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ARC Centre of Excellence for the Elimination of Violence Against Women

First Nations Women's Engagement with the Family Law System in the Context of Family Violence

The Evidence Base

Australian Research Council Centre of Excellence for the Elimination of Violence Against Women
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The Australian Research Council Centre of Excellence for the Elimination of Violence Against Women acknowledges the Traditional Custodians of the lands on which our various nodes stand and whose cultures and customs have nurtured and continue to nurture these lands. We pay our respects to Elders past and present. We extend our respects to all Aboriginal, Torres Strait Islander, and other Indigenous peoples around the world.

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CEVAW
ARC Centre of Excellence for the Elimination of Violence Against Women

The Australian Research Council Centre of Excellence for the Elimination of Violence Against Women (CEVAW) aims to transform our understanding of gender-based violence by examining the structural drivers that cause and compound violence, while pioneering evidence-based approaches to improve policy and practice across Australia and the Indo-Pacific. The Centre mobilises survivor-centric and Indigenous methodologies, interdisciplinary collaborations, and Indo-Pacific partnerships to deliver scalable solutions across legal, security, economic, health, and political systems.

Participating Organisations

Women's Legal Services Australia	Women's Legal Services Australia is the national peak body for 13 specialist Women's Legal Services in each state and territory across Australia, including two First Nations Women's Legal Services. WLSA provides a national voice for Women's Legal Services to influence policy and law reform, and advocates to increase access to gender-specialist, integrated legal services for women.
THE UNIVERSITY OF MELBOURNE	The University of Melbourne is one of six Australian universities participating in CEVAW, providing critical research expertise, infrastructure and leadership to advance the Centre's objectives.

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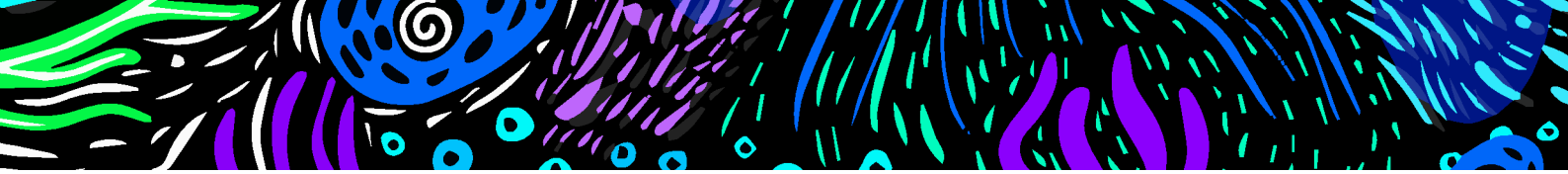

Abstract

This review focusses on First Nations women's engagement with the family law system, especially in the context of family violence (FV). It consolidates key considerations gathered from existing research about, and by, First Nations people and their engagement with colonial structures and institutions, focussing on the family law system.

In Australia, there has been growing recognition and understanding of the impacts of colonisation and historic and contemporary oppressive and discriminatory policies and practices on First Nations people and communities, both at an interpersonal level and in how systems and services are designed and delivered. This has underpinned efforts to reform systems and services with the aim to improve the accessibility, equity, inclusiveness and outcomes for First Nations women.

First Nations women face a significantly higher risk of FV than non-First Nations women and are also at greater risk of having their children removed from their care by state-based child protection agencies – potentially as a result of FV, institutional racism and other factors. The family law system may offer some protection against child removal. As such, identifying barriers and exploring how these barriers to the family law system can be dismantled for First Nations women is a vital component of Australia's strategy to reduce FV risks and harm. Targeted consideration of the legal and non-legal drivers and barriers First Nations women experience when engaging, or considering engaging, with the family law system is crucial.

This review finds that there has been limited research specifically on First Nations women's engagement with family law in the context of FV. Further research to identify and understand the needs of First Nations women in the family law system, especially in the context of FV, is necessary. Further analysis of available data from family courts, family law cases, support services and research with service providers and victim-survivors is needed to better understand the dynamics and drivers of First Nations women's engagement with the family law system. This is required to continue to enhance accessibility, equity, inclusiveness and outcomes for First Nations people and to prioritise the identification of systemic reform and to highlight required service changes and other reforms as part of this endeavour. Additionally, further research is needed to provide a clear evidentiary basis to understand what is working well and to inform recommendations to reform the ways in which the family law system can best work to meet the needs of First Nations women who have experienced FV.

This review developed out of a partner project between Women's Legal Services Australia (WLSA) and the Centre of Excellence for the Elimination of Violence Against Women. WLSA is a peak body for two First Nations Women's Legal Services, Wirringa Baiya Aboriginal Women's Legal Centre and First Nations Women's Legal Service Queensland, and other Women's Legal Services that provide legal assistance and support services to First Nations women. The focus of our review is grounded in what our partner, WLSA, has identified as a key priority area in terms of practically-oriented research that is needed on the ground.

Introduction

Centre of Excellence for the Elimination of Violence Against Women (CEVAW) has partnered with Women's Legal Services Australia (WLSA) to explore how, when, and why First Nations women who have experienced family violence (FV) engage with the family law system, the barriers to their engagement, and the advantages and disadvantages they experience in their engagement with the family law system.

This review focusses on First Nations women's engagement with the family law system, especially in the context of FV.[1] It consolidates key considerations gathered from existing research about, and by, First Nations people and their engagement with colonial structures and institutions, focussing on the family law system.

In Australia, there has been growing recognition and understanding of the impacts of colonisation and historic and contemporary oppressive and discriminatory policies and practices on First Nations people and communities, both at an interpersonal level and in how systems and services are designed and delivered (Allison et al., 2017; Kha & Ratnam 2022). This understanding has underpinned efforts to reform systems and services with the aim to improve the accessibility, equity, inclusiveness and outcomes for First Nations women (e.g. see FCFCOA nd; Laing et al., p.2018, 218; and see generally Section 3 of this review).

Some research suggests that the family law system can be protective for some women who have experienced FV (Kaye et al. 2005; Jeffries et al. 2016), including for some First Nations women who have experienced FV (ABC 2023; Titterton 2018). Walsh et al. (2023) interviewed lawyers and others who worked with clients across the child protection system in Queensland, but who also sometimes worked in the family law system. While Walsh et al. did not focus specifically on First Nations peoples' experiences, their study concluded that 'family law proceedings are an untapped resource for many parent respondents (and other potential carers) in the child protection system... it offers judicial oversight, counselling and alternative dispute resolution services that could benefit protective parents ...' (2023, p.172). First Nations women face a significantly higher risk of FV than non-First Nations women (AIHW 2024c) and are also at greater risk of having their children removed from their care by state-based child protection agencies (SNAICC 2024) – potentially as a result of FV. As such, identifying barriers and exploring how these barriers to the family law system can be dismantled for First Nations women is a vital component of Australia's strategy to reduce FV risks and harm. Targeted consideration of the legal and non-legal drivers and barriers First Nations women experience when engaging, or considering engaging, with the family law system is crucial (Australian Human Rights Commission 2020, p.15).

1. Background

The Australian family law system encompasses legal aspects of family relationships, including separation, divorce, care of children, child support, and the division of property (*Family Law Act 1975* (Cth)). As part of the family law system, the Australian Government funds a range of free and low-cost services including legal services, mediation services, advice lines and financial counselling (Attorney General's Department, 2024). The family law system is important in responding to FV when there are concerns for a child's safety when in the care of a parent, or when there are concerns of ongoing abuse and coercion by a FV-perpetrating parent. Court orders that determine parental responsibility and care arrangements may mitigate risks of ongoing abuse (Kaye et al. 2005; Jeffries et al. 2016). Family court orders can also bolster state-based FV orders through closing loopholes that may provide the perpetrator with opportunities to continue abuse both of the other parent and/or the children of the relevant relationship (Stambe and Meyer 2023; Carson and Dunstan 2018). For example, in cases where there are no family law orders in place regarding care arrangements and contact with children, it may be difficult in some cases for police to enforce FV orders (e.g. Douglas, 2021).

First Nations women are at greater risk of all forms of violence and related death compared to other Australian women, and the majority of this violence is FV (AIHW 2024c). Two in three First Nations people

[1] In general, we use the term family violence (FV) as defined in the *Family Law Act 1975* (Cth), section 4AB. Note also we have generally used the terms First Nations and non-First Nations unless we directly quote from a source and then we use the language from that source (e.g. Indigenous, non-Indigenous).

aged 25 and over who had experienced physical harm in the last 12 months reported the perpetrator was an intimate partner or family member (AIHW 2024c).

In 2023, Federal Circuit and Family Court of Australia Judge Matthew Myers echoed research by Adelaide Titterton, highlighting that family law can serve as a proactive and protective jurisdiction for First Nations families who have concerns for children's safety (ABC 2023; Titterton 2018). Judge Myers suggested that the family law system can facilitate and support care arrangements across kinship groups and provide for the rights and needs of First Nations children, upholding principles of cultural identity, and thereby affording consideration for First Nations children in ways that State-based child protection jurisdictions may not (ABC 2023; *Family Law Act 1975* ss 60CC(3), 61F; SNAICC 2024). Engagement with the family law system may be one way that First Nations children could remain in the care of their family and community, rather than in the care of child protection authorities (Titterton 2017).

Concerns about the accessibility and availability of the family law system and associated services have been widespread and discussed extensively in the literature. These concerns have highlighted, both by direct example or inference, that there are additional hurdles for First Nations people and communities to access the system as compared to non-First Nations people.

In April 2019, the Australian Law Reform Commission Inquiry into the Family Law System was tabled in Federal Parliament (ALRC 2019). This is the most recent comprehensive review of the family law system. The ALRC found the need for tailored approaches for Aboriginal and Torres Strait Islander peoples and families but did not specifically focus on the ways the system could better respond. The ALRC recommendations included legislative amendments to emphasise the importance of culture in determining a First Nations child's best interests and understandings of 'family,' but did not explore in detail the barriers faced by First Nations people and families when attempting to engage with the system (2019, p.16). However, we note that in response to this Inquiry, the *Family Law Amendment Bill 2023* implemented recommendations regarding kinship understandings of parenting (see further detail in Section 3.2 of this review).

The 2017 Parliamentary Inquiry (SCSPLA 2017) into how family law systems can better support those affected by FV identified several barriers for First Nations people to engage with the family law system. These included: (SCSPLA 2017, 231)

- Impacts of intergenerational trauma
- Fears of child protection involvement due to family law proceedings
- Physical access barriers due to travel to urban-centric court buildings and services
- Economic barriers
- High literacy and communication requirements by the family law system
- Lack of culturally appropriate services
- Housing issues

An earlier 2012 Family Law Council report echoed some of these concerns and specifically focused on the needs of Aboriginal and Torres Strait Islander family court users. The Family Law Council (2012) report recommended improvement of the family law system's capacity to respond to Aboriginal and Torres Strait Islander clients. Recommended improvements included education programs, increased practitioner cultural competency, and building a more diverse workforce in the family law system (Family Law Council 2012). The Family Law Council found that there were at least 9 barriers for Aboriginal and Torres Strait Islander peoples to engaging with the family law system. These included: (Family Law Council 2012, p.40)

- Avoidance and resistance of all legal systems due to the impact of past discriminatory laws and policies
- Confusion by and of legal processes and laws
- High literacy and communication requirements by the family law system
- Lack of culturally appropriate services and outcomes
- Courts and services located in urban or otherwise geographically isolating locations

- Family violence
- Siloed support across intersecting needs
- Unwelcoming court buildings
- Fear of government agencies

These findings and recommendations were echoed again in the Family Law Council's 2015 and 2016 reports, and the House of Representatives Standing Committee on Social Policy and Legal Affairs ('SCSPLA') report in 2017 (Family Law Council 2015; Family Law Council 2016; SCSPLA 2017). The reiteration of similar findings over 10 years highlights the lack of progress and the need for change. Such change must be led by First Nations people and communities to inform to ensure the family law system is accessible and inclusive.

2. Barriers to Engagement

2.1 Introduction

As the various report findings outlined in the previous section show, the way in which First Nations people engage with systems is influenced by the impacts of historic and contemporary discrimination, racism and bias (Australian Human Rights Commission 2024). First Nations people are often compelled to engage with legal systems, such as child protection, criminal law, and even the FV order system where police can apply for an FV order in the absence of the party's consent (Nancarrow 2019).[2] As we discuss further below, these systems have often delivered injustices to First Nations people.

The family law system is different to these other systems as it requires the party who wants an order to apply for one. However, the decision to apply and to engage with the family law system is compromised by the experience of compelled engagement, systems abuse, and associated injustices. It is also important to note that for some First Nations people the effect of an application by one party is that the other person must engage with the family law system if they want to resist the application being made. For example, if a father makes an application for contact with children and a mother does not want the father to have that contact, in order to resist the application, she will need to respond to the application. The factors influencing whether First Nations women, particularly those who have experienced FV, choose to apply for an order in the family law system are explored below.

There have been long-standing concerns that the family law system is under-utilised by First Nations women (Family Law Council 2012; Kaspiew 2012; Langton et al. 2020; Titterton 2018). In its 2003 survey on responses to legal incidents among 2,431 people residing in New South Wales, including 80 members of the sample who identified as 'Indigenous', Coumarelos et al. (2006, 88) found that Indigenous respondents were 2.1 times more likely than non-Indigenous respondents to report family law events. Overall, Indigenous respondents were much more likely to report 'doing nothing' in response to a range of legal events, including family law, than non-Indigenous respondents (50.9% of First Nations people compared to 32.8% of non-Indigenous people) (Coumarelos et al. 2006, p.98, 99).

Kaspiew (2012, 260) points out that almost 55% of First Nations children under 15 years live with two parents and in contrast 82.2% of non-First Nations children in the same age bracket live with two parents. Given this, it might be expected that a higher proportion of First Nations people may be assisted through family law arrangements.

Recent research into the legal and non-legal drivers of First Nations peoples' interactions with the family law system have predominantly focused on the overrepresentation of First Nations people in other legal systems including criminal law, FV (specifically the FV order system), and child protection, as well as the continuing interpersonal and systemic impacts of colonisation (Allison et al. 2017). Findings about experiences with these other systems are helpful when building understanding about the context in which First Nations women who have experienced FV, and potentially their advisers (in both legal and non-legal services), may think about the family law system. Experiences with other legal systems shed light on systemic biases and racism,

[2] Note that civil family violence orders have different names in each state and territory in Australia, we refer to these orders as family violence (FV) orders in this review. (For further in formation see Australasian Institute of Judicial Administration 2024, para. [7.1])

the mistrust of colonial institutions and legal frameworks, and highlight the necessity of cultural fitness and competency of legal system responses if they are to be utilised by First Nations people.

The remaining parts of Section 2 will summarise the intersecting themes of these findings and consider how they may inform understandings about First Nations women and their engagement with the family law system – especially where there is a history of FV.

2.2 Colonisation

Australia's colonial history, and the associated violence inflicted upon First Nations people, communities, and cultures, continue to have a profound contemporary impact. These historical injustices have eroded trust and confidence in colonial structures and systems (Australian Human Rights Commission 2020; DATSIPD 2000, p.xii, 46, 50). Oppressive laws and regimes, enforced by police and courts, included restrictions on where First Nations people and families could live and travel, whom they could marry, and their right to work and receive fair wages (ALRC 2010). These policies forced First Nations people onto reserves and missions and prohibited the practise of culture including prohibition on speaking First Nations languages (ALRC 2010). The forcible removal of children from their families and Country impacted significantly on First Nations social structures, leading to profound marginalisation (Australian Human Rights Commission 2020). The legacy of these laws, compounded by ongoing racism, discrimination and systemic exclusion, has had significant and long-lasting effects on the health and wellbeing of First Nations people. This history has fostered intergenerational distrust towards, and resistance against, colonial structures and institutions (Australian Human Rights Commission 2020; COIQPSDFV 2022).

The Wiyi Yani U Thangani Report highlighted the enduring impacts of Western systems on First Nations people and communities through history, and how they continue to affect First Nations women and girls today (Australian Human Rights Commission 2020). Wiyi Yani U Thangani found that government structures, including justice, child protection, FV and family law, are detached from the lived realities of First Nations women and families, and that even those systems designed to help continue to marginalise, isolate and oppress (Australian Human Rights Commission 2020). Wiyi Yani U Thangani identified priorities to address the underpinning issues of the continued disenfranchisement and highlighted the needs for systems reform (Australian Human Rights Commission 2020, p.34-36).

2.3 Discrimination, bias and racism

Discrimination and racism perpetrated against First Nations people and communities is well-documented, including by police and health systems (Judicial Council on Cultural Diversity 2016; COIQPSDFV 2022; DATSIPD 2000). Experiences of systemic racism undermine confidence in institutions and act as a significant deterrent to engagement. First Nations people identify racism, and a fear of experiencing racism, as a significant barrier to engaging with services, even when they have identified a need for support (AIFS 2020; Closing the Gap Clearinghouse 2013).

Dr Marlene Longbottom found that when First Nations women sought to report violence or seek assistance, they experienced explicit, and further traumatic incidents of racial and gender microaggressions targeted at them 'by a range of service providers, including government agencies such as the police, courts, health services, in addition to non-Aboriginal community services and private businesses' (2018). The women in Longbottom's study explained their experiences often resulted in a reluctance to report violence, or seek help, unless the violence was severe.

While stakeholders in Walsh et al.'s (2023) study pointed to the potential of the family law system to respond to the impacts of child protection engagements, Kerryn Ruska and Zoe Rathus have highlighted the risks of the family courts to, 'slide towards their own familiar norms' and continue to privilege parents over kinship carers, minimising the importance in First Nations communities of the role of the extended family and kinship relationships and obligations, even with legislative guidance (2010, 8). This risk may be particularly pertinent where the father is non-First Nations and the mother is First Nations. In cases where one party is non-First Nations there may be a risk that the non-First Nations person's version of events may be privileged by a non-First Nations decision-maker (Ransley and Marchetti 2001).

2.4 Services lack cultural competency, fitness and safety

The Indigenous Legal Needs Project identified that contact between First Nations people and private lawyers regarding civil and family law issues was not common, due to cost, accessibility and lack of cultural awareness (Allison et al. 2017). First Nations people are therefore almost entirely dependent on the public sector and the community legal assistance sector for support (Allison et al. 2017).[3] Limited services with limited capacity for the extensive assistance needed in often complicated family law processes do what they can to meet demands (Australian Human Rights Commission 2020; Mundy 2024, p. xvi). The lack of accessible and well-resourced culturally safe, trauma-informed, and FV-aware representation to provide information, advice and advocacy within the family law system remains a significant gap and barrier to accessing the family law system (Australian Human Rights Commission 2020). Videoconferencing has been proposed to go some way to address this, but does not overcome the barrier to building a relationship with a representative, and outreach needs to be regular and consistent, with a focus beyond criminal law and criminal court engagement (Cunneen et al. 2014).

First Nations people have identified a preference for Indigenous legal service assistance, where there is higher cultural capability, respect and understanding, but also a perception of greater trustworthiness with information (Allison et al. 2017). The disproportionate amount of Aboriginal and Torres Strait Islander Legal Service funding and resources devoted to criminal law cases compared to civil and family law matters creates barriers for those with experiences of FV or safety concerns (Allison et al. 2017). This concern has been longstanding and remains unaddressed despite multiple inquiry and research findings (Joint Committee of Public Accounts and Audit 2005; Mundy 2024). Langton et al. found that services which used culturally appropriate approaches to their delivery had the greatest success in smoothing access for First Nations clients (2020). This included: visible signposting that indicated First Nations people were welcome, including artwork and First Nations specific materials; staff well-informed about cultural safety principles; Aboriginal staff; and staff with in-depth knowledge about the complexity of FV for First Nations women and families. Systems and services must continue to enhance accessibility. With or without legal representation, a person engaging in the family court process faces costly filing fees and significant time investment in both waiting for listings and time before the court (Family Law Practitioners Association Queensland 2024).

2.5 Courts and services are located in urban centres or are otherwise geographically distant

Access to family law courts and services is difficult and lack of access is a significant barrier, particularly in regional and remote areas (SCSPLA 2017; Walsh et al. 2023, 170). Geographic barriers include the physical locality of courts and services, but also the impacts of weather events affecting transport, public transport service areas, and internet coverage and access to videoconference or remote engagement options. While 15% of First Nations people live in remote or very remote parts of Australia and face the barriers of remoteness, geography is also a barrier for some First Nations people living in urban areas due to limited access to (or cost of) transport and communication options including phones and internet (AIHW 2024b; Allison et al. 2017). The legal needs project research found geographical distance to be a significant barrier as First Nations people living in regional and remote areas are less likely to use phones or internet to make or retain contact with legal services located outside their community (Cunneen et al. 2014; see also Mundy 2024). As we consider in Section 3 of this review, specific services for First Nations people have been introduced but they are only available in some courts.

2.6 Confusion about family law systems, and high literacy and communication expectations

We note the claims of previous research that First Nations people may not engage with the family law system due to a lack of understanding of the legal processes and the potential benefits of engaging with them (Family Law Council 2012; Titterton 2018). With consideration of First Nations peoples' long history of oppression and marginalisation from, and by, colonial systems and structures, misunderstanding of complex legal institutions may be a barrier to engagement by First Nations people.

The 'high' English and legal jargon used by service providers, court staff, and in legal documents can create barriers for First Nations women to easily access legal assistance, particularly in a crisis or in distress

[3] Note the legal assistance sector includes Women's Legal Services, Community Legal Centres, Family Violence Prevention Legal Services, Aboriginal and Torres Strait Islander Legal Services and Legal Aid Commissions.

(Langton et al. 2020). The complexity of making an FCFCOA application can also be onerous or insurmountable with a minimum of 3 forms to file (FCFCOA 2022).

2.7 Child protection and the Stolen Generations

First Nations children are grossly overrepresented in the child protection systems across Australia. In 2024, 41% of all children in out-of-home care were First Nations, despite making up only 6% of the total child population in Australia (SNAICC 2024). This overrepresentation is complex and represents patterns of marginalisation, discrimination and intergenerational trauma (Swan and Swan 2023; McGlade 2018; Krakouer 2023; DATSIPD 2000, 101). The continued impacts of colonisation and associated discrimination also increase First Nations' peoples risk and experiences of poverty, unemployment, trauma and poor housing (AIHW 2024a). These social and economic hardships not only place strains on family stability but also draw attention from child protection agencies and referrers (Judicial Council on Cultural Diversity 2016; Langton et al. 2020).

Misperceptions and misunderstandings about First Nations families and culture further contribute to this over-surveillance and resulting intervention. Child protection systems are designed around Western/non-First Nations models of parenting and family structure, which may not align with Aboriginal and Torres Strait Islander cultural norms (SNAICC 2024). These cultural differences can result in child protection intervention based on biases or a lack of understanding about cultural dynamics and practices (Yoorrook Justice Commission 2023; Titterton 2017).

Systemic racism, biases and discrimination also impact the way First Nations families are treated by child protection services (Yoorrook Justice Commission 2023). Implicit bias among social workers, teachers, police, healthcare workers and others in, or referring into, the child protection system can lead to First Nations children being more likely to be referred, investigated and removed from their families, even when they may not be at greater risk than non-First Nations children (SNAICC 2024).

Child protection matters often overlap with family law matters so some families may be involved in cases in state-based child protection courts and in the federal family courts (Walsh et al., 2023, p.156; Family Law Council 2017, p.42-43). For example, parents may be disputing parenting arrangements in the family courts while at the same time the relevant state child protection agency may claim the child is at risk of harm if placed with one or both parents (Laing et al. 2018). Walsh et al. (2023, p.156; Family Court of Australia 2021, p.25) highlight that in 2020–21, 55% of all parties' applications to the Family Court for final orders included allegations of child abuse or a risk of child abuse.

If a child protection order is made by the relevant child protection authority, it will take precedence over any existing family law order (*Family Law Act 1975* s 69ZK). However, even in the absence of an order, *Family Law Act* provisions introduced in 2024 require child protection authorities to share information and records to the family courts when a relevant request is issued by the court (*Family Law Act 1975* Part VII, Div 8, Subdivision DA). While this information sharing is designed to ensure the courts are fully informed, it could contribute or lead to mistrust or anxiety, particularly if the child protection involvement has felt unfair or insufficiently sensitive to cultural dynamics.

Despite formal apologies and efforts to address the legacy of the Stolen Generations (e.g. Rudd, 2008), First Nations families continue to face disproportionate intervention by child protection authorities often based on cultural biases, and lack of support to address concerns arising from intergenerational trauma and marginalisation (SNAICC 2024; HREOC 1997; Douglas and Walsh 2013). The legacy of forced removal of children has created deep-seated fear (Langton et al., 2020, p.65) and reluctance to engage with the family law system (SCSPLA 2017). The close ties between child protection and the family law system, including mandatory reporting practices by agencies and the information sharing protocols of the family courts, may serve as significant deterrents to system engagement (for example *Child Protection Act 1999* Qld s 159M; *Family Law Amendment (Information Sharing Act) 2023;* AIJA 2024, para. [10.5]).

2.8 Criminal law and criminal justice systems

First Nations people are overrepresented in Australian criminal law systems. First Nations people are 3.8% of the Australian population, yet account for 32% of the prison population (AIHW 2024). Although most First Nations people will never come into contact with the criminal justice system, those who do are more likely to have faced multiple forms of disadvantage (Australian Human Rights Commission 2020). This

overrepresentation has been identified in multiple reports, particularly since the 1991 Royal Commission into Aboriginal Deaths in Custody, and has consistently been linked to over-policing, systemic racism and compounding systemic inequalities experienced by First Nations people and communities (ALRC 2017; Queensland Sentencing Advisory Council 2021). The recent Inquiries into the Queensland Police Service have found significant evidence of both sexism and racism linked to poor police responses (COIQPSDFV 2022; Queensland Human Rights Commission 2024). The Commission of Inquiry found that racist attitudes influenced how officers treated FV victim-survivors, placing them at risk of criminalisation if police name them as a respondent to an FV order (COIQPSDFV 2022; Douglas and Fitzgerald 2018).

The criminalisation of First Nations survivors of DFV is a problem of increasing urgency. Instead of providing protection under the civil FV order schemes, many First Nations women are being misidentified as the respondent and channelled into the criminal justice system through further systems failings or systems manipulation by their abuser (Douglas and Fitzgerald 2018; COIQPSDFV 2022; Australian Human Rights Commission 2020). The fastest growing prison population is First Nations women (ALRC 2017, p.22; Queensland Sentencing Advisory Council 2021). However, this data is not reflective of an actual increase in offending but highlights the failings of the criminal law system in responding to First Nations women (Change the Record 2021; Australian Human Rights Commission 2022, p.30). In recognition of this issue, the Central Australian Women's legal Service (CAWLS) has established a specialist criminal law practice to support women who have criminal matters before the courts (CAWLS 2024). In the Northern Territory First Nations women are significantly overrepresented in the prison population, experiencing incarceration at 14 times the rate of other women (Department of the Attorney General and Justice 2021, p.13). Such high rates of incarceration may operate as a disincentive to engage with the family law system, yet engaging with the family law system may help reduce incarceration.

Submissions to the ALRC (2017, p.326) review of incarceration and First Nations people claimed that access to civil or family law assistance may help reduce rates of incarceration. Women's Legal Service NSW stated in their submission:

> Access to legal services in prison is essential to help reduce the risk of prisoners reoffending and being re-incarcerated. This is because imprisonment often exacerbates civil law and family law issues which are interconnected with the criminal law issues... Maintaining this relationship has resulted in women calling us for early legal advice about their safety, arrangements for their children and assistance to avoid parole breaches, for example, by varying reporting conditions (ALRC 2017, p.327).

Similarly, the Queensland Law Society submission commented that:

> Incarceration of women has significant implications for families and can lead to family law and child protection issues. Women tend to be primarily caregivers for children and may be the only caregiver in a family. In these circumstances, incarceration can lead to children being placed in out of home care and triggering the entire child protection machinery, which often results in trauma to children, separation from family and community and difficulty achieving reunification. It can also place considerable pressure on extended families (ALRC 2017, p.377).

2.9 Family violence, misidentification and systems abuse

The frequency and scale of gender-based violence experienced by First Nations women have received national attention and significant research endeavours, and the Australian government has committed to a standalone First Nations Plan for Family Safety (Australian Government 2024). First Nations researchers and scholars have highlighted the problems of First Nations peoples' experience of FV in the contexts of colonisation and intergenerational trauma, and the need to respond to FV for First Nations women as an issue that affects the whole community, requiring a holistic response (Atkinson 1990; Langton et al. 2020). First Nations women are three times more likely to experience FV than non-First Nations women, and 34 times more likely to require hospitalisation (AIHW 2024c). First Nations women are also at far higher risk of intimate partner homicide, and eight times more likely to die due to assault than non-First Nations women (AIC 2022; Cripps 2023).

Embedded assumptions exist that First Nations women experience FV only from First Nations men (Longbottom 2018). However, the violence experienced by First Nations women is not only connected to colonisation and intergenerational trauma, but also interpersonal racism and sexism. The most recent 2021

census data (ABS 2023 – see graphs 5 and 6) reported that there were 159,843 ‘couples’ (defacto or married) where one or both partners identified as Aboriginal and/or Torres Strait Islander. Most of these (81.7%) were couples where one party identified as Aboriginal and/or Torres Strait Islander and the other as non-First Nations (ABS 2023). In all states and territories except for the Northern Territory, in at least 70% or more couples where one or both partners identified as Aboriginal and/or Torres Strait Islander, one of the members of the couple was non-First Nations. In the Northern Territory, in 71.8% of couples both partners identified as an Aboriginal or Torres Strait Islander person (ABS 2023). However, there is limited research about violence in couples where only one party is a First Nations person, with many reports focussed on the context of First Nations communities (see e.g. Guthrie et al, 2020).

The real and established risk of police racism impacting how police may penalise a First Nations victim-survivor, and the flow-on effects for how courts respond, isolates First Nations women from systems and services intended to support and enhance their safety (COIQPSDFV 2022; Langton et al. 2020, 30; Douglas and Fitzgerald 2018; Women’s Legal Service Victoria 2018). Lived experiences of systemic racism may also erode trust in systems to support them instead of their non-First Nations abuser in these cases. As observed by Ruska and Rathus’ Courts, courts are still lacking workforce diversity and judicial officers may slide towards their own norms when making decisions (2010).

However, First Nations women are not only overrepresented as victim-survivors of FV, they are also overrepresented in police and systems misidentification as the respondent or person using FV (COIQPSDFV 2022; Langton et al. 2020, p.21). Misidentification of First Nations women as perpetrators of FV is attributed to two key issues: stereotypes regarding victims, and the increased likelihood of First Nations women relying on resistive violence including the use of a weapon to overcome disparities in physical strength (Nancarrow 2019). Police stereotyping of First Nations women as just as violent as men indicates an ongoing failure by police to understand women’s use of force, particularly in the context of prolonged interpersonal and systemic victimisation (COIQPSDFV 2022).

First Nations women who experience FV have reported that they have felt police did not believe their disclosures of FV, the violence was minimised, or police misidentified them as the perpetrator (COIQPSDFV 2022; Langton et al. 2020, p.71; Women’s Legal Service Victoria, 2018). By the time First Nations women do seek assistance from police or courts, it is likely they have endured abuse for an extended period of time, and that the violence has escalated significantly (COIQPSDFV 2022). As a result, police are often responding to First Nations women at a crisis point, where there is also an increased chance that resistive violence will be used (Nancarrow 2019). Poor police responses in this context exacerbate the historical distrust of police and the FV system.

When First Nations women are dismissed or criminalised when seeking help from police or the courts, mistrust in the legal system is intensified and can leave a person feeling abandoned and less likely to call for assistance when their safety is at risk in the future (Langton et al. 2020; COIQPSDFV 2022). Fears of child safety involvement due to reporting FV are also high and often justified (Longbottom et al. 2019).

It is estimated that up to 90% of violent incidents against First Nations women go undisclosed (Willis 2011; Langton et al. 2020, p.21). Accurate rates of FV experienced by First Nations people are difficult to establish due to: underreporting, lack of accurate or consistent recording of incidents by police and service providers, variations in police responses to reports of FV, and misidentification by police and courts of the person most in need of protection (Olson and Lovett 2016).

As is clear from Part 2 of this review (see 2.2−2.4; 2.7; 2.9) there are many reasons why First Nations women may not report FV or may be less likely to engage with legal processes. Reasons may include the fear and risk that the person who has used violence might be criminalised and incarcerated.
For example, in an interview study about FV and legal systems engagement First Nations woman, Cassie explained, regarding her First Nations partner and the father of their children:

> Like I keep saying I don't want to give up on him because everybody is - in his whole life, he's always had people give up on him. I keep saying I don't want to do that...He hasn't got anyone else. I don't want my kids’ father to be out on the street. (quoted in Douglas 2021, p. 116).

Concerns about reporting FV leading to criminalisation and incarceration may be heightened and the risk exacerbated if there are children and there are concerns the father could go to prison, or the children could be removed from care, particularly if there is also sexual assault, child abuse or other criminal conduct

(Langton et al. 2019, p.70). Langton et al. highlighted a range of reasons for First Nations women not to report FV including distrust of the police, fear of homelessness, fear of loss of financial support, and fear of isolation from family and ostracism from community and in many instances these concerns led to women disengaging with, or refusing to seek help from, family violence legal and support services (2019, p.70).

The continued failure by police and courts to understand the experiences and dynamics of FV for First Nations women, including how system responses help or hinder safety, creates barriers to engagement with legal systems in general and potentially the family law system specifically. The messages First Nations women receive from how the FV system fails to understand or respond to their needs and experiences informs how other, related systems, may also fail to understand and meet their needs.

Notably, if First Nations women's reports of violence are not documented or responded to, this can have implications for future family court matters. For example, assumptions may be made about women's credibility if they state they have experienced and reported abuse to police, but no record of a report exists.

FV is also a key consideration for family court due to the risks of systems abuse. There are long-standing concerns that family law proceedings are used to continue perpetrating abuse and harassment (Kaspiew et al. 2015). The risks of systems abuse going undetected are likely higher for First Nations women as it was reported to the Australian Human Rights Commission that First Nations women are, and feel, judged by lawyers and courts as being 'overly emotional and reactive' (2020, p.159). Langton et al. found that perpetrators of FV against First Nations women regularly engaged in systems abuse (2020).

3. First Nations Women's Engagement with the Family Law System

3.1 Introduction

The examination of different systems, particularly the child protection, criminal law and FV systems show the continued consequences of cultural assumptions and misunderstandings by both individuals within the system and the systems themselves. The poor response these systems have often delivered shows how and why distrust has been built, potentially this distrust extends to the family law system. In this section we identify developments with the family law system which seek to deal with these barriers. Despite the barriers faced by First Nations women who have experienced FV, First Nations women do engage with the family law system. We also consider the current engagement of First Nations women with the family law system through an overview of reported cases.

3.2 Federal Circuit and Family Court of Australia and change

3.2.1 The Family Law Act 1975 (Cth)

The Family Law Council has noted that unlike child protection statutes (Cripps and Laurens 2015), neither the *Family Law Act 1975* (Cth) (FLA) nor the *Family Court Act 1997* (WA) (FCA) includes an Aboriginal Placement Principle, nor is there a requirement for a cultural plan to be made in respect of First Nations children (Family Law Council 2015, 35). The Albanese government introduced changes to the *Family Law Act 1975* (Cth) aimed at strengthening First Nations peoples' cultural rights, by amending the definition of 'member of a family' and 'relative' and including protection of culture and language as a best interests factor (*Family Law Amendment Bill 2023* (Cth) Exposure Draft; see also Attorney General's Department 2023,p.15, 25-26). These changes came into effect in 2023 and are reflected in the current sections 4; 4(1); 4(1AB) and 60CC *FLA*.

Section 4(1) of the FLA defines '*Aboriginal or Torres Strait Islander culture'* in relation to a child:

> (a) means the culture of the Aboriginal or Torres Strait Islander community or communities to which the child belongs; and
>
> (b) includes Aboriginal or Torres Strait Islander lifestyle and traditions of that community or communities.[4]

[4] Note this provision has been in place since 2006 and is mirrored in section 5(1) *FLA*.

'Relative' of a child pursuant to section 4 *FLA* includes: 'for an Aboriginal child or Torres Strait Islander child- a person who, in accordance with the child's Aboriginal or Torres Strait Islander culture (including but not limited to any kinship systems of that culture), is related to the child.' 'Member of the family' includes 'relative' (section 4(1AB) *FLA*) and 'step-parent' includes a person who 'treats, or at any time while married to, or a de facto partner of, the parent treated, the child as a member of the family formed with the parent' (section 4(1) *FLA*).[5]

Section 60CC *FLA*, is titled 'How a court determines what is in a child's best interests' and sets out at sub-section 1(b) that if the child is an Aboriginal or Torres Strait Islander child the court must consider the matters set out in sub-section 3. Sub-section 3 sets out additional considerations regarding a child's right to enjoy Aboriginal or Torres Strait Islander culture:

> (3) For the purposes of paragraph (1)(b), the court must consider the following matters:
>
> (a) the child's right to enjoy the child's Aboriginal or Torres Strait Islander culture, by having the support, opportunity and encouragement necessary:
>
> (i) to connect with, and maintain their connection with, members of their family and with their community, culture, country and language; and
>
> (ii) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
>
> (iii) to develop a positive appreciation of that culture; and
>
> (b) the likely impact any proposed parenting order under this Part will have on that right.[6]

In considering the determination of parental responsibility or in identifying a person or persons who have exercised or may exercise parental responsibility the family courts must have regard to 'any kinship obligations, and child - rearing practices, of the child's Aboriginal or Torres Strait Islander culture' (section 61F *FLA;* see also section 61F *FCA*). This provision was in place since 2006. In 2024, there was a note added to section 61F *FLA* stating :'the expression *Aboriginal or Torres Strait Islander culture* is defined in subsection 4(1)'.

There has been no consideration of the changes introduced in 2024 and set out above. Case law discussion in the next part of this section relates to previous legislation, however, some cases emphasised the importance of proper recognition and consideration of First Nations culture in determining appropriate outcomes for children.

Case law consideration

In *Donnell & Dovey* [2010] FamCAFC 15 (*Donnell & Dovey* [2010]) the court found that consideration of s61F *FLA* was 'of crucial importance in any case involving an Indigenous child' [178]. The Full Court repeated an extract of the Explanatory Memorandum to section 61F when it was introduced in 2006 (Donnell & Dovey 2010, para. [330]):

> ... The purpose of this provision is to ensure that the unique kinship obligations and child-rearing practices (**such as the involvement of extended family**) of Aboriginal and Torres Strait Islander culture are recognised by the court when making decisions about the parenting of an Aboriginal or Torres Strait Islander child. This provision is consistent with other amendments **to facilitate greater involvement of extended family members in the lives of children** (bold in the reported case).

The court acknowledged that 'there are marked differences between Indigenous and non-Indigenous people relating to the concept of family' and that the Act enshrines particular assumptions about relationships between children and parents that are incompatible with Indigenous child-rearing practices (Dewar 1997 cited in *Donnell & Dovey* [2010] para. [321], [324]).

[5] Note that definitions of relative, family member and step-parent are slightly different/likely narrower in the Western Australian context, see sections 4(1) 'relative' 'step-parent'; 6 'member of the family'.

[6] See also section 66C(3)(h) *FCA* for approach to best interests for Aboriginal and Torres Strait Islander children – for discussion of the *FCA* provision see *U v N* [2010] WASA 106.

Kha and Ratnam argue that section 61F 'has at times led to proper judicial consideration of Indigenous culture in determining care arrangements' (2015, p.1373). They discuss the case *Hort & Verran* [2009] FamCAFC 214 (*Hort & Verran* [2009]) where the Full Court considered the scope of an 'appropriately qualified expert' regarding children's identity. The Full Court found that evidence from 'an appropriately qualified expert' regarding the children's Tiwi culture and identity was adduced from the maternal grandmother, who was a Tiwi Elder, and it was open to the Federal Magistrate in *Hort & Verran* [2009] to accept the grandmother's evidence in respect of the issue of the children's Aboriginal and Torres Strait Islander culture and identity (para. [104]).

The Full Court decision of *B & R & the Separate Representative* [1995] FamCA 104 (*B & R* [1995]) considered the issues of culture and identity as experienced by Aboriginal and Torres Strait Islander children, and the importance of bringing evidence that 'addresses the reality of Aboriginal experience, relevant as that experience is to any consideration of the welfare of the child in the present case' [26]. The Court provided specific guidelines for the gathering of evidence on particular cultural issues in cases involving an Aboriginal and Torres Strait Islander child (*B & R* [1995], para. [150]). The Court identified that the trial judge should inform themselves of 'readily accessible public information' and, if necessary, appoint a suitable expert to examine relevant cultural issues that arise in the course of proceedings (*B & R* [1995], para. [150]). The court said that an Independent Children's Lawyer could be appointed, to ensure all relevant evidence is placed before the Court (*B & R* [1995], para. [151]).

The protection of cultural safety was highlighted in *Ricketts & Crowe* [2015] FCCA 3629 (*Ricketts & Crowe* 2015). In dealing with two First Nations parties, the judge placed significant reliance on an expert family report to understand the 'fluid nature of Aboriginal child caring arrangements and parenting practices' (para.[90]. The Court considered the child's attachment to his carer as compared to the detrimental impact that dislocation from culture can have on an Indigenous child's long-term emotional and psychological welfare (Kha and Ratnam 2015, 1374; *Ricketts & Crowe* 2015 para. [102]).

Ruska and Rathus (2010) observe that there may be cases where expert evidence is not available, and this may present evidentiary difficulties and raises questions as to whether the decision arrived at by the judicial officer is culturally appropriate. The Full Court in *Donnell & Dovey* [2010] observed:

> A rigid interpretation of s 61F may have suggested that the adjournment option was to be preferred. On the face of the section, it is mandatory for the court to have regard to the relevant Indigenous child-rearing practice in every case involving a child of Aboriginal or Torres Strait Islander background. If there is no evidence, or there is a lacuna in the evidence, the court cannot fully comply with the obligation imposed by the statute.

The language of 'connection' remains in the post 2024 FLA reforms (section 60CC(3) *FLA*). The meaning of 'connection' was considered by Moore J in *B & F* [1998] FamCA 239 as requiring an active and participatory connection to culture. The importance of connection to culture has been recognised as a significant protective factor for the wellbeing of Aboriginal and Torres Strait Islander children and their families (Attorney General's Department 2023, p.15).

Ralph (1998) has observed that the law struggles to deal with Indigenous concepts of kinship and the various child-rearing practices observed by Aboriginal or Torres Strait Islander peoples. This lack of understanding may provide some explanation for reliance on more familiar experiences of child-rearing practices, sometimes implicitly privileging parents over other kinship carers in parenting proceedings (Rathus and Ruska 2010). Ralph (1998) has also suggested that there is a general assumption made in family law decisions that a child's need for stable attachment to a primary caregiver should outweigh consideration of their need for cultural affiliation. The introduction of changes in section 60CC(3) *FLA* in 2024 aim to respond to these concerns (Attorney General's Department 2023, p.15).

3.2.2 Reconciliation Action Plan

In 2019, the Federal Circuit Court of Australia (FCCOA) was the first court in Australia to enter into a Reconciliation Action Plan (RAP) (FCCOA 2019). The RAP continued to 2021, at the time the FCCOA had jurisdiction for family law matters and a variety of general law matters. The RAP states that:

> Parenting orders can provide security in relation to the living arrangements of children being raised by kin carers, stabilise contact arrangements with their parents and provide for issues covered by parental responsibility orders (FCCOA 2019).

The RAP acknowledges the damage caused by policies that have allowed the forced removal of children from their families (FCCOA 2019). It states that the FCCOA's vision for reconciliation:

> ... is for Aboriginal and Torres Strait Islander peoples to enjoy access to justice through engagement with a judicial system that is attuned to their needs, maintains a connection and collaborates with the community to consider and appreciate broader perspectives. By doing so, the FCC seeks to enable Aboriginal and Torres Strait Islander litigants to fully participate in proceedings and create an equitable justice system for Australia's First Peoples (FCCOA 2019).

Since 2021 the family law jurisdiction has been restructured and the RAP has not been updated.

3.2.3 Indigenous Family Liaison Officers and Indigenous lists

According to the FCCOA (nd) website Indigenous Family Liaison Officers (IFLOs) are located at a number of registries across Australia (Adelaide, Brisbane, Launceston, Lismore, Melbourne, Newcastle, Parramatta and Townsville). They are employed by the family courts and their role is to help and support First Nations people navigating the courts and to help First Nations people connect to legal and other services.

While IFLOs cannot give legal advice, represent parties or influence the decision of the court, the FCCOA (nd) website observes that IFLOs can:

- attend court hearings or other court events to provide support and explain the process
- assist parties with accessing court information and filing documents
- connect parties to legal and other community-based services
- assist parties with connecting with Court Ordered programs
- talk to community about family law and the Court process
- explain practical reasons that may affect the party doing what the Court has asked, and
- visit services, legal profession and community to talk about the Courts and the IFLO role.

IFLOs are not a new development. They have been recommended for over 20 years (DATSIPD 2000, p.244). IFLOs were employed in the family courts prior to 2006 (Akee 2006) but did not exist after 2006 legislative reforms to the *Family Law Act 1975* (Cth) (Kaspiew 2012). In the past the funding for these roles has been precarious and ad hoc. For example, when writing about the role over 10 years ago, Kaspiew (2012) pointed out that an Indigenous Family Consultant was employed at the Cairns registry. There has been a similar approach in Western Australia with IFLOs funded from time to time (Kaspiew 2012). IFLOs can play an important role, as Akee notes 'if Indigenous people are to know about, access, and receive appropriately delivered services from the Family Court, then the Court needed to employ Indigenous people to enhance the possibility of that happening' (2006, 80-81). She reported that in 2006 there were only 6 IFLOs in Australia (excluding Western Australia). ILFOs seem to be an important part of the family law system, but they need to be consistently resourced, this point was made by a number of submissions to the Senate Inquiry into the Family Law Amendment Bill 2024 (see for example Women's Legal Services Australia 2024, p.4).

The family courts have developed Indigenous Lists in 10 locations (Adelaide, Alice Springs, Brisbane, Coffs Harbour, Darwin, Lismore, Melbourne, Newcastle, Sydney and Townsville) (FCCOA nd). These lists are distinct from other court lists as they are more informal, specialised support services available on the day, and 'the judge may decide to close the courtroom to the public, if considered appropriate' (FCCOA nd1). In some locations IFLOs are available to assist parties. In media coverage of the introduction of an Indigenous List at the Newcastle court, Ea (2023) reported that the case management system was modified to enhance First Nations peoples' access to the court.

3.3 Federal Circuit and Family Court of Australia data

Despite concerns addressed in previous sections of this review that the family law system is underutilised by First Nations people, recent data from the Federal Circuit and Family Court of Australia (FCFCOA) indicates that First Nations people and families are not underrepresented in terms of proportion of population (FCFCOA 2024). At the 2021 census, 3.8% of the Australian population identified as an Aboriginal and

Torres Strait Islander person (ABS 2021). Indeed, for some time, research has suggested that First Nations people are overrepresented, as compared with whole of the population, as parties in family law cases (Hunter 1999, p.20). Data from the Federal Circuit and Family Court of Australia (FCFCOA) shows that 7% of final order applications in 2023–24 include a First Nations litigant, increasing from 4% in 2013–14 (FCFCOA 2024; ALRC 2019). While these figures suggest notable engagement with the family law courts by First Nations people, caution is needed. Matters proceeding to final order applications are generally more complex and less able to be settled earlier in the proceedings. Therefore, the fact that there is an increase in First Nations people with final order applications is not necessarily an indication of increased engagement with the courts, but could reflect increased complexity in relation to these matters for a range of reasons including heightened or more complex FV or other factors.

The FCFCOA hypothesise this increase could be attributed to the work by the Indigenous Family Liaison Officers providing assistance to First Nations litigants and community engagement to enhance understanding of the family courts (FCFCOA 2024). However, it is not clear why or in what context First Nations people, and especially First Nations women who have experienced FV are utilising the family courts. On one hand, their representation may be considered an underrepresentation given the high rates of single parent households (reported on **page 7** of this review). On the other hand, it may be that they are respondents to applications brought by non-First Nations parties, given the high proportion of couples where only one member of the couple is First Nations (reported on **page 12** of this review).[7]

3.4 Family law decisions – an overview of recent cases

A preliminary review of published Federal Circuit and Family Court of Australia (FCFCOA) judgements from 2023 and 2024, where any party is identified as First Nations, was undertaken to explore the representation of First Nations people as applicants and respondents. The review identified 43 cases, and they provide some limited insights regarding the dynamics or patterns of family court engagement for First Nations women who have experienced FV and been a party in a family law matter. This case analysis is necessarily a very limited picture as many cases are not reported, and many cases do not proceed to a hearing in the family courts. Just over half the reported cases involved a mother who is First Nations. The applicant was the First Nations mother in half of those matters but almost all of those had allegations of FV against the father/other party.

Statistical data from 43 cases in the Federal Circuit and Family Court involved one or more First Nations parties across the 2023 (26 cases) and 2024 (17 cases) period (up to 1 December 2024).

The cases were searched and analysed by year, with the same method used for each year. An initial search of family law cases on Westlaw and LexisNexis was undertaken using the terms below to find the most relevant cases first:

- ‘First Nation’
- ‘Indigenous child’
- ‘Child of Aboriginal descent’
- ‘Connection to aboriginal heritage and culture’
- ‘Child of aboriginal heritage’

An initial review of the 2024 cases showed that the language used in each case to describe First Nations people was varied.

A subsequent search of cases on LexisNexis and Westlaw using the search term ‘Aboriginal’ and excluding ‘not an aboriginal’ as this was a common statement in cases that did not include aboriginal children. This search was limited to family law cases on the search term filters.

[7] Note in evidence to the South Australian Royal Commission into Domestic, Family and Sexual Violence (2024, p.59) Olive Bennell, CEO of Nunga Mi:Minar a specialist family violence ACCO notes: "in terms of the data that we collect, 78% of the families we work with, the intimate partner is not Aboriginal."

A third and final broad search by court on Austlii using the term 'Aboriginal' was undertaken to check that all relevant cases had been identified. A basic descriptive statistical analysis was conducted. The results of this analysis are set out in Table 1 and Figure 1.

Table 1: Indigeneity of Parties

	Percentage	Number
One party non-First Nations and one party First Nations	84%	36
Both parties First Nations	12%	5
Indigeneity of one or both parties unknown	4%	2

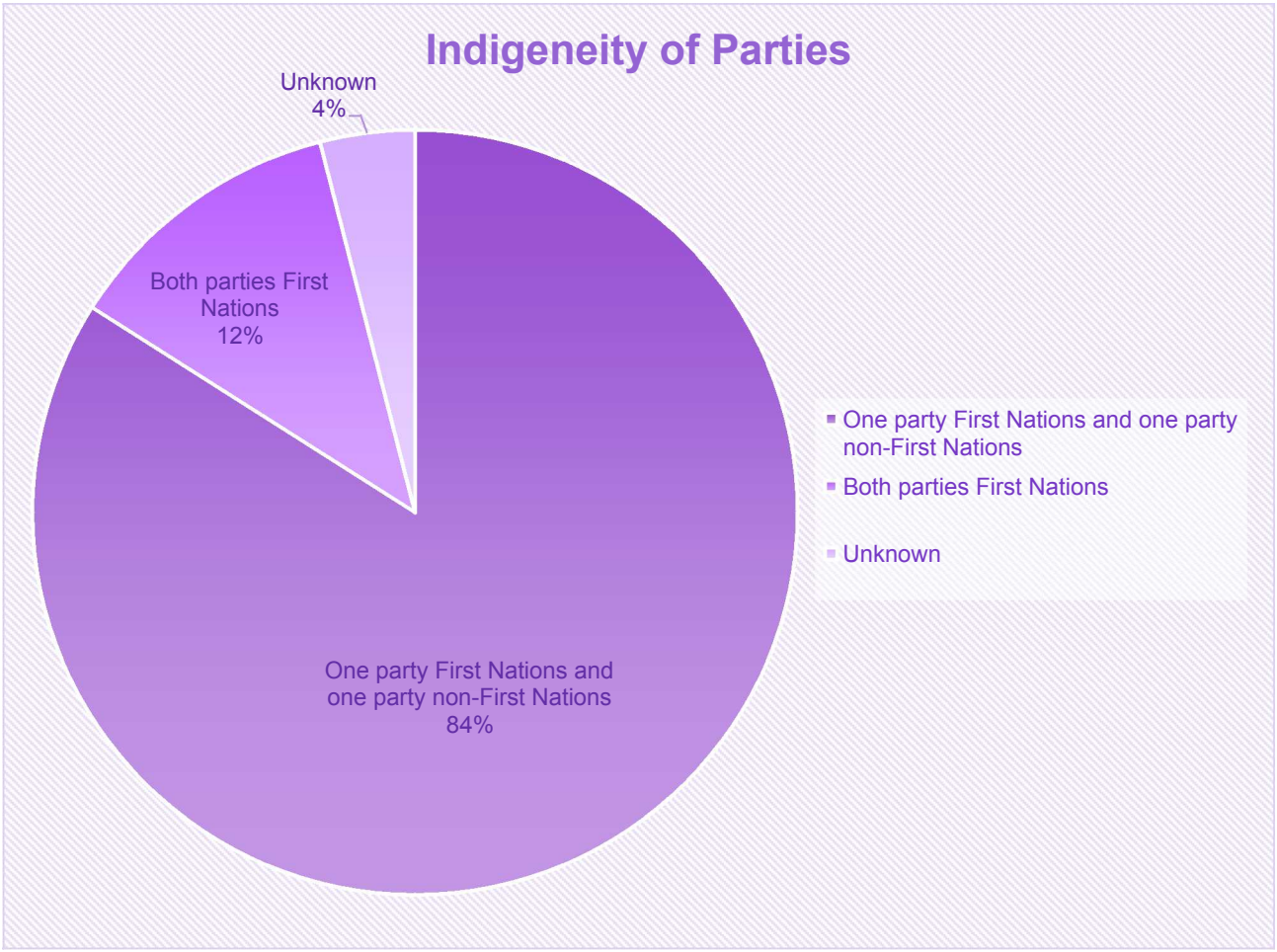

Figure 1: Indigeneity of parties

In the 36 cases where one party was non-First Nations and the other party was First Nations, nearly 60% involved a non-First Nations father, while nearly 40% involved a non-First Nations mother.

In 21 cases the father was non-First Nations and the mother was First Nations. In these cases, the applicant was:

- the First Nations mother in 11 cases
- the non-First Nations father in 7 cases
- mother/father joint applicants in one case
- non-First Nations father's grandparents in one case, and
- Department of Communities and Justice (at the request of the non-First Nations father) in one case.

In 14 cases the mother was non-First Nations and the father was First Nations. In these cases, the applicant was:

- the First Nations father in 9 cases
- the non-First Nations mother in 4 cases, and
- the maternal grandmother and father were joint applicants in one case.

One of these cases involved 2 mothers, one First Nations and one non-First Nations. In this case, the applicant was the First Nations mother.

In the 5 cases where both parties are First Nations, the father was the applicant in 3 cases, the mother was the applicant in one case, and the sister of the deceased mother was the applicant in one case.

Table 2 shows that, in the reported cases, the highest proportion of cases (n17) involved cases where there were allegations of FV made against the father and there was evidence of that alleged violence (an FV order or police report). In only 3 cases were there allegations of FV perpetrated by the mother where there was evidence of that violence (FV order or police report). In 11 cases there were allegations perpetrated by both parties – but no evidence was presented.

Table 2: Allegations of Family Violence Breakdown

Allegations of Family Violence Perpetration	Number	Judgments
Allegations of FV perpetrated by father and/or evidence of FV perpetrated by father (e.g. protection order or police record)	17	*Carlsen & Lind* [2024] FedCFamC1F780 *Casilda & Annice* [2023] FedCFamC1F 992 *Clovis & Huff* [2023] FedCFamC2F 1147*Crouper & Mitchell (No 2)* [2024] FedCFamC2F 523 *Euclid & Brantley* [2023] FedCFamC2F 1612 *Fiedler & Vitale (No 2)* [2024] FedCFamC1F 584 *Fryre & Pewitt* [2023] FedCFamC1F 688 *Garven & McFarlane* [2024] FedCFamC2F 1008 *Hagarty & Valenza (No 2)* [2023] FEDCFAMC2F 1651; BC202319786 *Halligan & Weldon* [2024] FedCFamC2F 164[8] *Kasun & Rask* [2023] FedCFamC2F 1012[9] *Masters & Herceg (No 3)* [2023] FedCFamC1F 766 *Penn & Laird* [2023] FedCFamC2F 571 *Qodirov & Grayson* [2024] FedCFamC1F 345 *Sachs & Massen (No 2)* [2023] FedCFamC2F 738 *Secretary, Department of Communities and Justice & Mercado* [2023] FedCFamC1F 874[10] *Warren & Barrow (No 2)* [2024] FedCFamC2F 126

[8] While the judgment notes that father alleges the mother has committed family violence against him there is no reference to evidence (beyond allegation) in the judgment.

[9] As above.

[10] As above.

Allegations of FV made against both parties (mother and father)	11	*Halit & Halit, [2024] FedCFamC1F 437* *Nagle & Nagle, [2024] FedCFamC2F 594* *Salera & Baranski [2024] FedCFamC2F 632* *Gammill & Walworth, [2023] FedCFamC2F 936* *Hansom & Toth, [2023] FedCFamC2F 920* *Cobb & Papworth, [2023] FedCFamC2F 715* *Weekes & Kendrick* [2023] FedCFamC2F 358[11] *Groff & Fox* [2023] FedCFamC2F 1729 *Rowlinson & Bradford* [2023] FedCFamC2F 1484 *Garnand & Garnand* [2024] FedCFamC2F 971 *Maples & Maples* [2023] FedCFamC2F 782[12]
No allegations of FV	7	*Pethes & Pethes* [2024] FedCFamC1F 213 *Dendy & Penta* [2024] FedCFamC2F 1116 *Tyrrell & Tyrrell* [2023] FedCFamC2F 1604 *Derren & Schuyler* [2023] FedCFamC2F 1255 *Janco & Riordan* [2023] FedCFamC2F 470 *Moffett & Varrone* [2023] FedCFamC1F 232 *Bilson & Trang* [2023] FEDCFAMC2F 1734; BC202319789
Allegations of FV perpetrated by mother and/or evidence of FV perpetrated by mother (e.g. intervention order)	3	*Lamison & Calderwood* [2024] FedCFamC2F 1263 *Galpin & Varley* [2023] FedCFamC2F 369 *Jesson v Garrick* [2023] FedCFamC2F 252
Allegations of FV perpetrated by mother's partner	2	*Walter & Stiller, [2024] FedCFamC1F 575* *Shelburn & Beazley* [2023] FedCFamC2F 1163
Unclear	2	*Higgins & Best* [2024] FedCFamC2F 995 *White & Rolphe* [2023] FedCFamC2F 1372
Allegations of FV against both mother and father; and mother's former partner	1	*Garin & Courtenay* [2024] FedCFamC2F 140

[11] Allegations made against both parties but court found in favour of father and ICL.

[12] Allegations were made against both parties but no findings of FV were made.

4. Conclusion

There has been limited research specifically on First Nations women's engagement with the family law system in the context of FV. Further research to identify and understand the needs of First Nations women in the family law system, especially in the context of FV, is needed. Further analysis of available data from family courts, family law cases, support services and research with service providers and victim-survivors will help to build a better understanding of the dynamics and drivers of First Nations women's engagement with the family law system and to identify gaps within legal assistance services or dispute resolution services. This is required in order to continue to enhance accessibility, equity, inclusiveness and outcomes for First Nations people and to identify required service changes and other reforms. These issues are the focus of this research.

Cultural safety and fitness initiatives of the family courts, such as Indigenous Liaison Officer programs, Indigenous lists and a Reconciliation Action Plan may be promoting accessibility and inclusivity for/of First Nations women in the family court system. However, further research is needed to provide a clear evidentiary basis to understand what is working well and to inform recommendations to reform the ways in which the family law system can best work to meet the needs of First Nations women who have experienced FV.

This review developed out of a partner project between WLSA and CEVAW. The focus of our review is grounded in what our partners have identified as a key priority area in terms of practically-oriented research that is needed on the ground. This review is, therefore, an important starting point. Our ongoing work is examining what can be done now to improve Aboriginal and Torres Strait Islander women's experience of the family law system. This review must be read alongside calls for structural change, and responses to FV that turn away from the criminal legal system, and toward responses that centre Aboriginal Laws, cultures, and communities (Blagg et al., 2022). Therefore, we recognise the importance of research that aims to improve women's everyday lives, while also building towards systemic change.

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