

ALRC Review of the Australian Family Law System

Introduction

WLSQ provides Queensland wide specialist, free legal information, advice and representation to women in matters involving domestic violence, family law, child protection and sexual violence matters. Last year we assisted over 11 000 women and with them 17 000 children. We also employ allied domestic violence social workers who assist clients to obtain a comprehensive response from our service. Our programs target women at high risk with 55% of clients indicating urgent safety risks and 50% of clients from a rural and remote community.

WLSQ receives Women's Safety Package (WSP) funding for our high risk Gold Coast and Brisbane Domestic Violence Units and our Health Justice Partnership solicitor who services victims of domestic violence at the Logan, Gold Coast, Redlands, QE2, PA and Royal Brisbane Hospitals.

We have been operating for 34 years and have been actively involved in advocating for law reform in family law for the majority of our existence, principally concerned with how domestic violence is dealt with in the system and the long and short term impacts on women and children's wellbeing when safety is not prioritised in decision making. We are a member of Women's Legal Services Australia (WLSA) and endorse their comprehensive submission. The purpose of this submission is provide a particular perspective from our own service experience.

We particularly endorse the statement by WLSA – *if Australia is going to reduce domestic and family violence in the community and in particular violence against women and children then reform of the Family Law Act and wider system is necessary.*

In Queensland, there has been immense reform since the release of the *Not Now: Not Ever Report* into domestic violence in 2015. Despite extensive systems and legislative reform, women and children continue to be exposed and face ongoing violence, including death. This is for a number of complex reasons but unfortunately, one of the major impediment to women and children achieving safety after leaving domestic violence, is the family law system.

Domestic and Family Violence Death Review Advisory Board Annual Report 2016/17 – findings on post separation violence and contact abuse

As stated in the WLSA submission, the family law system must place domestic violence safety and risk at the centre of all practice and decision making. In deaths considered by the Queensland Domestic and Family Violence Death Review and Advisory Board¹ between 2011 – 2015 16.4% involved child custody or access disputes as a risk factor. Of interest, in deaths involving Culturally and Linguistically Diverse (CALD) people as a risk factor it was double being 33.4%. In addition, it was found that where children were present in the relationship and the parents were or had separated, there was evidence that the perpetrator used the children as further means of controlling or abuse the victim in over two thirds of cases (69.7%)². This is a very common scenario that our clients experience but the family law system can have difficulty identifying this behaviour as abusive. For example, perpetrators of violence can retain, hold over or abduct children as a means of inflicting fear or concern on the mother. Our clients can have difficulty in obtaining legal aid support for urgent court proceedings to retrieve the children unless there are immediate safety concerns because *"he has as much right to care for the child as she has and the domestic violence is unproven"*.

¹ 2016 – 17 Annual Report

² Ibid p.11

The two highest risk indicators of death identified in the Annual Report were a history of domestic violence and an actual and/or pending separation – both of these indices puts families in the family law system fairly and squarely in the cohort of high risk matters. The links cannot be denied and any new family law system must have issues of domestic violence safety and risk as its core.

Recommendation 1

That the new family law system place issues of domestic violence safety and risk at the centre of all practice, procedure, legislation and decision making.

Recommendation 2

That the family law system develop and implement as a matter of urgency a domestic violence risk screening process in conjunction with domestic violence specialists.

Recommendation 3

That in making determinations about the best interests of children that the family courts specifically consider the history of domestic violence in the relationship.

Philosophical underpinnings

In our experience working in this area over decades, legislative and policy reform concerning issues of domestic violence and abuse needs to be clearly articulated and up front, otherwise the violence can be completely missed, minimised or ignored by service providers and decision makers. All professionals that work in the family law system require a heightened awareness of issues of domestic violence and abuse and its impact on women and children and be able to intervene early or as appropriate and provide safe and appropriate referrals to specialist domestic violence agencies.

Mutualising domestic violence

At the moment, there can be a tendency by professionals working in the family law system to prioritise outcomes that promote the cooperative care of children over and above issues of safety and risk.

Terminology such as 'high conflict' or conflictual relationships can be used in domestic violence matters. This has the effect of mutualising violence in relationships, meaning that both parents may be to blame for their involvement in the 'conflict'.

Serious consequences for the safety of women and children can flow from a failure to accurately identify the existence of domestic violence. Domestic violence concerns dynamics of power and control, often continues after separation, can involve systems and litigation abuse, and can be highly dangerous and potentially lethal to women and children

Importantly, when there is domestic violence, the cooperative care of children may not be in their best interest as it can continue to expose the mother and the children to ongoing issues of violence and control in the relationship.

Recommendation 4

That the Family Law System recognise its central role in protecting women and children in Australia from ongoing domestic violence and become domestic violence informed in its processes and decision making.

Recommendation 5

That the family law courts embed a domestic violence specialist professional (still employed by a domestic violence agency) in the court registry to assist with the system becoming more domestic violence informed especially in relation to issues of safety and risk.

Blaming Victims for the Violence

Unfortunately there can be a tendency in the family law system to "victim blame". In systems that do not take a domestic violence informed approach it can result in mothers being blamed for a range of behaviours but to take by way of example, they can be blamed for unruly children in their care. Professionals can fail to consider the dynamics of domestic violence and its impact on the family very deeply where the perpetrator may have intentionally disrupted the dynamics between the mother and the children or the perpetrator may have promoted this behaviour as a way of continuing control over the mother or the children are disruptive as they feel safer in her care. This approach was quite common in child protection or welfare system's responses in Australia and throughout the world.

In Queensland, in response to the *Not Now: Not Ever* domestic violence report and the Carmody Inquiry into Child Protection, the Queensland Government has invested quite substantially into more closely aligning the child protection and domestic violence systems.

This beginning of the culture shift is occurring by the adoption in some areas of David Mandel's Safe and Together Model which provides a domestic violence informed framework of operation for child protection workers. There is required and compulsory training in the model and its hallmarks include prioritising perpetrator accountability and not holding women accountable for men's use of violence, whilst recognising the impact of violence on women and children. It has a very important approach to the use and consideration of claims of mutual violence and requires child protection workers to map out the use of violence by each party and identify the "intent" of the violence. This means for women who may have used violence in the relationship (not uncommon), exploration around "intent" (was it self-defence, a trauma or frustration response?) is incredibly important. It may result in a professional assessment that her violence is unlikely to continue if she and her children are protected and if they can be supported to safety. The approach is quite revolutionary in the area of child protection and drives a culture shift away from victim blaming by professionals in this field.

Recommendation 6

That the ALRC investigate the work of David Mandel and the Safe and Together Model and whether key aspects can be translated to the family law system as a whole.

Contact Centres

In our experience, clients experience lengthy delays in getting into contact centres, sometimes up to 12 months. This is challenging as it can be an impediment to agreement and can sometimes result in an agreement between parents about post-separation arrangements for the children falling down because it can't be implemented as the contact centre haven't enough places available. The lack of places can also result in unreasonable pressure being placed on women in domestic violence situations in the family law system to supervise the contact themselves, which can be unsafe, or to agree to supervision by the father's relatives or friends, which can be dangerous or unsuitable. It has also led to the establishment of private and unregulated operators and the system utilising them out of desperation. This is completely unsatisfactory and all contact centres should be subject to government regulation and standards.

Given the serious cases of domestic violence and abuse that use contact centres as a way of ensuring some safety, the primary philosophical underpinning of contact centres should be about safety and this should drive their direction, practice framework and policies and not the alternative philosophy which is about *enhancing or maintaining relationships*.

Recommendation 7

That all child contact centres be licenced and government regulated with a central practice framework of safety rather than enhancing or maintaining relationships.

Child Support

We understand the issue of child support is not dealt with by this review as the legislation is separate from the Family Law Act 1975 and it is also administered by the Department of Social Services rather than the Attorney General's Department.

This is unfortunate as issues of Child Support and the payment thereof and of family law children's issues are inextricably linked.

In our experience, child support is a driver of much family law litigation as perpetrators of violence pursue increased time with children to reduce their child support liability. Commonly contact arrangements can be negotiated around child support formulas.

Many of our clients describe having gone through a lengthy mediation or court process to end up with an agreement or order for time that it is not taken up by the child support payee. This essentially leaves her having to prove to the child support agency that the time is not being taken up by the father. Proving this may be difficult in terms of adducing evidence, but it also takes time, in which she is receiving less money from Centrelink and less child support while having potentially full time care of the children. This is a common way for perpetrators to punish and continue to control survivors of domestic violence.

The underlying policy framework of the Family Law Act and the paramountcy principle of the best interests of children considers the payment of child support as separate to the amount of time a child should spend with a parent. For example, if a parent cannot afford child support this would not disentitle them to spending time with their child.

Despite this, the Child Support legislation completely relates child support and time with children as payments can be reduced with increased time spent with children.

Recommendation 8

That the Child Support legislation align with the Family Law Act by making the best interests of the child the paramount consideration.

Recommendation 9

The family law system better recognise and respond to the use of Child Support as a means to financially abuse women and children.

Recommendation 10

That research be undertaken as a matter of priority about the extent of domestic violence in the client base of the Child Support Agency and the extent in particular of how child support is used

as a means to inflict financial abuse and to measure child support as a "driver" of other forms of family law litigation.

Recommendation 11

That the Government guarantee payment of Child Support to payee parents and their children to reduce the potential for financial and systems abuse and to alleviate poverty and pursue any arrears from the payer as a government debt.

Recommendation 12

That the Child Support Agency establish a domestic violence strategy and specialist pathway to respond to domestic violence cases and that the decision makers be particularly alert to child support and child support processes being used as a tool of financial abuse and systems abuse against victims of violence and their children.

Child Sexual Abuse

WLSQ is concerned about the way child sexual abuse is dealt with in the family law system. When clients contact us about this issue they say that they find it difficult to believe the father would perpetrate such abuse but they have to take the allegation seriously. The mother may respond to the symptoms a child presents with by taking the child to a doctor – an action for which she can be criticised.

A failure to act protectively can see the removal of a child from their parents in the child protection jurisdiction. However, our clients have also reported that making notifications to child safety, and following up those notifications for further information have been misconstrued by child safety officers as the mother making the same allegations many times leading them to draw a conclusion that she is fixated and not believable.

If there is a Child Safety investigation, without physical signs it is difficult to substantiate the allegation. It is common that children do not make disclosures to police officers who are strangers and conduct interviews in an unfamiliar and potentially scary place for the child. This does not eliminate the possibility that the abuse took place.

We are not a research agency and cannot provide definite evidence but believe over the years there has seen a reduction in the number of clients seeking advice from us about child sexual abuse. We surmise a range of possible reasons for this including:

- *An overall hardening of the system's response to these issues being raised by mothers more noticeably since the shared parenting reforms introduced into the Family Law Act in 2006.*
- *Mothers are not believed, the system assumes she is lying or the children are making it up.³*
- *Mothers being advised by lawyers not to raise their concerns unless they have strong independent evidence of the abuse occurring.*
- *The courts increased propensity to change the living with arrangements for the children on the basis that the mother is emotionally damaging the children by raising and not proving the abuse to the satisfaction of the court.*

³ ABC, In the child's best interest, Background Briefing, 14 June 2015 at: <http://www.abc.net.au/radionational/programs/backgroundbriefing/in-the-childs-best-interests-v2/6533660>

- *Questionable framework and evidence of risk of sexual abuse based on sexual abuse risk reports.*
- *Assuming that if the mother herself was a victim of sexual abuse during her childhood that she in turn is projecting this experience onto her children.*

Mothers can be placed in an unenviable Catch 22 if there is no physical evidence of abuse described below:

This results in our clients make[ing] unenviable decisions about consenting to orders before trial where the children see the father for shorter periods of time eg. Every second weekend rather than risk having the living with arrangements changed at trial for the children to live with the father fulltime. Mothers are therefore making impossible decisions that involve weighing up exposing their children to the risk of sexual abuse every second weekend vis a vis the risk of the child living with him on a fulltime basis if the matter proceeded to trial. These clients become stuck between systems and the children suffer and arguably are being exposed to ongoing abuse. Child Safety will not / are reluctant to investigate any claims of sexual abuse of children if the family court is involved. The Police may also be more reluctant to respond thinking the claims are a tactic in a family court hearing. The Family Court itself is not set up to respond appropriately because it does not have an investigatory arm.

WLSQ acknowledges an investigatory gap in family law matters:

Child Safety's reluctance to investigate abuse allegations when family law proceedings are on foot may protect Child Safety's resources by diverting the issue to the Family Law Courts. However, it also perpetuates powerful myths: that women lie about violence and abuse of their children, and they do so to obtain advantage in the Family Law Courts. Unfortunately, it can leave very vulnerable children exposed to ongoing violence and abuse. Separation does not stop violence and abuse. It can be a time of increased danger and risk and can be an opportune time for violence/abuse to be directed at the children who are often having unsupervised contact with the perpetrator. The Family Law Courts do not have an investigatory arm and this means without evidence; they will invariably maintain contact, including significant time arrangements.

We note this issue was raised and a recommendation made in the 2010 ALRC/NSWLRC *Family Violence – A National Legal Response Final Report*:

.....the Commissions are also concerned that the problems outlined above [the investigatory gap] have been identified for many years, that recommendations to deal with them have been made in numerous ways and that, in some locations at least, no solution has been found. The Commissions note the strength of support from stakeholders that this issue be dealt with effectively. In the interests of the children concerned, these problems should not be allowed to persist.

The Commissions are of the view that investigatory services in Family Court cases should be provided by state child protection agencies. Further, there is strength in the proposal of the National Abuse Free Contact Campaign and the National Council of Single Mothers and their Children that there should be a specialist section in state child protection agencies to undertake this work [investigations]. This arrangement would have several advantages including:

- *drawing on existing child protection expertise;*

- *providing a dedicated service responsive to the particular needs of Family Courts;*
- *developing expertise within child protection agencies in the needs of Family Courts; providing a resource of people familiar with both systems who can 'translate' between the systems and educate participants in both systems; and*
- *providing a service that is not in competition with resources that need to be devoted to state child protection matters.⁴*

WLSQ supports implementation of ALRC/NSWLRC recommendation 19.1:

Federal, state and territory governments should, as a matter of priority, make arrangements for child protection agencies to provide investigatory and reporting services to family courts in cases involving children's safety. Where such services are not already provided by agreement, urgent consideration should be given to establishing specialist sections within child protection agencies to provide those services.

In addition, we recommend⁵:

That a formal, independent, transparent and open investigation take place into the way that child sexual abuse matters are currently being approached and handled in the family law courts.

Recommendation 13

WLSQ supports the ALRC/NSWLRC recommendation in the Family Violence Report (19.1) that Federal, state and territory governments should, as a matter of priority, make arrangements for child protection agencies to provide investigatory and reporting services to family courts in cases involving children's safety. Where such services are not already provided by agreement, urgent consideration should be given to establishing specialist sections within child protection agencies to provide those services.

Recommendation 14

That a formal, independent, transparent and open investigation take place into the way that child sexual abuse matters are currently being approached and handled in the family law courts.

History of care of the child

The stability of care arrangements and of the household and routines are important considerations for any child. For children where there is domestic violence this can be even more important. We support an additional Section 60CC consideration that a "history of care for the child" is taken into account in determining the best interests of the child. We acknowledge the current legislation alludes to this in considering the nature of the relationships. However, this provision specifically requires the court to look back in the relationship to determine care giving roles, which is particularly important in domestic violence matters.

Recommendation 15

That in determining the best interests of the child the family courts consider the history of care of the child.

⁴ ALRC/NSWLRC, *Family Violence: A National Legal Response*, 2010, paragraphs 19,95-96, Recommendation 19.1

⁵ Women's Legal Service Qld, *Submission to House of Representatives Parliamentary inquiry into a better family law system to support and protect those affected by family violence*, 2017, Recommendation 20.

Pre-nuptial and binding financial agreements

WLSQ recognises that adults can and should be able to enter into agreements and contracts as they see fit, if they are satisfied about their rights including their right to obtain legal advice and there is full disclosure. We are aware that many women, especially those who are entering into relationships for the 2nd or 3rd time want to enter binding financial agreements with their new partner in an attempt to protect their assets, especially for their children. These are generally in fairly equal bargaining positions with their new partners. They are not the clients of WLSQ.

WLSQ therefore supports the upholding of binding financial agreements in circumstances where:

- The parties are have an equal or fairly equal bargaining position;
- The parties obtain independent legal advice;
- The parties are able to negotiate around terms and conditions;
- There has been full disclosure and the parties are fully aware of their rights and risks;
- There are hardship provisions that can be accessed to avoid injustice, including if the person was a victim of domestic violence.

Our clients who seek advice about property settlements and binding financial agreements are generally vulnerable – financially and in other ways, can be victims of domestic violence or financial abuse and there are usually clear power differentials between the two parties.

Overall, WLSQ is concerned that any prospective provisions around BFAs-:

- Specifically consider the issues for vulnerable people, particularly women and how BFAs can be used as a tool of financial abuse; and
- appropriately protect their interests;

BFAs currently are an attractive option for use by perpetrators of violence as they are a particularly useful tool to financially exploit vulnerable women. Our practice knowledge tells us that BFAs are particularly used against culturally and linguistically diverse women, who have limited or no English, little understanding of their legal rights, have limited support and no understanding of the Australian legal system or laws.

Recommendation 16

WLSQ recommends any recommended changes to BFAs should include:

- *stricter requirements about disclosure before entering BFAs;*
- *require BFAs to be just and equitable;*
- *Include a domestic violence set aside provision*
- *Include a general hardship set aside provision.*

Domestic Violence Pathway – what would it look like?

The features of a specialist domestic violence family court pathway could include:

- early determination of the existence of domestic violence
- the prioritisation of the safety (emotional and physical) child and adult victims in all decision making

- a recognition that the greatest opportunity for a child who has lived with domestic violence to recover is to also support the safe care giver to find safety.
- the ability to suspend orders for time with for a period of time to allow time for the children and adult victim to gain stability, housing, schooling, safety, to recover.
- Orders to relocate for reasons of safety.
- Orders for the victim and children to hide where she is domiciled and for no contact
- Expedited processes for hearing applications for the suspension of orders in the above circumstances
- Decision makers being alert to system's abuse, litigation abuse, financial abuse via child support and property determinations
- Case management and consistent decision makers
- Specialised judiciary and other court professionals
- Use of specialised domestic violence reports that relay issues of safety and risk and expand on the dynamics of violence in the relationship including the subtle and covert use of power and control, identify patterns of behaviour, impacts of the violence on all family members including children.
- Early and speedy determination of issues.