Public consultation: Family violence amendments

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The following submission is a response to the consultation paper released by the Attorney General on December 2016 titled 'Amendments to the Family Law Act 1975 to respond to family violence.'

The consultation paper proposes two primary objectives, which will be addressed separately:

1. The delegation of the Family Law Act to state magistrates and children's courts so as to enable a streamlining of protection orders, childrens matters and Family Law matters.
2. The introduction of a National Domestic and Family Violence Benchbook which will be used to train state judicial officers to achieve uniformity.

Delegation of the Family Law Act to States and Territories

The current system in inefficient in requiring issues relating to protection orders to be dealt with in multiple jurisdictions and impacting many court systems. Any streamlining that would lead to a more efficient outcome, with a speedier resolution of the matter is welcome. Accordingly, the general aims that these amendments seek to achieve are to be applauded.

The consultation paper mentions the following aims:

1. Strengthening orders issued by state and territory courts
2. Increasing the power of the court to dismiss unmeritorious claims
3. Enabling the court to explain orders in a manner that supports the best interests of the child

Turning to each, in order:

1. Strengthening orders issued by state and territory courts

With regards to this issue, while we are generally supportive of the aims, we have the following reservations:

- Streamlining will only be achieved if the protection orders under the Family Law Act fully replace the current state-based system of Apprehended Violence Orders (or the equivalent such as Intervention Order, Violence Restraining Orders in the various jurisdictions). Proposing these amendments without replacing the existing systems will end up in a doubling-up that will lead to inefficient outcomes offering no extra protection at the cost of the courts being clogged up with additional, not alternative but improved process.
- There is a risk that by conflating the four issues of protection, custody, criminal consequence as well as property settlement - natural justice will be eroded. Each of these aspects currently have a different level for the evidence to reach a verdict. It is vital to ensure that a low evidential bar set for the purposes of protection (namely an ex-parte prima facie case without evidential requirements) does not end up with consequences that ought to require a different test - be it satisfaction beyond reasonable doubt (for criminal consequences) or a test that is solely focused on the best interests of the child (for children's matters). It is vital that each question of protection, children's matters, criminality and property settlement are determined on the appropriate test.

2. Increasing the power of the court to dismiss unmeritorious claims

It is vital that claims motivated by vendetta or tactical purpose without merit, be dismissed at the earliest opportunity and certainly before the emotional and financial cost to those concerned results in

the very damage the court is attempting to prevent. This power should be used for all unmeritorious claims, whether they relate to an 'abuse of the family law system by perpetrators' or an abuse of the legal system by those resorting to perjury in order to advance their family law case.

To our mind, it is a human condition that those stressed and in difficult situations, will more readily resort to use of any advantage open to them at any point unless the consequences of doing so are deemed to be worse. Such behaviours are not tied to demographic make up. Our experience is that both men (fathers) and women (mothers) are equally capable of abusing the court process and of outright perjury in both police statements and to the court. We make reference here to research concerning females only as this relates directly to the proposed legislative change and we refer to the 2011 'Submission to Senate Committee on Legal and Constitutional Affairs' by Prof. Patrick Parkinson[1] on the matter of false allegations of abuse and agree with his conclusions.

The perception that 'women going through custody battles often make up or exaggerate claims of domestic violence in order to improve their case' is backed by a majority of those surveyed in a large scale national survey, and the lived experience of the magistrates, family lawyers and the majority of the community in general[2]. It is not uncommon that mothers who come to us for support ('Mums in Distress' service) will inform us that they were advised to make such claims in order to gain strategic advantage in their family cases, sometimes overtly, other times by subtle suggestion that any such claims would be helpful to them were they to perhaps apply. In light of this, it would be irrational to suppose that no such advice or suggestion is ever pursued, or that where such allegations are made, that a child or children would not have lost contact with their loving and available parent without genuine reason with significant consequences.

It is important to remember the medical maxim or Hippocratic oath; '*Primum non nocere*', First do no harm. In allowing children to be severed from innocent parents based on false allegation, we potentially do more harm than had they been left to have contact with both parents. Strengthening the legislation to act more assertively, where the law is already known to be abused by false allegation for strategic advantage is concerning without further safeguards, that we are unable to see in the proposed changes.

The ability to dismiss unmeritorious claims and those found to be based upon perjury is welcome so long as the same evidentiary standard is applied equally regardless of gender.

[1] Family Law Legislation Amendment (Family Violence) Bill 2011 Submission to Senate Committee on Legal and Constitutional

Affairs Prof. Patrick Parkinson, University of Sydney

[2] 'Without restraint': the abuse of domestic violence orders by Augusto Zimmermann NEWS WEEKLY, MARCH 14, 2015 - Note Augusto Zimmermann, LLB, LLM, PhD (Monash), Chair in Legal Theory and Constitutional Law, Murdoch University School of Law; Law Reform Commissioner, Law Reform Commission of Western Australia; President, Western Australian Legal Theory Association (WALTA); Fellow at the International Academic for the Study of the Jurisprudence of the Family (IASJF).

3. Enabling the court to act in a manner that supports the best interests of the child

It remains unclear how and when judicial officers may communicate matters relating to legal processes in a courtroom 'in a manner that supports the best interests of the child.' The debate on whether or not children should be more actively involved in judicial processes is one that remains unsettled and is likely to vary from case to case.

Rather than focusing on one aspect (explaining the orders), it is important to highlight that a positive aspect of these amendments would be a requirement to judge the matter from the best interests of the child.

At present, it is our experience that children are added as a matter of course to a protection order sought by the custodial parent even when the is no evidence suggesting that any danger is posed to the child (eg. allegation of financial abuse of the mother).

It would be prudent for Judicial officers to be content that a potentially long term (weeks or months is a long time in a child's life while parents await court availability) or permanent separation between a parent and a child is necessary before including a child on protection orders. The application of Section 60CC of the Family Law Act means that a presumption must now exist, both in law and in fact, that it is in the best interest of the child to maintain a meaningful relationship with both parents. At this time, we believe that this presumptive principle is routinely ignored where clearly non dangerous risks are alleged.

Accordingly, cases where parent-child separation is warranted should prove the exception rather than the norm for interim protection orders. Undoubtedly, there will be some cases where there is some evidence of a clear risk of danger posed to the child through unsupervised contact, but barring that, the presumption of what is clearly in children's best interest cannot be negated by mere conjecture. The low bar set for protection orders might be set somewhat higher to determine what is / is not in the best interest of the child before this court. This will undoubtedly require more than the average 3 minutes the court currently spends on protection orders. Failure to devote serious inquiry before separating parent and child will see us replicating the errors of the stolen generation.

The takeaway message is that we see that the delegation of the Family Law Act to judicial officers will require a more responsible inquiry before children are to be added to protection orders. To the extent that this responsibility is taken seriously by judicial officers, this will pose a welcome change from the status quo.

What appears to be overlooked

The Family Law Act in its most basic form, represents societal expectations of what is right and fair in an attempt to settle disputes between aggrieved family members with a focus on the children, and by extension to minimise negative impact on society.

The fundamental issue was expressed by a QC to one of the Board Members in the statement "I have never seen a case where it was not advantageous for one of the parties to delay or frustrate a case" and this rings true especially for Family Law.

We have already made reference to unmeritorious claims and our views. Other concerns include the use of various tactics to delay case outcomes which lead to the de facto establishment of a new and enforced status quo of the child's situation (e.g. location, school, carers, parental contact etc) which courts then appear loath to alter.

A basic principle of restorative justice appears to have been neglected by the current proposals to the Family Law Act along with its administration. As present, application of family law does not discourage poor or damaging behavior by one party as they will rarely be held accountable for their action. This is a scenario, we see many times being presented to our groups each week. The knowledge that restorative justice would be applied in Family Law matters, may reduce the number and severity of high conflict cases with a net benefit to the children and with follow on benefits to the court waiting times, costs to government and parties concerned, and to wider society in general.

The disturbing trend to start family law matters with a domestic violence claim, when unwarranted, is something that needs to be addressed and these amendments in their current form does nothing to address this highly destructive trend. This use of Domestic Violence claims has been discussed by various eminent persons such as Justice Collier[3] and Augusto Zimmermann[4] and reflects our experience.

Interstate issues often occur when restraining orders and recovery orders are requested. How cases would move between the various State based jurisdictions (e.g. if someone abducts a child from Vic to NSW) and the Federal Court, is also something that is not well outlined or addressed in the proposed changes.

We believe a far broader review of the Family Law Act is significantly overdue and would indeed encourage just such a review.

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[3] 'False abuse claims are the new court weapon, retiring judge says'; Sydney Morning Herald; Harriet Alexander; Published: July 6, 2013

[4] 'Without restraint': the abuse of domestic violence orders by Augusto Zimmermann NEWS WEEKLY, MARCH 14, 2015 - Note Augusto Zimmermann, LLB, LLM, PhD (Monash), Chair in Legal Theory and Constitutional Law, Murdoch University School of Law; Law Reform Commissioner, Law Reform Commission of Western Australia; President, Western Australian Legal Theory Association (WALTA); Fellow at the International Academic for the Study of the Jurisprudence of the Family (IASJF).

National Domestic and Family Violence Benchbook

Part 1 of the National Domestic and Family Violence Benchbook[5] has been published with Part 2 expected to be published later this year. Further, the government proposes to train Judicial officers in June 2017.

The National Domestic and Family Violence Benchbook 2016 ends with the real life experiences of those interviewed by the authors of the Benchbook. The stories of twenty females named Angelina, Anna, Cassy, Celina, Faith, Felicity, Francis, Ingrid, Jane, Jennifer, Julia, Leyla, Lisa, Melissa, Mira, Rosa, Sally, Sandra, Sara and Yvonne are balanced out with the experience of Ben, the only male on the list. This 20:1 ratio does not reflect societal normative family violence and demonstrates a narrative that influences the reader's mind.

This imbalance is not reflective of the incidence of female violence (based on data published by the Australian Institute of Criminology) and would appear to reflect the bias of the authors of the Benchbook. The authors include Heather, Kate, another Kate, Elissa, Louise, Imogen, Jasmine, Juliet, Renita, Rebekka, Marissa, Lyndal, Hannah and, a solitary male, Daniel.

In contrast, half of those whose life will be affected by this Benchbook will be female - the other half will be male. It appears to deliberately ignore relevant data from our key statistical bodies such as the ABS[6] and AIC[7] about rates of female violence - a rate that is underestimated by virtue of discomfort that society has with male victimhood, a taboo perhaps reinforced by your consultation paper and its related Benchbook.

The Benchbook is also more sympathetic to female violent offenders suggesting that 'most participants, prior experience of violence is a significant factor in their offending' and that 'individual counselling rather than group programs' are appropriate treatment. No such sympathy or attempt to understand the causes of violence is reserved for male offenders.

[5] http://dfvbenchbook.aija.org.au produced by the AIJA - a research and educational institute associated with Monash University

[6] Australian Bureau of Statistics - 45100DO006_2014 Recorded Crime - Victims, Australia, 2014

[7] Australian Institute of Criminology - Research in Practice SUMMARY PAPER No. 07 December 2009

For the avoidance of doubt, our aim is not to say that men are predominantly the victims and that women are predominantly the perpetrators. We acknowledge that the majority of victims of physical domestic related violence are women. However, framing this important issue along a binary gender divide and portraying men and boys as natural perpetrators and women and girls as natural victims ignores the well researched reality of domestic violence, distorts our ability to address the real issue - to the detriment of genuine female victims - and perpetuates the problem, resulting in greater suffering for all parties. As an aside, this gendered policy manifests itself in, for example, the refusal of women's shelters to harbour women with post-pubescent boys.

The Benchbook refers to the Duluth Model (Domestic Abuse Intervention Project) as the default model and appears to be based predominantly upon that theoretical model. The Duluth model was developed a quarter of a century ago in Duluth, Minnesota and is based on feminist theory that domestic violence is a product of the patriarchy in which men are encouraged to control their partners. There is no scientific method to support this model, nor any known empirical evidence suggesting that its application has ever yielded positive results in the entire period it has been utilised.

The Duluth Model fails to account for the following:

- Violence against men in domestic relationships is not as insignificant as the Benchbook suggests. One in three men have experienced violence in the past 12 months from their their current female partner. Family violence kills one man every 10 days. Yet men are half as likely to report these incidents of violence. (ABS, 4906 - Personal Safety 2012). This runs completely counter to the Duluth model. Even the Victorian Royal Commission Into Family Violence[8] reported in Volume V, Section 32 Page 205 "Men make up around one quarter of victims of violence by intimate partners within heterosexual relationships".
- Indigenous females are 35 times more likely[9] (and Indigenous males 22 times likelier) to be victims of family violence than the average non Indigenous Australians. This suggests factors beyond gender are at play (eg. education, alcoholism, culture and fatherlessness). Note that a claim of approx ratio 2:1 for female:male DV victims accounts for predominantly pro-female legislative protection , yet Duluth employed as the driving model ignores or is unable to address a 35:1 ratio between women of differing ethnicity within Australia.
- 'People who identify as lesbian, gay, bisexual, trans, intersex or queer (LGBTIQ) experience intimate partner violence at similar rates as those who identify as heterosexual.'[10] These

[8] State of Victoria, Royal Commission into Family Violence: Summary and recommendations, Parl Paper No 132 (2014–16).

[9] AIHW: Al-Yaman F, Van Doeland M & Wallis M 2006. Family violence among Aboriginal and Torres Strait Islander peoples. Cat. no. IHW 17. Canberra: AIHW

[10] Australian Institute of Family Studies Intimate partner violence in lesbian, gay, bisexual, trans, intersex and queer communities Key issues Monica Campo and Sarah Tayton CFCA Practitioner Resource— December 2015

statistics coupled with the fact that the LGBT community is arguably not part of a 'patriarchal system' suggests the Duluth model is erroneous and would not, therefore, be able to actually address the challenge at hand.

- The majority of households in which family violence exist are mutually violent. At times, one party is the instigator and at times the other party is. A model that assumes a sole and constant perpetrator and a sole and constant victim will fail to address the cases that do not fit that mould. Only a minority of family violence cases are non reciprocal yet Duluth assumes otherwise.

In 2006, Dr Donald Dutton, one of the world's leading authorities on the psychology of both perpetrator and victim in family violence, published a study[11] of the Duluth model and concluded that it was a gender political model that sought to push aside and deny scientifically robust psychological modelling based on empirical data. Further, that application of this model to address family violence demonstrates a high failure rate.

In relation to the Victorian Benchbook, which like the proposed Benchbook, appears to be based entirely on the Duluth Model, WA law reform commissioner Augusto Zimmermann[12] commented on the document, saying he is "Appalled by patently inaccurate and misleading information in the Judicial College of Victoria's manual on Family Violence." He points out it deliberately ignores relevant data from our key statistical bodies such as the ABS and AIC about rates of female violence.

"It resorts to a sexist narrative which is based on radical feminist theory that domestic violence comes from a sense of patriarchal domination over women. This false assumption cannot be substantiated by empirical evidence which shows that women too, are capable of inflicting violence against their partners and children without any apparent justification." Zimmerman, says, referring to the "the overwhelming body of scientific evidence showing that women are as physically aggressive or more aggressive than men in their relationship with their spouses or male partners"

As part of their evaluation of the 2012 family violence amendments, the Australian Institute of Family Studies (AIFS) found in their Experiences of Separated Parents Study (2015) that males (fathers) made up between 36.4%[13] and 63.0%[14] of family violence victims - versus females (mothers) depending upon

[11] Aggression and Violent Behavior 11 (2006) 457–483

[12] Correspondence - Note Augusto Zimmermann, LLB, LLM, PhD (Monash), Chair in Legal Theory and Constitutional Law, Murdoch University School of Law; Law Reform Commissioner, Law Reform Commission of Western Australia; President, Western Australian Legal Theory Association (WALTA); Fellow at the International Academic for the Study of the Jurisprudence of the Family (IASJF).

[13] 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. Table 2.5

[14] 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. Table 4.1

specific category. This is complete odds with guidance presented in the Benchbook part 1. In part this is because the data relied upon in the Benchbook part 1 references the general public whilst the research we cite above relates specifically to research of those separating parents within the court system; and therefore the body of people for whom this guidance is meant to apply. Undoubtedly, the more applicable data shows that there is little gendered difference in violent behaviours amongst separating parents.

Importantly, at this time it is unclear what, the as yet to be produced, Benchbook part 2 and associated training will contain or upon which body of research or theory concerning family violence they will be based. As such, it is impossible to comment without first having sight of the materials in question. The non scientific method, and theoretical ideology underpinning Benchbook part 1 do however raise concern over what will follow in part 2 and in the training to be provided.

The Bench Book lacks a focus on the impact on children

The Family court is meant to focus on the Children and therefore Benchbook part 1 appears to almost entirely miss the focus upon which the court is formed and its primary objective. Sections need to be added as there is no information of the impact of the removal of a child from a safe, loving and available parent which we believe has significant long term negative impact on the child.

Section 60C outlines how the children's views are expressed. This has proven to be disastrous for many children of the mothers and fathers that come to us with the children forced to have limited access to their non-custodial parent. It is not unusual that those children are subtly or overtly coerced into taking the position of one parent by the other by using a multitude of tactics which are incredibly destructive for the children involved.

It is important the focus of the Benchbook part 1 be revised to align with the focus of the court so that better short and long term outcomes for the children are achieved.

We would also like to see part 2 of the Benchbook and training material prior to finalising our position.

Benchbook Conclusion

Our starting assumption is that good and bad behaviours are equally distributed between those of differing gender, ethnicity, sexual orientation and other demographic segmentation. In sharp contrast, the starting assumption of the family violence Benchbook appears to simply be that men are bad (perpetrator) and women are good (victim). It is a book seemingly written with identity politics as its ink

and with outdated sexist undertones that are so pervasive, that we see no option but to call for its rejection in its entirety and leave the matter to the learned discretion of each judicial officer.

If independant experts suggest that the education of judicial officers is necessary, we submit that a new family violence Benchbook be commissioned with experts in law and psychology who, critically, are shown to balanced, unprejudiced, apolitical and verifiable fact based in their approach.

Since ancient times the icon in common law jurisdictions show the Lady of Justice with:

- Blindfold - representing that justice should be meted out objectively, without fear or favour, regardless of money, wealth, fame, power, or identity; blind justice and a position that all people are equal before the law,
- Scales - which measure the strength of the cases support and opposition
- Sword - which represent punishment in Justice

All three aspects of these principles are risked by the amendments as presented and by the Benchbook.

It is imperative that the Attorney General's office is seen to be even handed in its approach and uphold the traditional values of justice. Concerningly, there appears to be an over-reliance on material provided by organisations whose aims are to promote the views of one gender at the cost of the other while simultaneously ignoring neutral data from official sources such as the government itself.

There appear to have been extensive consultation with women's (mothers) organisations but to our knowledge no consultation with any men's (fathers) organisation or, for that matter, any organisation taking a gender neutral stance and supporting parents through family breakdown.

This concerns us greatly, not least as Parents Beyond Breakup (formally Dads/Mums in Distress) Australia's leading and most established peer support organisation for separating parents that is gender neutral in positioning and practice. It would seem a curious and quite glaring omission by the government and we would fully expect that any further amendment to the family law act or associated guidelines and training would involve Parents Beyond Breakup at the very earliest stages.

Each year we hear from and provide direct hands on support to thousands of mothers and fathers experiencing distress resulting from separation and their experience of the family law system. Parents Beyond Breakup is far better placed than many organisations in Australia today to advise government from a neutral position on the challenges that these demographics experience and to advise on the likely approaches that would best help minimise them. At the very least, as a result of this submission, we would hope to receive assurance that this would not be repeated to put aside real concerns over an appearance of intentional bias.

In its introduction, the consultation paper references the Coronial Inquest into the Death of Luke Batty (2015) while making no mention of the Coronial Inquest into the deaths of Heather Glendinning, Jessica Rose Cuzens and Jane Lesley Margaret Cuzens (2016). (We append to this submission the letter sent by Grace Cuzens[15] following the inquest [ANNEX]).

Family violence is a serious issue affecting many Australians. It should be tackled in much the same way as we tackle a medical crisis - using a best-practice evidence-backed approach that does not discriminate between members of the community on the basis of gender, race or other characteristic. We must learn the real causes of violence so that we know how to mitigate it. In contrast, using the education of judges as a subtle manner in which to promote identity politics over facts, and ideologically-backed positions over evidence-based practice will undermine the aims of that which we are all attempting to achieve - a safe and healthy environment for all, regardless of their ethnicity or gender.

We look forward to being consulted on the proposed revised Benchbook part 1, Benchbook part 2 and with regard to the referenced judicial training.

Conclusion

We applaud this government initiative which is well overdue. We look forward to working with the government to make the amendments in such a way that would truly be child focused, strengthen the laws and processes, while reducing the negatives impact of the Family Law system that often have seriously negative outcomes on the children's future, parents focus and behaviour and therefore society as a whole.

Kind Regards

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[15] https://medium.com/kafkascourt/letter-to-family-court-b42ffdc12795#.mr6uidkri