untested.
- 5.4. In essence, where women access the family law system without legal representation there is a significant risk that power imbalances will be perpetuated and that any resulting parenting arrangements may not adequately take into safety concerns.

Complex Trauma in the Courtroom

- 5.5. In order to understand how women who have experienced family violence may be disadvantaged when accessing the family law system without legal support, it is necessary to consider how the impacts of complex trauma may play out within the courtroom.
- 5.6. The impacts of complex trauma can be categorised into four clusters of symptoms: re-experiencing or intrusions, avoidance, arousal and cognitive changes. Each cluster of symptoms presents specific barriers for women who are forced to self-represent:
- 5.6.1. **Re-experiencing symptoms or intrusions** include flashbacks, intrusive thoughts and recurrent nightmares. These symptoms may cause women to experience re-traumatisation or high levels of distress when forced to recount their experiences of violence to the courtroom or to confront their abuser through cross-examination.
 - 5.6.2. **Avoidance symptoms** include the avoidance of people, places, activities, thoughts or feelings associated with the experience of traumatisation. These symptoms may influence women to withhold details about their experiences of violence or to consent to unsafe parenting arrangements in order to avoid further confrontation with their perpetrator. As a result, court outcomes may not adequately take into account safety concerns.

¹⁵ Family Court of Australia 2003, *Self-represented litigants – a challenge: Project report December 2000-December 2002*, Family Court of Australia. The report drew on a questionnaire of judges and registrars.

¹⁶ FLC Final Report 2016, p. 22, referring to R Hunter, A Genovese, A Chranowski & C Morris, *The changing face of litigation: Unrepresented Litigants in the Family Court of Australia*, Law and Justice Foundation of NSW, August 2002, and Family Law Council, *Litigants in Person: A Report to the Attorney-General*, 2000, which noted this issue.

- 5.6.3. **Arousal symptoms** include difficulties sleeping, symptoms of heightened anxiety and/or anger, difficulties concentrating, hypervigilance and exaggerated sympathetic nervous system responses. These symptoms may impact women’s capacity to present their account to the magistrate in a coherent, persuasive format.
- 5.6.4. **Cognitive alterations** include negative beliefs about the self and distorted cognitions about the causes or consequences of the traumatic events. These symptoms may cause women to feel insecure about their own parenting capacity, to doubt their own recall of events, or to inappropriately justify or excuse the perpetrator’s abusive behaviours. Where women express these distorted cognitions to the magistrate, this may lead to unsafe and/or unjust arrangements.
- 5.7. It is critical that magistrates receive extensive and ongoing training in relation to complex trauma so they may recognise and respond appropriately when these presentations arise.
- 5.8. However, the most critical factor to ensure that women who have experienced family violence have access to safe and just family law outcomes is access to specialised, free and timely legal advice and representation.

Recommendations

- 5.9. Increased support services may go some way to alleviating the problems associated with self-representation for women who have experienced family violence. These may include those support services outlined in Issues Paper 48 – specialist clinics to provide pro bono training and plain English legislation and court forms. We also support the WLS NSW proposal to ‘develop guidelines for self-represented litigants on drafting affidavits about family violence, safety concerns and impact on parenting capacity to improve the quality of primary evidence of family violence’.¹⁷
- 5.10. However, ultimately, women who have experienced violence will be disadvantaged unless they have access to specialised, free and timely legal support and representation.
- 5.11. As such, we support WLSA in recommending that:
 - 5.11.1. the Australian Government, working together with the state and territory governments, implement the Productivity Commission’s 2014 recommendation for \$200 million additional annual funding to legal assistance services.
 - 5.11.2. the Australian Government encourage Legal Aid Commissions to amend their funding guidelines in family law to promote greater access to legal aid for women who have experienced family violence.

6. Legal principles in relation to parenting and property

Issues Paper Question 15: What changes could be made to the definition of family violence or other provisions regarding family violence, in the Family Law Act to better support decision making about the safety of children and their families?

- 6.1. R&DVSA support the current definition of family violence in the FLA which focuses on coercive and controlling behaviour and subjective fear.

¹⁷ Carolyn Jones. (2016). *Sense and Sensitivity: Family Law, Family Violence and Confidentiality*. Women’s Legal Service NSW, Proposal 4.

- 6.2. However, we are concerned that matters involving family violence continue to be treated by Part VII of the FLA as an “exception to the norm”. As Dr Sifris and Anna Parker state:

...if the family law system is to respond adequately to the high incidence of violence and abuse within separated families, provisions in the Family Law Act which treat family violence as an exception to the norm must be amended. The present treatment of cases involving violence as an exception to the mainstream family law pathway fails to recognise the prevalence and seriousness of violence permeating the family law system, resulting in unsuitable and unsafe parenting outcomes.¹⁸

- 6.3. R&DVSA strongly support WLSA’s recommendation to amend Part VII of the FLA to create a separate and distinct legislative pathway for cases involving family violence, which places safety concerns at the centre of the decision-making process. The creation of a separate pathway would have an important educative function by clarifying to both magistrates and the general public the need to prioritise safety concerns above all other considerations.
- 6.4. R&DVSA also support WLSA’s call to remove the presumption of equal shared parental responsibility and overall emphasis in the FLA on equal time and shared parenting. We acknowledge the presumption of equal shared parental responsibility does not apply in matters involving family violence. However, R&DVSA is concerned that clients continue to negotiate parenting arrangements “in the shadow” of this misunderstanding.¹⁹ For example, women may determine not to leave violent relationships out of fear that the family court would award unsupervised contact between their partner and children. Other women may consent to unsafe parenting arrangements where they believe their partner has a ‘right’ to parental contact.
- 6.5. Finally, R&DVSA support WLSA’s recommendation for the establishment of a national legally-assisted family dispute resolution program specifically designed for matters involving family violence. As the Victorian Royal Commission into Family Violence recognised, court processes are often “intimidating, confusing and unsafe” for people who have experienced family violence.²⁰ As such, R&DVSA support the shift towards non-adversarial and multidisciplinary alternatives which may reduce the risks of re-traumatisation. However, it is critical that participants have access to specialised, trauma-informed legal support in order to ensure power imbalances are not perpetuated throughout this process.

7. Professional skills

IP 48 – Q 41: What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

IP 48 – Q 42: What core competencies should be expected of judicial officers who work in the family law system? What measures are needed to ensure that judicial officers have and maintain these competencies?

¹⁸ Dr Adiva Sifris and Anna Parker. (2014). Family Violence and Family Law: Where to Now?. 4 *Fam L Rev* 3, 3. Available online at: <https://nicholeslaw.com.au/wp-content/uploads/2014/08/Family-Violence-Article.pdf>.

¹⁹ Becky Batagol and Thea Brown. (2011). *Bargaining in the Shadow of the Law: The Case of Family Mediation*. Annandale, NSW: Themis Press.

²⁰ State of Victoria. (2014-16). *Royal Commission into Family Violence: Report and recommendation*. Vol III, Parl Paper No 132, Ch 16, 117.

- 7.1. The attitude, knowledge and skills of family law professionals and judicial officers are vital to ensuring the safety and protection of women and children accessing the family law system. In their Final Report, the Victorian Royal Commission stated that judicial officers' skills and approach in matters involving family violence are "critical" to "the outcome of a hearing, the victim's safety, and a perpetrator's level of accountability."²¹
- 7.2. The importance of education about family violence for family law professionals and judicial officers has been a consistent theme emerging from recent inquiries including:
 - 7.2.1. The Parliamentary inquiry into a better family law system to support and protect those affected by family violence – Recommendation 27 and 28.
 - 7.2.2. The 2016 Victorian Royal Commission into Family Violence Report – Recommendations 215 and 216.
 - 7.2.3. The 2016 FLC Final Report on Families with Complex Needs and the Intersection of Family Law and Child Protection – Recommendations 11 and 12.
 - 7.2.4. The 2015 Federal Senate Finance and Public Administration References Committee inquiry report titled Domestic violence in Australia – Recommendations 9.71 and 9.72.
 - 7.2.5. The 2009 report of Professor Richard Chisholm titled Family Courts Violence Review report – Recommendations 4.3, 4.4 and 4.6.
- 7.3. Like WLSA, R&DVSA endorse the 2017 House of Representatives Committee's recommendations that:
 - 7.3.1. the Australian Government develops a national and comprehensive professional development program for judicial officers from the family courts and from states and territory courts that preside over matters involving family violence (Recommendation 27); and
 - 7.3.2. the Australian Government develops a national, ongoing, comprehensive, and mandatory family violence training program for family law professionals, including court staff, family consultants, Independent Children's Lawyers, and family dispute resolution practitioners (Recommendation 28).
- 7.4. R&DVSA submit that the training package for family law professionals and judicial officers should include components on:
 - The dynamics, complexities and impacts of sexual assault, domestic and family violence;
 - Identifying family violence risk factors and responding appropriately;
 - The intersection of family law and child protection;
 - Trauma informed practice;
 - Cultural competency in relation to working with Aboriginal and Torres Strait Islander people;
 - Cultural competency in relation to working with people from a culturally and linguistically diverse (CALD) background;

²¹ State of Victoria. (2014-16). *Royal Commission into Family Violence: Report and recommendations*. Vol III, Parl Paper No 132, Ch 40, 210.

- Working with lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) families;
- Working with older people;
- Working with people with a disability; and
- Working with other people made vulnerable by their circumstances.

8. Professional wellbeing and vicarious trauma

IP 48 – Q 44: What approaches are needed to promote the wellbeing of family law professionals and judicial officers?

- 8.1. R&DVSA commend the ARLC for recognising that family law professionals and judicial officers are at risk of vicarious trauma (VT). It is critical that strategies are put in place to manage VT effectively, not only to ensure the wellbeing of professionals but also to ensure the family law system functions effectively for clients.
- 8.2. R&DVSA has significant experience and expertise in responding to and developing strategies to manage VT. Through the NSW Rape Crisis counselling service, we regularly provide counselling support to professionals assisting someone who has experienced sexual assault.
- 8.3. Further, on the basis of extensive research and clinical expertise, R&DVSA has developed a best practice Vicarious Trauma Management Program. This program includes a comprehensive suite of strategies aimed at both an individual and organisational level. The R&DVSA VT Management Program has been implemented internally for over ten years. It has also been implemented externally through training and consultation undertaken with other organisations and individuals working with people who have experienced, or are at risk of, trauma. In 2007, the R&DVSA VT Management Program won the WorkCover NSW Safety Work Award for its approach.

The concept of Vicarious Trauma

Doing this work means bearing witness to atrocity, holding the pain of others and being an unwilling participant in traumatic re-enactments.

Saakvitne and Pearlman, 1996²²

- 8.4. R&DVSA recommend the ALRC adopt the concept of VT when considering the professional wellbeing of family law professionals, over other concepts such as burnout, compassion fatigue or secondary traumatic stress. While these terms are often used interchangeably, each concept denotes different impacts of working with traumatised populations.
- 8.5. VT is a term used to describe the negative psychological impacts experienced by people not directly affected by traumatic events but nevertheless exposed to them in some way.

²² Saakvitne, K. W., and Pearlman, L. A. (1996). *Transforming the Pain: A Workbook on Vicarious Traumatization*. New York: W. W. Norton & Company.

R&DVSA's understanding of VT is influenced by the work of Charles Figley,²³ Laurie Pearlman²⁴ and Zoe Morrison,²⁵ among others.

- 8.6. VT is characterised by two clusters of psychological symptoms: secondary traumatic stress symptoms and cognitive change symptoms:²⁶
 - 8.6.1. **Secondary traumatic stress symptoms** are similar to those of Post Traumatic Stress Disorder (PTSD). They can include intrusive symptoms (eg. recurrent dreams, images, flashbacks, intense distress at re-experiencing), avoidance symptoms (eg. avoiding places, people, activities, feelings or thoughts that remind the person of trauma), and arousal symptoms (eg. sweating, sleep disturbances, irritability, hyper vigilance or reckless behaviour).²⁷
 - 8.6.2. **Cognitive Change Symptoms** are disruptions to important beliefs that individuals hold about themselves, other people, and the world. This may include changes to an individual's frame of reference (eg. spirituality or worldview), self capacities (eg. maintain a consistent and coherent sense of self) and psychological needs (eg. beliefs about safety, esteem, intimacy, trust and control). For example, repeated exposure to traumatic material can lead a person to develop schemas that the world is unsafe and that people are often cruel to others.
- 8.7. In the 2010 report *Family Violence – A National Legal Response*, the ALRC and NSW Law Reform Commission referred to the impact on professionals working in the area of family law as 'burnout'.²⁸ The concept of burnout refers to emotional exhaustion related to workload rather than specifically to working with trauma. For example, burnout may develop as a result of high workload, conflict between an individual and an organisation's goals, limited control over the quality of service provided etc. While burnout may occur more frequently in those who respond to traumatised populations, it does not capture the specific impacts experienced as a result of working with traumatic material.
- 8.8. The terms compassion fatigue and secondary traumatic stress attempt to describe the experiences of working with clients who have experienced trauma, however they do not fully capture the cognitive changes that can occur as a result of trauma work. In the early 1990's Karen Saakvitne and Lorraine Pearlman suggested that impacts from working with

²³ See for example, Figley, C. R. (1995). Compassion fatigue as secondary traumatic stress disorder: An overview. In C.R. Figley (Ed.). *Compassion fatigue: Coping with secondary traumatic stress disorder in those who treat the traumatized*, (pp. 1-20). New York, NY: Brunner/Mazel.

²⁴ See for example, Pearlman, L. A. (1995). Self-care for trauma therapists: Ameliorating vicarious traumatisation. In B. H. Stamm (Ed.), *Secondary traumatic stress: Self-care issues for clinicians, researcher, and educators* (2nd ed., pp. 51-64), Lutherville, MD: Sidran Press.

²⁵ See Morrison, Z. (2007). Feeling heavy: Vicarious trauma and other issues facing those who work in the sexual assault field. *Australian Centre for the Study of Sexual Assault Wrap*, 4. Melbourne: Australian Institute of Family Studies.

²⁶ Jenkins, S. R., and Baird, S. (2002). Secondary Traumatic Stress and Vicarious Trauma: A Validation Study. 15(5) *Journal of Traumatic Stress* 423; Morrison, Z. (2007). Feeling heavy: Vicarious trauma and other issues facing those who work in the sexual assault field. *Australian Centre for the Study of Sexual Assault Wrap*, 4. Melbourne: Australian Institute of Family Studies.

²⁷ Figley, C. R. (Ed.) (2002). *Treating Compassion Fatigue*. Philadelphia: Brunner/Rutledge; Coles, J., Astbury, J., Dartnall, E. & Limjerwala, A. (2014). A qualitative exploration of researcher trauma and researcher's responses to investigating sexual violence. *Violence Against Women*, 20(1), 95-117. doi:10.1177/1077801213520578.

²⁸ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 1488. The term 'burnout' is also used in another source referenced in the Issues Paper: Lisa Morgillo. (2015) *Do Not Make Their Trauma Your Trauma: Coping With Burnout as a Family Law Attorney*. 53(3) *Family Court Review* 456.

people who have experienced trauma can also include cognitive changes such as altered beliefs about the world, others and the self.²⁹ The concept of vicarious trauma was developed to capture both clusters of symptoms: of secondary traumatic stress *and* changes to cognitive schemas.

- 8.9. In order to promote the wellbeing of family law professionals and judicial officers, it is important to address both secondary traumatic stress and cognitive change symptoms. As such, R&DVSA submit that the ALRC should adopt the concept of vicarious trauma.

Recommendation 1: The concept of vicarious trauma should be preferred over other concepts such as burnout, compassion fatigue or secondary traumatic stress when considering the professional wellbeing of family law professionals and judicial officers.

A work, health and safety issue

- 8.10. R&DVSA hold the view that the only reliable predictor of whether or not a person will experience vicarious trauma is their exposure to traumatic material.³⁰ Given that family law work inevitably involves significant contact with traumatic material, VT represents a work, health and safety risk for family law professionals and judicial officers.
- 8.11. This conceptualisation of VT as a work, health and safety issue has two important implications. First, it becomes clear that managing VT is an organisational responsibility. Second, this conceptualisation emphasises that VT is a legitimate response to the nature of the work rather than a result of any personal inadequacy or weakness.

Recommendation 2: Vicarious trauma should be considered a work, health and safety issue to emphasise that organisations have a duty to implement risk management strategies.

The need for a proactive approach

- 8.12. Although the risks of VT cannot be altogether eliminated, research suggests that VT effects can be ameliorated if proactively addressed at an organisational level.³¹
- 8.13. Implementing a VT management program will inevitably involve up-front expenditures. However, the experience of R&DVSA demonstrates that a proactive approach has the potential to reduce both human and financial costs significantly.

²⁹ Saakvitne, K. W., and Pearlman, L. A. (1996). *Transforming the Pain: A Workbook on Vicarious Traumatization*. New York: W. W. Norton & Company.

³⁰ Some literature suggests that individual differences can predict whether a person will experience VT symptoms, such as a person's previous trauma history, age, gender, social support, education, and coping styles. However, there is a significant body of research which shows that exposure to traumatic material is the only variable that reliably and significantly predicts VT. See, for example: Kassam-Adams, N. (1995). The risks of treating sexual trauma: Stress and secondary trauma in psychotherapists. In B. H. Stamm (Ed.), *Secondary traumatic stress: Self-care issues for clinicians, researchers, and educators* (2nd ed., pp. 37-48); Lutherville, MD: The Sidran Press; Salston, M. D., & Figley, C. R. (2003). Secondary traumatic stress effects of working with survivors of criminal victimisation. *Journal of Traumatic Stress, 16*(2), 167-174; Schauben, L. J., & Frazier, P. A. (1995). Vicarious trauma: The effects on female counsellors of working with sexual abuse survivors. *Psychology of Women Quarterly, 19*, 49-64.

³¹ Cerney, M. S. (1995). Treating the "heroic treaters". In Figley, C. R. (Ed.), *Compassion Fatigue*, (pp. 131-148). New York: Brunner/Mazel; Sansbury, B. S., Graves, K., & Scott, W. (2015). Managing traumatic stress responses among clinicians: Individual and organizational tools for self-care. *Trauma, 17*(2), 114-122. doi:10.1177/1460408614551978; Sexton, L. (1999). Vicarious traumatization of counsellors and effects on their workplace. *British Journal of Guidance and Counselling, 27*(3), 393-403.

- 8.14. Where vicarious trauma is not managed proactively, there are likely to be serious and long-term impacts on:
- Employees' physical and mental wellbeing;
 - Employee work performance
 - Collegial relationships
 - Workplace culture
 - Staff attrition rates
 - Unplanned absences from the workplace and
 - Worker compensation claims.
- 8.15. It is possible these impacts may partially explain the high number of complaints made against lawyers practising in the area of family law, as suggested in ALRC Issues Paper 48.
- 8.16. An internal analysis of R&DVSA's VT Management Program shows that a proactive approach may significantly alleviate these impacts. After ten years of implementation, the percentage of sick leave entitlements taken by R&DVSA staff had dropped by 50 per cent. The number of workers compensation claims had also reduced from approximately one claims per year to none over a period of ten years.
- 8.17. R&DVSA estimate that our organisation has saved approximately \$250,000 per year through the implementation of our VT Management Program. These savings were achieved as a result of lowered insurance premiums, fewer insurance claims, and reduced costs associated with sick leave, staff attrition and responding to maximal VT impacts.
- 8.18. R&DVSA recommend that the ALRC consider how best to ensure that family law professionals and judicial officers have access to a proactive VT management program.

Recommendation 3: There must be a proactive approach to VT management for family law professionals and judicial officers.

Best Practice VT Management Program

- 8.19. The best practice R&DVSA VT Management Program includes five components: education, risk reduction, monitoring, early intervention, and offsetting symptoms.
- 8.19.1. **Education** includes strategies to ensure that workers are aware of the risk of vicarious trauma and have the knowledge and skills necessary to identify it early in themselves and in their subordinate staff. Education is critical to establishing a culture in which staff feel as though they can discuss VT without fear that it will impact their performance appraisal.
- 8.19.2. **Risk reduction** includes strategies to ensure that vicarious trauma symptoms do not escalate to become maximal impact symptoms. This may include strategies to encourage ongoing communication with peers through opportunities to debrief, varying workers' caseloads and facilitating trauma-free areas and activities.
- 8.19.3. **Monitoring** involves regular monitoring strategies designed to provide a reflection of the severity and type of vicarious trauma symptoms present for individual workers and the collective workforce. This may be achieved through psychometric testing, monitoring associated factors such as unplanned absence and retention rates, and comprehensive supervision practices.

8.19.4. **Early intervention** includes the use of strategies to intervene in vicarious traumatisation immediately upon the discovery of symptoms. This may include making on-call counselling support available for professional who notice VT impacts.

8.19.5. **Offsetting symptoms** involves longer term proactive strategies that seek to offset the particular symptoms that each individual is most likely to experience. This may involve developing individual self-care plans with staff and providing financial support for activities that may offset vicarious trauma symptoms.

Recommendation 4: Trauma specialists should be engaged to develop a program designed to manage vicarious trauma for family law professionals and judicial officers which incorporates education, risk reduction, monitoring, early intervention and offsetting symptoms.

9. Privilege for confidential counselling records

- 9.1. R&DVSA has serious concerns about the absence of protections for confidential counselling records in the family law system.
- 9.2. Currently, the FLA protects the confidentiality of records created by accredited Family Dispute Resolution Practitioners (FDRP) or accredited Family Counsellors (FC) as well as records created as a result of a referral to an associated professional by an accredited FDRP or accredited FC. However, there are no specific protections for other service providers and record holders, such as counselling organisations like R&DVSA.
- 9.3. This means that parties regularly issue subpoenas for the production of confidential counselling records that contain sensitive information about the client's experiences of sexual, family or domestic violence.
- 9.4. Where counselling records are produced against the client's wishes, this may have negative impacts not only on the subject of those records, but also on other people who have experienced sexual assault, domestic and family violence, and support services more broadly. For example:
 - 9.4.1. The client may feel violated or traumatised and experience heightened trauma impacts including feelings of shame, guilt, fear or disconnection from community;
 - 9.4.2. There may be damage to the relationship of trust and confidence between the counsellor and client and consequently, to therapeutic outcomes;
 - 9.4.3. There may be a risk of further harm to the client, where an offender uses sensitive information in order to disadvantage, intimidate, humiliate or stigmatise them or obtains other sensitive information that may enable ongoing abuse;
 - 9.4.4. Information obtained from the notes may be used to damage a child's relationship with one or both parents;
 - 9.4.5. Where there are current police investigations, production may prejudice future criminal proceedings and circumvent protections provided by Sexual Assault Communications Privilege; and
 - 9.4.6. Other people who have experienced sexual assault, domestic or family violence may be less willing to report to service providers and access counselling services;

9.4.7. Counselling services may be incentivised to adopt practices designed to protect their client's notes, such as minimal record keeping or making dummy files, even though these practices inhibit the counselling relationship and reduce the accountability of counsellors.

9.5. The potential impact on reporting rates is supported by findings in a 2005 report by the Australian Institute of Criminology (AIC) that:

key concerns influencing the decision whether or not to report an assault to the police are confidentiality, fear of the assault becoming public knowledge, and the possibility of a defence lawyer being able to access details of medical and sexual histories.³²

9.6. As such, R&DVSA submit that the ALRC should consider the need for greater protections for the use of confidential counselling records in family law proceedings, subject to the paramount consideration of the best interests of the child.

Recommendation 5: The ALRC should consider the need for greater protections for the use of confidential counselling records in family law proceedings, subject to the paramount consideration of the best interests of the child.

Limited forensic relevance

9.7. R&DVSA acknowledge there may be certain circumstances where it is necessary to adduce confidential counselling records in order to uphold the best interests of the child.

9.8. However, we submit that in the vast majority of circumstances, counselling records will have limited relevance to family law matters. This is because the purpose of counselling records is therapeutic, not investigative or forensic. They record the counsellor's observations and opinions about the emotional and psychological responses of the client, rather than any forensic assessment of the facts of the matter.

9.9. In the 2005 review of the Evidence Act 1995 (Cth), the Commissions' found that:

disclosures made in a counselling context may well be misleading for a credit purpose due to the nature of the counselling relationship, the nature of the particular offence, and to the variances in the way that counsellors take notes.

Counsellors' notes are generally made for the purpose of providing therapy to the client, and not as a record of the assault. As part of the counselling process, a victim of a sexual assault is likely to discuss feelings of his or her own shame and guilt, and may disclose prior assaults or be unclear about the events surrounding the assault.

This Inquiry has heard that, depending on the policies of the counselling service and the individual counsellor's preference, notes may be taken as a stream of consciousness or they may have the views of the counsellor interspersed with those of the client. The actual 'evidence' or facts of the case may be quite different to what is represented in the notes. In most counselling practices, a client does not have an opportunity to check the notes that are taken, and so will not be able to correct the

³² Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [15.78], referring to D Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (2005) Australian Institute of Criminology, Canberra, 36.

counsellor if an inaccurate version of his or her comments are recorded. Their forensic value cannot be equated to a police statement or other account.³³

9.10. The following R&DVSA practices further demonstrate the potential for counselling records to be misused or misinterpreted in family law proceedings:

9.10.1. R&DSVA counsellors often record the nature of any sexual, family or domestic violence in the client's file using a single dot-point summary. This approach is designed to facilitate easy handover within our team-based phone counselling practice. However, this practice may disadvantage a client where the court assumes the file note represents a complete record of all allegations made by the client.

9.10.2. R&DVSA counsellors regularly record client's cognitive alterations which may include negative beliefs about the self and/or positive reflections of the alleged perpetrator. The purpose is to record the impacts of trauma experienced by the client in order to facilitate effective therapeutic intervention. For example, a counsellor may record that a client has said she is a 'hopeless parent' and has 'failed her children' in order to signal the need for psycho-education around the causes and consequences of family violence. However, this practice may serve to disadvantage a client where the court misinterprets these notes as a forensic assessment by the counsellor.

9.10.3. R&DVSA counsellors may sometimes discourage clients from revisiting trauma material and instead focus on strategies designed to establish safety or enhance day-to-day functioning. This approach accords with our stage-based model of trauma recovery. However, as a result, R&DVSA counselling notes often contain little detail about the client's allegations of violence. This absence of detail may be used to discredit the client by suggesting the allegations were invented retrospectively.

9.11. These examples demonstrate the discord between effective therapeutic practice and the use of counselling records in family law proceedings.

9.12. Even where counselling file notes do contain information that may be relevant to the court's task to determine the best interests of the child, there is often alternative evidence that is more appropriate for legal purposes. In many Australian states, counsellors are covered by mandatory reporting legislation that requires counsellors to report information where a child is being exposed to family violence. Often, it may be more appropriate to seek information from child protection agencies given these agencies have investigative powers and operate with a forensic purpose.

A qualified privilege

9.13. In recognition of the public interest in preserving the confidentiality of counselling relationships, every state and territory in Australia has enacted legislation since the mid 1990s designed to limit the disclosure of communications made in the course of a confidential relationship between a victim of sexual assault and a counsellor. However, the Commonwealth remains the only jurisdiction that does not have a sexual assault counselling privilege.

9.14. R&DVSA recommend that a qualified privilege for confidential counselling communications be inserted into Commonwealth legislation that covers family law proceedings. This may

³³ Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [15.75].

be either the FLA or the *Evidence Act 1995* (Cth). The ALRC should consider extending the privilege to both sexual and family violence.

- 9.15. A qualified privilege would strike an appropriate balance between the need to uphold the best interests of the child and the public interest in preserving the confidentiality of counselling records.
- 9.16. By creating a requirement that a party seek leave in order to compel, adduce or produce evidence of confidential counselling records, the privilege would reverse the onus from parties who have experienced violence or counselling professionals, to the party seeking access to the records. However, parties should still retain the right to object to production even where leave is granted to issue the subpoena.
- 9.17. In determining whether to grant parties leave, the court should be required to satisfy itself that the evidence is necessary in order to determine the best interests of the child and that there is no alternative source of evidence available that would be less intrusive to the person who has been impacted by sexual, family or domestic violence.
- 9.18. In order for the qualified privilege to be effective, it is critical that individuals and counselling services wishing to object to the production of confidential counselling records have access to legal support. As such, we submit the Australian Government should establish and fund a legal service to provide free advice and representation to individuals and counselling services wishing to object to the production of confidential counselling records. This service could operate in a similar way to the Sexual Assault Communications Privilege Service in NSW.

Recommendation 6: Insert a qualified privilege for confidential counselling communications into Commonwealth legislation that requires a party to seek leave in order to compel, adduce or produce evidence of a confidential counselling record into family law proceedings.

Recommendation 7: When determining whether to grant leave, require the court to satisfy itself that the evidence is necessary in order to determine the best interests of the child and that there is no alternative source of evidence available that would be less intrusive to the person who has been impacted by sexual, family or domestic violence.

Recommendation 8: The Australian Government should establish and fund a legal service to provide free advice and representation to individuals and counselling services wishing to object to the production of confidential counselling records.

10. Full list of recommendations

- **Recommendation 1:** The concept of vicarious trauma should be preferred over other concepts such as burnout, compassion fatigue or secondary traumatic stress when considering the professional wellbeing of family law professionals and judicial officers.
- **Recommendation 2:** Vicarious trauma should be considered a work, health and safety issue to emphasise that organisations have a duty to implement risk management strategies.
- **Recommendation 3:** There must be a proactive approach to VT management for family law professionals and judicial officers.
- **Recommendation 4:** Trauma specialists should be engaged to develop a program designed to manage vicarious trauma for family law professionals and judicial officers which

incorporates education, risk reduction, monitoring, early intervention and offsetting symptoms.

- **Recommendation 5:** The ALRC should consider the need for greater protections for the use of confidential counselling records in family law proceedings, subject to the paramount consideration of the best interests of the child.
- **Recommendation 6:** Insert a qualified privilege for confidential counselling communications into Commonwealth legislation that requires a party to seek leave in order to compel, adduce or produce evidence of a confidential counselling record into family law proceedings.
- **Recommendation 7:** When determining whether to grant leave, require the court to satisfy itself that the evidence is necessary in order to determine the best interests of the child and that there is no alternative source of evidence available that would be less intrusive to the person who has been impacted by sexual, family or domestic violence.
- **Recommendation 8:** Establish and fund a legal service to provide free advice and representation to individuals and counselling services wishing to object to the production of confidential counselling records.