SUBMISSION

FAMILY LAW COUNCIL

FAMILIES WITH COMPLEX NEEDS AND THE INTERSECTION OF THE FAMILY LAW AND CHILD PROTECTION SYSTEMS

Prepared by Women's Legal Service Victoria

Endorsed by

Domestic Violence Victoria

Federation of Community Legal Centres Victoria

No To Violence Male Family Violence Prevention Association

Women with Disabilities Victoria

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Introduction

We thank the Family Law Council (the Council) for the opportunity to provide a submission in response to its current reference – Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems.

We also congratulate the Council for its comprehensive interim report in relation to this reference.

Identifying and managing risk in the family law system is critical in parenting cases where family violence has occurred within the family unit.

It is important to note that managing risk issues for *women* who are family violence victims in the family law system can be critical to managing risk for the children in their care. Too often, the safety of women who are victims of family violence is not adequately raised, assessed or responded to in the family courts. Separation and family law disputes can elevate risk to both mother and child and any framework that is developed must include *all* victims of family violence. As such, our submission focusses on improving the family law system for women and their children.

Our service made a submission to Victoria's Royal Commission into Family Violence earlier this year. We have attached our submission on multi-jurisdictional issues, which outlines a model for resolving multiple legal issues within the one state-based court system.

Women's Legal Service Victoria

WLSV, established in 1981, is a state-wide not for profit organisation providing free and confidential legal information, advice, referral and representation to women in Victoria. Our principal areas of work are family law, family violence intervention orders and victims of crime compensation.

In addition to providing legal services to women, WLSV also ensures that clients' experiences inform the development of legal policy and legislation by participating in law reform activities including writing submissions and sitting on various stakeholder advisory reference groups and committees with the government and other organisations.

WLSV develops and implements preventative family violence programs through education, training and professional development in these areas of law to non-government and government organisations including; police, lawyers, registrars, barristers, social workers and other professional groups and community organisations.

Family relationship services and information sharing

The Council seeks views on information sharing between programs and services that currently operate within the family law system and the family courts.

Family Dispute Resolution Practitioners

The Council's discussion paper canvasses the options regarding information sharing between Family Dispute Resolution Practitioners (FDRPs) and the family courts.

We note that there are currently provisions in place that allow FDRPs to communicate disclosure made during mediation.

An FDR practitioner may disclose a communication made in FDR if he or she reasonably believes that the disclosure is necessary for the purpose of:

a) protecting a child from the risk of physical or psychological harm

b) preventing or lessening a serious and imminent threat to the life or health of a person

c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person

d) preventing or lessening a serious and imminent threat to the property of a person

e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to the property of a person or a threat of damage to property

f) assisting an independent children's lawyer to properly represent a child's interests.

Our lawyers represent parties participating in mediation through Victoria Legal Aid's Family Dispute Resolution Centre, Family Mediation Centre and Melbourne Family Relationships Centre. Our view is that legally assisted mediation that is properly resourced, is a beneficial process for family violence cases.

We have some concerns with the proposal that FDRPs disclose further information in a section 601 Certificate or through an observational or assessment report.

Mediation exists as a non-prejudicial form of dispute resolution. It allows parties to disclose allegations of family violence and for such allegations to be recognised. Safety concerns can be discussed in a safe environment by parties and their lawyers.

Removing the confidentiality of this process can limit a party's willingness to engage in a meaningful way in negotiating and reaching a resolution. It can diminish trust and make parties wary of admitting to past behaviour and agree to change behaviour. Further to this, it may provide a disincentive to parties engaging in the mediation process altogether. As such we would not support broader information sharing between mediation services and the family courts.

Family therapeutic services or programs

We believe there is some value in therapeutic service programs providing observational or assessment reports once a court proceeding is on foot.

Our lawyers noted that there is little information available to the court of a party's engagement in a program. For example, a party that fails to engage in an appropriate way in

a parenting program is not held accountable by the court for their lack of engagement. The only information before the court is that the program was completed.

The court should be provided with observational and assessment reports about the progress of parties. It is important to have clear guidelines about the use of the information and ensure that it is shared and used within a clear, ethical information sharing framework.

An alternative model to risk assessment and information gathering

It is our view that the family courts themselves are best placed to collect information and assess and manage risk. We have proposed an alternative model below.

Court-based family violence specialist

We propose that family courts are funded to employ a family violence specialist at each registry. The role of the family violence specialist could be to gather relevant information on risk, conduct comprehensive risk assessments and develop a risk management plan.

Where a parenting application is filed with allegations of family violence, the family violence specialist could identify risk and safety issues in the material filed with the application. The specialist could then follow up with the victim by interviewing her. The purpose of an interview would be to collect information on the history of family violence, what contact the victim has had with police, child protection, other courts and support services.

The family violence specialist could also undertake a risk assessment and create a risk management plan. A risk management plan could “red flag” particular issues (for example, recent threats of harm made by one of the parties) and puts in place strategies that minimise the risk to the other party and their children. Other strategies could include putting in place arrangements to enable a victim to give evidence via remote witness facility.

Such information should be prepared as early as possible and prior to an interim decision being made. Consideration should be given to the evidentiary value of this information – that is, should it inform only court process or additionally, judicial decision making?

There is significant benefit in having a court-based family violence specialist. A specialist working with other court staff and the judiciary can strengthen the understanding of family violence and responses across the whole of the family court system.

A single specialist at court gathering information and providing an assessment of risk also avoids the inconsistency of multiple (and possibly conflicting) risk assessments from external services and programs (particularly those assessments where there is limited understanding of family violence). A single specialist collecting the relevant information can create a more comprehensive picture of the family violence and risk elements in a particular case, which would in turn, improve the family courts’ response to risk.

Information gathering by way of subpoena

It is often useful in matters where there has been reporting of family violence incidences or interactions with statutory bodies or public health services that that information is available to family law decision-makers at an early stage in a family law proceeding.

It is often prohibitively expensive and difficult for people who are unrepresented to issue subpoenas themselves. Often where subpoenas have been issued by the parties, it is at a later stage in a proceeding, for example, just prior to trial.

In order to ensure that greater information is available at an interim decision-making stage, where there are allegations of family violence, we recommend that the court develop a practice direction that supports the practice of registrars issuing subpoenas on their own motion. The power to issues subpoenas on a registrar or court's own motion already exists in the Federal Circuit Court[1] and Family Court Rules.

The benefit of adopting a regular practice where the registrars issue subpoenas, is that the burden is shifted from the victim of family violence to produce evidence herself. This is particularly important where the case is complex and involves contact with multiple agencies and services.

Case conferencing at an early stage

A significant issue for our clients is the pressure placed on them, at an early stage, to agree to interim arrangements to enable an abusive parent to spend time with the child/children. In practice, the burden is placed on the shoulders of the family violence victim to negotiate an interim arrangement, despite their concerns regarding safety and their own experiences of violence at the hands of other party.

Introducing an early case-conferencing process in the Federal Circuit Court creates a more positive obligation on the court to assess risk and to take responsibility to put in place safe interim arrangements. It shifts the responsibility from the victim to facilitate time despite her fears. A case conferencing process could include the family violence specialist, registrar, the parties and their legal representatives (if any). It could bring together some of the information gathered by the family violence specialist to inform and guide decision-making.

Weighting the information gathered

Whilst we support a greater level of information being available to the court with respect to family violence, it is important to recognise that information on risk and observational reports will not necessarily be made by workers that have an expertise in family violence. This is particularly relevant to child protection material and initial assessments that are carried out by child protection workers. This is why it is critical to have family violence specialists within the court to work through the information gathered.

Risk assessment tool

The discussion paper canvasses the alternatives with respect to a standardised risk assessment tool. Our view is that adopting state and territory based tools, such as the Common Risk Assessment Framework (CRAF) in Victoria, may lead to inconsistent family law assessments across states and territories. We also note that the current CRAF will require review in order to strengthen its capacity to be used to assess risk to children.

The feedback from our lawyers is that DOORS is not a commonly used tool in the legal profession. Rather than using a tool specifically developed for the family law system, we would support the development of a national risk assessment and risk management

[1] Rule 15A.02

framework that draws from best practice both within Australia and internationally. Such a tool should be developed in consultation with the family violence sector and risk assessment specialists. We would suggest that responsibility for the development of such a tool sit with an organisation such as ANROWS.

Collaborative and integrated responses in the family law system

There is an opportunity, in developing integrated responses, to draw in specialist services that support women and children most at risk of family violence. To this extent, there must be recognition by family law policy and law-makers that women and children face greater barriers in the system if they belong to specific groups including:

- Aboriginal and Torres Strait Islander women
- women and children who are newly arrived in Australia and on temporary visas
- women and children from diverse cultural and linguistic backgrounds
- women and children in regional and rural communities
- women and children with disabilities; and
- women in prison.

In developing collaborative and integrated responses in the family law system, it is essential that policy and law-makers be informed and guided by:

- the experience of women who are from high risk groups and who are victims of family violence
- the expertise of specialist family violence focused agencies, such as the Victorian based Aboriginal Family Violence Prevention Legal Service (AFVPLS), InTouch Multicultural Centre Against Family Violence (InTouch) and Women with Disabilities Victoria.
- the existing body of research that documents the experiences of women from high risk groups, for example, Deakin University's publication, *Landscapes of violence: women surviving family violence in regional and rural Victoria* [2]

Support services and programs

Council would be aware of some of the existing integrated supports available at Family Violence Specialist Courts and Family Violence Divisional Courts in the Magistrates' Court. We would support similar programs being developed, piloted and made available nationally across family courts.

Koori support programs

The Magistrates' Court was piloting a Koori family violence support program that had both a Koori applicant and respondent worker. It provided culturally tailored, specialist responses in family violence cases. Unfortunately, we have recently been advised that this program has

[2] Amanda George and Bridget Harris, Centre for Rural and Regional Law and Justice (2014).

no further funding to continue it at this stage. We would support a similar program being available in the family courts.

Specialist family violence workers

With respect to family violence support services, there are two different approaches that are worthwhile considering. Firstly, an approach which enables family courts to contract local family violence agencies to provide support workers at court. We note that family violence agencies should be specifically funded to provide such services rather than an expectation that they draw on their existing stretched resources.

The second approach is to consider court based family violence support workers that are employed by the court and that can link women in with relevant support agencies. Currently in some Magistrates' Court, applicant and respondent support workers link victims and respondents in with relevant agencies and services.

Case management where alcohol and drug issues are present

The Coroner, in the recent inquest into the death of Luke Batty, recommended an expansion of the Victorian Courts Integrated Services Program (CISP) to be available in family violence cases in the Family Violence Divisions of the Magistrates' Court. The CISP model features:

- A multidisciplinary team-based case management model in which case managers carry out a range of assessment, compliance, reporting, support and referral functions
- Clients are assessed and based on the level of risk, allocated to one of the three program levels
- Once engaged, a client is the responsibility of a CISP case manager, but other specialists may be consulted
- CISP provides a range of direct services, with drug and alcohol, acquired brain injury and accommodation service interventions delivered by contracted service providers (including Men's Behaviour Change Programs)
- Additional services may be delivered by referral to external agencies, with brokerage funds available to pay for a range of treatment and support services including emergency accommodation, pharmacotherapy assessment or treatment, and education or other programs.

Creating a program within the family law system that can case-manage the range of complex issues that parties present with, in a similar manner to CISP, is highly desirable.

Promoting perpetrator accountability in the family courts

In order for family courts to effectively manage risk to women and children, perpetrator accountability must be central to policy and practice within the family law system. There must be significant work done to develop a strong accountability framework within the family law system to work with perpetrators of family violence who seek to spend time with their children.

Such a framework may include court-based respondent workers, strengthened referrals to men's behaviour change programs and changes to the legislative decision-making framework to place a greater level of accountability on men who perpetrate family violence who seek to spend time with their children.

In this respect, we recommend that the family courts engage with the family violence sector, particular the peak body, No To Violence to develop such a framework.

Strengthening legislative responses to family violence

There is considerable scope, within the current legislative framework, to improve the response of family courts to family violence and risk to children.

Presumption of equal share parental responsibility

The references in the Family Law Act to "equal time" and "equal shared parental responsibility" diminish the issues of risk and safety to children. This decision-making framework is applied in a way that places undue emphasis on "equal" time with their children rather than time with children that is appropriate considering the level of risk.

The references to "equal" in the Family Law Act contribute to misconceptions by the community and parties in a case around their "rights" to "equal" access to their children. It can also place undue pressure on victims of family violence to allow children to spend time with an abusive parent.

Equal time does not apply in cases where family violence is established in a proceeding. However, because it is often difficult to "prove" violence/abuse to the satisfaction of the Court, the presumption and consideration of equal time is sometimes still applied when the child has been abused or exposed to family violence, and can have the result of orders/agreements that include shared parenting provisions which unnecessarily put women and their children at risk of further harm from a perpetrator they are trying to escape.

We would support the removal of references to "equal" in the Family Law Act.

Legislative protection from direct cross-examination

Currently family violence victims can be directly cross-examined by their perpetrator in family law hearings. If a perpetrator of family violence is unrepresented in a family law case, he can directly cross-examine his victim. Family violence victims are at risk of and do experience direct cross-examination by abusive ex-partners in family law hearings. There are currently no legal protections in the Family Law Act to stop this from happening.

Specific protections exist at a state level in:

- family violence trials in Victoria (civil cases)
- criminal trials relating to family violence and sexual offences.

Direct cross-examination in family law hearings can be another form of control and abuse of a victim who may have been subject to rape, assault and psychological abuse. Even if the question itself is not abusive, the very act of being questioned by a perpetrator can be a

significant trigger for traumatized victims. Further to this, victims may feel pressure to settle before a family law trial because of the fear of being cross-examined at trial.

We recognise that a number of arguments have been raised against legislative protections. For example, that judges already have the power to stop a witness from answering a question that is offensive, abusive or humiliating. However, we note that if the court believes that it is “in the interests of justice” for the victim to answer a question, it must be answered. The court is bound by obligations to be “procedurally fair” to both parties which makes it difficult to deny a party the right to cross-examine.

There are a range of different options to ensure procedural fairness of a party that cannot directly cross-examine a victim – for example appointment of a legally aided representative for the purposes of cross-examination, submitting questions in writing to the judge or appointing an independent third person to put the questions to the victim.

We would recommend legislative amendments that protects family violence victims from direction cross-examination in family law hearings.

Conclusion

We wish you well in finalising your review.

If you would like to discuss our submission or would like further information, please contact Pasanna Mutha-Merennege, WLSV Policy & Projects Manager on (03) 8622 0600.