

ANU Law Reform and Social Justice
ANU LRSJ Domestic Violence Project
R Oats and J Apolinar
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Domestic Violence Project
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Dear Commissioner Rhoades,

Review of the Family Law System – Issue Paper (IP 48)

Thank you for the opportunity to provide this submission to the Australian Law Reform Commission.

We are students from the Australian National University (ANU), Rhiannon Oats is studying a Juris Doctor and Jessica Apolinar is studying a Bachelor of Laws/PPE. We are part of the Domestic Violence Project under the ANU Law Reform and Social Justice Portfolio.

As students, we believe we offer a unique perspective on the issues raised. From our experiences and research we have chosen to answer two selected questions from the Issue Paper; Question 9 and Question 15.

Despite changes in the family law system we strongly agree with Senator the Hon George Brandis QC, former Attorney General of Australia, that the family law system is overdue for reform.

Specific responses to the ALRC Issue Paper published on 14 March 2018:

Question 9	<i>How can the accessibility of the family law system be improved for people living in rural, regional and remote areas of Australia?</i>
	<p>The rule of law emanates from a grounding that everyone has a right to equality under the law. But where is this equality when the nearest representation is 800-kms away? The Family Violence Legal Service Aboriginal Corporation's (SA) Annual 2015/16 Report states that in the area of greatest need, Ceduna on the far west Eyre Peninsula, recruitment for solicitors was their biggest problem. Their matter types were disproportionately relating to Family Law in 2015/16 with 43% relating to family or domestic violence and intervention orders. 10% of matters related to child protection. 38% of matters to family law and other matters making up the remaining 9%.</p> <p>Given that Universities on a national basis graduate more young lawyers than there are jobs available, there is an evident disparity between the oversupply of young lawyers in metropolitan areas and the recruitment challenges for legal services addressing family violence in towns such as Ceduna.</p> <p>A short term solution to this issue could be to offer incentives for recently graduated lawyers and accredited solicitors to gain experience in rural and remote areas to improve the lack of services. Incentives could follow the form of bursaries or scholarships to work in rural areas. Additionally Magistrates could increase the amount of times they fly in and out of rural areas. Or the quality of digital literacy could be improved with updating technology and increasing training. Or increasing the local legal aid centres' community legal education portfolios to schools, by providing schools with incentives for implementing legal education into classrooms.</p> <p>But a longer term solution is to increase the legal services to rural areas. This can be done by implementing a national scheme to support rural towns where the family law system is not adequately supported by existing services. The scheme</p>

detailed below could be pilot trialled in selected states. Clinical placements in rural areas would offer an insight into the challenging environment and barriers people face when accessing legal services in rural areas.

A person's ability to defend and uphold their rights should not be based on their postcode, but on a stable justice system that offers pathways to connect to and uphold those rights.

Recommendations:

1. We recommend that direct policies be put in place to implement a National Rural Clinical Law Program to:
 - Establish a national clinical program that joins participating Universities and Legal Aid/Community Legal Centres in rural areas. Rural Legal Aid/Community Law Centres would host the clinical programs.
 - Establish rural clinical objectives aimed at increasing access to justice in rural areas and accessibility to the family law system.
 - Establish clear timeframes of programs, 6 or 8 weeks full time with options to extend.
 - Establish a 5 year plan for the future progress of the National Rural Clinical Law Program to include annual reviews and 6 monthly checks.
 - Provide or allocate funding through the National Partnership Agreement on Legal Assistance Services between the Commonwealth and states and territories.
 - Allocate to the existing Legal Aid Centres/Community Legal Centres experienced family law solicitors to lead the programs.
 - Provide training to participating solicitors for engaging and creating a cohesive team of clinical participants from Universities.

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

Family violence is defined in s 4AB(1) of the *Family Law Act 1975* (Cth) ('the Act') as 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family, or causes the family member to be fearful'. This definition largely frames and reflects the common understanding of family violence. However, assumptions about who is affected by and what constitutes family violence still present obstacles for victims, especially when seeking legal intervention and assistance.

Challenging the assumption of 'one victim'

Almost every discussion of family violence rests on the assumption that there is only one victim. The definition of family violence in the Act refers to a victim as a 'member of the person's family' or 'the family member'. For its 2016 Personal Safety Survey, the Australian Bureau of Statistics notes violence as occurring to 'a person'.^[1] The White Ribbon Foundation describes the use of violence to exercise domination over 'the other person'.^[2] This assumption also prevails in a majority of influential theories which explain family violence and abuse.^[3] Nonetheless, it is clear that family violence can have widespread effects on multiple victims. Children in particular are too often affected by family violence, whether they experience it directly or indirectly. It is well-known that children who experience family violence suffer from emotional, physical, psychological, social and behavioural harm. Moreover, children who live in homes where there is family violence not only grow up with fear and anxiety but are also vulnerable to manipulation.

The Act addresses this by including the exposure of children to family violence and its effects in the definition of family violence. But this definition separates those

who are directly subjected to family violence from those who are indirectly harmed by it, even though the link between the violent or threatening behaviour and the damage suffered are effectively the same.^[4] This distinction may be helpful for decision-makers. It may, however, also mean that decisions regarding the various victims of family violence are made with different considerations in mind. Where the relationships within the family are especially complex, the interests and concerns of individual members may not always align. Decision-makers must be conscious of the reality that the impact of family violence extends to members of the family who both directly and indirectly suffer from it. They must also aim to balance the victims' different interests to find a solution that ensures their safety and protection without compromising the bonds within the family.

Challenging the assumption of discrete acts of violence

Under the current provisions on family violence in the Act, there has been substantial reliance on measures of the prevalence of violence and methods of recording and making decisions based on incidents of physical and sexual harm. The definition of family violence in the Act has been drafted in a way which focuses on *discrete acts of violence or threats*. For example, s 4AB(2) lists examples of behaviour that may constitute family violence to include 'an assault' or 'a sexual assault' or 'intentionally damaging or destroying property'. Similarly, some areas of research use the term 'violence' to refer to acts or threats of physical harm or sexual harm.^[5] These methods have reported successes in increased reporting and issuing of family violence prevention orders.^[6] Yet methods that are based on this definition cannot determine whether violence appeared as an isolated incident or as part of a systemic pattern of abuse, whether it was accompanied by other forms of abuse, or whether it involved fear. As a result, this approach disregards important forms of violence. A narrower definition of family violence fails to reveal the full extent and consequences of the coercive and controlling relationship that it can engender. It also neglects to account for other significant forms of violence, such as emotional, psychological and verbal abuse.

More importantly, the definition does not recognise that patterns of violence behaviour may continue even after a perpetrator has been apprehended and after family violence prevention orders have been issued. Perpetrators can and will take advantage of the legal system, especially where their control over the victim or victims is perceived to be threatened by police and judicial intervention. The coronial inquest into the murder of Luke Batty, for example, identified the various problems which can stem from an understanding of family violence as just a matter of isolated incidents. Of course, some situations of family violence may occur as a one-off event. Regardless, what is particularly concerning is that dealing with family violence as a set of episodic events can lead to a failure of the system to make updated assessments of risk. As a result, reported cases are poorly managed and perpetrators are able to “play” the system’.^[7] In Luke Batty’s case, his father Greg Anderson frequently challenged intervention orders, did not appear in court and was able to avoid arrest knowing of a ‘glitch’ in the system that meant he did not have to report to police for bail.^[8] Furthermore, the day that Luke was killed, an active family violence intervention order was in place but neither he nor his mother knew of it. A more recent case highlighting the same warnings is the murder of Tara Costigan by her ex-partner, Marcus Rappel, the day after he had been served an interim protection order.^[9] She too was not aware of the order made against him. And yet the Act still does not grasp the lesson that both cases, along with many others, raise. That is, the legal system has failed to support, protect and simply inform victims of decisions that affect them.

The fact that the same fundamental issues about family violence continue to be raised after decades of research illustrates that the very foundations of family violence legislation need to change. Of course, there are many old and new concerns as to the effectiveness and success of the legal system in dealing with family violence. But to address these concerns, to truly commit to putting the interests and safety of children and their families first, we need to start by revising our understanding of what family violence is. We need to alter the boundaries that frame the discussions that are held and the decisions that are made. We need to

look more closely at the concept of family violence and work toward creating a new definition that broadly captures the many victims and forms of family violence.

Recommendations:

1. The definition of family violence in the Act should accommodate for the fact that more than one family member can be a victim.
2. The definition of family violence in the Act must acknowledge its dynamic nature. This definition should register family violence as an ongoing pattern of control, involving a range of physical and non-physical tactics of abuse and coercion, not just in terms of discrete incidents.^[10]
3. Decision-makers must prioritise the safety of victims of family violence as they navigate the legal system, particularly by ensuring that they are the first to be made aware of any decisions and court orders which affect them.

[1] Australian Bureau of Statistics, *Personal Safety, Australia, 2016: Experience of Violence* (8 November 2017) Australian Bureau of Statistics
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4906.0~2016~Main%20Features~Experience%20of%20Violence~4>>.

[2] White Ribbon, *Domestic violence definition* (2018) White Ribbon Australia
<<https://www.whiteribbon.org.au/understand-domestic-violence/what-is-domestic-violence/domestic-violence-definition/>>.

[3] Denise Hines and Kathleen Malley-Morrison, *Family Violence in the United States: Defining, Understanding and Combating Abuse* (SAGE Publications, 2005) 17-20.

[4] See Lesley Laing, 'Children, young people and domestic violence' (Issues Paper No 2, Australian Domestic and Family Violence Clearinghouse, 2000) 1.

[5] Above n 3.

[6] Anthony Morgan and Hannah Chadwick, 'Key issues in domestic violence' (Research in practice No 7, Australian Institute of Criminology, 2009).

[7] *Inquest into the Death of Luke Geoffrey Batty* [2015] COR 2014 0855[468].

[8] Melissa Davey, 'Luke Batty: killed by a father no one truly knew', *The Guardian*(online) 2 November 2014 <<https://www.theguardian.com/australia-news/2014/nov/02/-sp-luke-batty-killed-by-a-father-no-one-truly-knew>>.

[9] *An Inquest into the death of Tara Maree Costigan*[2018] ACTSD 4; Alexandra Back, 'Coroner recommends review of family violence order processes after Tara Costigan death', *The Canberra Times*(online) 1 March 2018 <<https://www.canberratimes.com.au/national/act/coroner-recommends-review-of-family-violence-order-processes-after-tara-costigan-death-20180301-h0wuhl.html>>.

[10] See National Council to Reduce Violence against Women and their Children, 'Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021' (Background Paper, Department of Social Services, 2009).

Yours Sincerely,

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