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St Kilda Legal Service

Submission into the Family Law System Review

Introduction

St Kilda Legal Service (**SKLS**) welcomes the opportunity to submit to the Australian Law Reform Commission (**ALRC**) review of the family law system (the **review**). SKLS would like to take the opportunity to endorse the following submissions to the review:

- Women's Legal Service Victoria (**WLSV**) submission
- Women's Legal Services Australia (**WLSA**)
- Federation of Community Legal Centres (**FCLC**)

We support the recommendations outlined in the above submissions and acknowledge the work these organisations have undertaken in supporting and representing women.

SKLS is a generalist legal service which provides free legal services to disadvantaged residents of the Cities of Port Phillip, Stonnington, and Bayside. SKLS currently operates a family violence program which includes a duty lawyer service at Moorabbin Justice Centre and a specialised family violence outreach service. It is through this program that we are able to see problems within the system through the representation of our clients involving family violence matters. Many of our clients have complex needs, or are dealing with a perpetrator who has complex needs, drug or alcohol addiction or serious mental illness, in addition to family violence.

SKLS would like to thank the family violence survivors who shared their stories with us, and assisted in forming the recommendations outlined below.

Background

While the WLSV submission in particular highlights a set of priority areas for reform, our submission focuses on one specific area of the family law system. For victims of family violence, protection and privacy remain paramount, in particular where there has been severe incidents of physical and emotional abuse.

Currently a victim survivor of family violence who is a parent needs the permission of the perpetrator in the following circumstances.

- To change the name of the child
- To travel overseas

If there is joint parental responsibility and there is no consent between the parties in either of these scenarios, then the victim survivor will need to commence proceedings in the Federal



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Circuit Court in order to obtain consent from the perpetrator to either change their child's name, or travel overseas.

This process opens up an avenue for the perpetrator to continue to commit family violence and place the victim survivor and their children at greater risk. SKLS has gathered case studies from clients to support the recommendations outlined below.

Consent to name changes

Changing a child's name from the perpetrator's, to the survivor's surname, for example, may have significant personal and symbolic importance to a family violence survivor, and very often for the child involved. Yet the process for changing a child's name generally requires the perpetrator's consent, or a court process, both of which often create safety risks for the family violence survivor.

If a child has a birth certificate signed by both the mother and father, the name listed on the certificate will be the legal name of the child (s 26 of the *Family Law Act 1975(Cth)*).

Generally, in order to change a child's name legally, a separated parent will either:

- Have to seek the agreement of their ex-partner about the child's last name, and then register that as a Change of Name with the Births, Deaths and Marriages Office; or
- If no agreement can be reached, seek a court order that allows her to change the name

In cases where there is sole parental responsibility, a court order may exclude a parent from being consulted on any of the five "major long-term issues":

- (a) the child's education (both current and future); and
- (b) the child's religious and cultural upbringing; and
- (c) the child's health; and
- (d) the child's name; and
- (e) changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.

However in situations where sole parenting orders are made and there is no specific exclusion, the *Family Law Act* requires that both parents consent to changing a child's name.

Where there is joint parental responsibility, the parents must consult with each other before making a decision to change a child's name, including by hyphenating it. Before commencing court proceedings in relation to a name change order, the parent seeking the name change must take "all reasonable steps" to seek the other parent's consent.



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Yet for victim survivors of family violence who have joint parenting responsibility or who do not have parenting orders, requiring them to contact the perpetrator to seek consent to a name change often places that survivor, and her children, at unnecessary risk of harm. This includes the risk of physical violence, psychological harm, or of protracted legal proceedings that themselves are may be a form of control and psychological harm.

Even if in family law the survivor has sole parental responsibility and is not required to seek the perpetrator's consent for a name change, state law may still require a court order to allow a name change.

In our state of Victoria, section 26(3) of the *Births, Deaths and Marriages Act 1996 (Vic)* provides that an application for the change of a child's name may only be made by one parent if:

- The applicant is the sole parent;
- There is no other surviving parent; or
- A Court approves the proposed name change.

There are similar requirements in NSW and Queensland name registration law.¹

Therefore, a court order is often required to effect a name change, and such proceedings can take a long time to resolve. In the case of *Reynolds & Sherman* [2015] FAM CAFC 128 the Court recognised changing a child's surname was a matter of "real importance" and adequate court time should be allocated in order for the Court to consider such an issue.²

Where consent is not given by the perpetrator, the victim survivor must demonstrate to the court that all reasonable steps have been undertaken to seek that permission, including contacting the perpetrator. Most victim survivors who have fled family violence prefer to maintain limited or no contact with the perpetrator in order to reduce safety risks. Therefore, this process is stressful and creates the risk of further physical and mental harm.

As in Sarah's and Mona's cases (**below**), the requirement for seeking the consent of the perpetrator as well as a court order in most cases, creates a significant barrier for family violence survivors to effect a name change of their child. This includes safety concerns associated with re-engaging with the perpetrator, as well as an unwillingness to engage in further litigation that may provide the perpetrator another mechanism of control.

Sarah's story

¹ See this discussion of Reagon & Orton [2016] FamCA 330 -

[http://www.hopgoodganim.com.au/page/Publications/What%E2%80%99s in a name Changing a child%E2%80%99s name post-separation - 22 June 2016/](http://www.hopgoodganim.com.au/page/Publications/What%E2%80%99s%20in%20a%20name%20changing%20a%20child%E2%80%99s%20name%20post-separation%20-%2022%20June%202016/)

² <https://www.andersons.com.au/lawtalk/2016/september/change-child-name-without-ex-consent/>

Sarah has one child with Tom, she separated from him after a three year relationship. Since the birth of her child, there has been several reports of physical abuse towards Sarah and the child by Tom, including broken limbs, bruises and internal bleeding.

After the child spent seven days in hospital from injuries sustained by Tom, the police applied for an IVO on behalf of Sarah in 2013. Over the next four years, intervention orders were applied for and breached numerous times by Tom, who made threats via text message and surveillance of Sarah and her child.

A final intervention order was granted in April of 2016, however Tom's behaviour continued and eventually a 10 year order was made with contact ceasing completely other than via future family law orders.

Sarah sought legal advice regarding name change for school enrolment and safety purposes. Tom has a distinctive last name and her child only has his last name. To minimise the risk of being located, Sarah did not want her child to have the same last name as Tom.

However, after receiving legal advice, Sarah was concerned that litigation may open the door for Tom to apply for family law orders effecting Sarah's parental responsibility. She was also concerned that there was no guarantee that she would get the desired outcome, and that there may be safety risks associated with reengagement with Tom. She therefore decided not to proceed with a court application.

Overseas travel

The same process, and risks, apply in circumstances where the family violence survivor would like to travel overseas. Currently, if there is a parenting order in place or an order pending, it is an offence under sections 65Y and 65Z of the *Family Law Act 1975* (Cth) to remove a child from Australia unless you have the written consent of the other parent.

Where there is joint parental responsibility, one parent seeking to travel with a child will need to obtain the written consent of the other parent for the child to undertake the travel. Similar to the process above involving name changes, a parent will need to apply for a court order if the other parent refuses or they cannot obtain consent.

In circumstances where a family violence victim survivor would like to take a child overseas and does not have sole parental responsibility, again they would have to take reasonable steps to gain consent of the perpetrator to do so, which may put them at risk.

Mona's Story

Mona has two children with Arthur, and the couple has been separated for 3 years. Mona has an elder daughter to a previous relationship. There is no parenting plan or family law orders in place, and the Department of Health and Human Services had been involved with the family.



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There was an intervention order (IVO) against Arthur made in September 2016 for a period of ten years. Arthur breached the order and received a punishment of 6 months imprisonment. Sarah informed SKLS that Arthur was a drug user and unsafe to be around.

Mona sought advice from SKLS, as she wished to change the children's names for future passport applications and due to safety reasons. After considering the risks of seeking Arthur's consent, or applying to the court, Mona elected to not change the child's name.

Recommendations

1. The Commonwealth Government should amend the *Family Law Act* to provide that where:
 - a. the court finds that there has been a history of violence in a relationship;
 - b. sole parental responsibility has been granted to the victim survivor of family violence; thenthe survivor should not be required to seek the perpetrator's consent, or a court order, to either obtain the child's passport, or to undertake overseas travel with the child.
2. The Commonwealth Government should amend the *Family Law Act* to provide that where sole parental responsibility has been granted to the victim survivor in a case of family violence, the survivor should not be required to seek the perpetrator's consent, or a court order, to change the name of the child.
3. State and Territory Governments should amend Births, Deaths and Marriages Acts (where relevant) to allow the Registrar of Births Deaths and Marriages to effect a name change upon the application of only one parent without a court's approval of the proposed name change where:
 - a. The applicant has sole parental responsibility; and
 - b. A court has found that the applicant is the victim survivor of family violence.

If you have any queries, please contact Kali Watson, Community Legal Education & Law Reform Lawyer, on 03 9534 0777 (reception) [REDACTED]

Yours faithfully

ST KILDA LEGAL SERVICE CO-OP LTD

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