DOMESTIC VIOLENCE
LEGAL WORKERS
NETWORK

14 May 2018

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Via email: familylaw@alrc.gov.au

Dear Colleagues

FAMILY LAW REVIEW

Who we are

The Domestic Violence Legal Workers' Network of WA (DVLWN) welcomes the opportunity to provide input into Australian Law Reform Commission (ALRC) review of the family law system.

The DVWLN was established in 2004 as a peak body for family violence legal workers in Western Australia. Our members consist primarily of solicitors from community legal centres who work with family violence victim-survivors and other family violence specialists throughout the Perth metropolitan region and regional Western Australia.

Our members and clients

Our members work with clients who experience disadvantage, have complex needs and require additional support to participate in and engage with the family law system.

Our clients come from a range of diverse cultural and linguistic communities, including remote Aboriginal and Torres Strait Islander communities. The family violence trauma suffered by our clients is frequently compounded by other challenges including poverty, disability, differences in language and culture, lack of education and mistrust of the legal system.

What we do

Our members provide legal advice and representation across the various areas of law that arise with family violence, including family law, criminal law, family violence restraining orders and care and protection.

Family violence remains a core element in the vast majority of the family law matters undertaken by our members. We advocate for the needs of family violence victim-survivors and their children to be a central priority of this review in order to ensure the family law system is better able to respond to family violence and achieve safe and just outcomes for these families.

Format of our Submission

We believe it is important that the ALRC has the benefit of hearing from our members to ensure that the experiences of our clients as the more vulnerable in society are heard.

Our clients face immense challenges and barriers in engaging with the family law system. However, given the limited funding of the community legal sector, the DVLWN does not have the resources to respond to each of the questions in ALRC Discussion Paper individually. Attached to this letter and marked Annexure "A" is the submission of the DVLWN. We have focused on the areas of the family law system which our members consider to be the most in need of reform in order to enhance the ability of the family law system to make it safer and more just for families affected by family violence.

Questions or Further Information

If you have any questions or would like any further information about this Submission please contact Allison Munro, Network Co-Coordinator at dvlwn@wlcwa.org.au .

Yours sincerely

Allison Munro and Sarah Bright

Co-Coordinators

Domestic Violence Legal Workers' Network (WA)

Annexure "A"

Submission of DVLWN (WA) to ALRC Family Law Review

Introduction

Our members' experience is that the current family law system frequently results in further trauma and disadvantage to family violence victim-survivors. Victim-survivors face several challenges in the family law system, some of which prove insurmountable and result in victim-survivors relinquishing their rights or disengaging from the system altogether.

These challenges include the disconnect between:

1. Risk screening and assessment in the family violence sector compared to how risk of harm is assessed in the family law system;
2. The understanding of the drivers and dynamics of family violence and the different methods used by perpetrators to coerce and control the victim-survivor (including the use of family law courts to perpetrate systems abuse);
3. The different courts and sectors which together form the 'family violence system' and the ability of traumatised persons and those with complex needs to understand and navigate the system without continuous support or advice provided from service professionals with a holistic perspective.
4. What the law, court practice and procedures require victim-survivors to do, and their ability to:
    a. know about;
    b. understand;
    c. navigate; and
    d. participate in

    the various systems in order to achieve an outcome, while at the same time requiring additional support and experiencing ongoing family violence.

Summary of Recommendations

The DVLWN members consider that the safety of family violence victim-survivors and their children would be increased if there was:

1. Compulsory training introduced for all professionals working in the family law system with respect to family violence risk assessment and screening, trauma-informed practice and cultural competency;
2. More cross-sector training available to enable lawyers and non-legal professionals working with families experiencing family violence to better understand the roles that each profession plays and learn from each other;

3. An increased ability to hold professionals in the family law system to account when they engage in behaviour which increases risk to parties in the family law system;
4. An early and ongoing risk assessment process to identify family violence in the family law system. This should include an easier way for family violence to be disclosed that minimises the risks of disclosure and burden on the victim-survivor;
5. Simplified court forms and processes to increase engagement of parties with the family law system and reduce the resources required to facilitate parties seeking outcomes from the system;
6. Removal of the presumption of equal shared parental responsibility and a simplified legislative pathway for determining best interests of children;
7. Consultation with representatives from Aboriginal and Torres Strait Islander communities and culturally and linguistically diverse (CALD) communities to identify opportunities to improve the functionality of the family law system for these victim-survivors;
8. Consultation with representatives from disability advocates and organisations to identify opportunities to improve the functionality of the family law system for these victim-survivors;
9. The option for a specialised model of ADR which is safe for parties experiencing family violence and further funding for parties to attend legally assisted mediation;
10. Creation of a mechanism to fast track and reduce paperwork required for parties with small asset pools to seek property settlement and financial relief;
11. Amendment of the *Family Law Act* to require courts to actively and specifically consider family violence when determining just and equitable outcomes;
12. Further funding to enable community legal centres and Legal Aid Commissions to expand the advice, assistance and representation they can provide to families experiencing or at risk of experiencing family violence.

The issues and the challenges experienced by our members with their family law casework are discussed in more detail below.

1. Risk assessment and screening

It is the experience of our members that the way in which the family law system identifies and responds to the risks of family violence is inconsistent with the family violence system and other related systems with which victim-survivors engage. There is a significant disparity between the training of professionals working in the family violence sector compared to those who practice solely in family law in relation to:

- Risk screening and assessment;
- Trauma informed practice;
- The dynamics of family violence (e.g. power and control wheel etc); and
- The behaviours, including that of professionals working in the system, that may contribute family violence.

There is a general lack of training available to family lawyers about the principles of risk assessment and screening (although it is noted that many experienced family law practitioners do acquire these

skills). This is in direct contrast to the level of training that lawyers and professionals who work in the family violence sector receive, much of which is only available to government funded services or those funded through the National Legal Aid Commission.

This lack of training amongst many of those practising in family law means that certain behaviours are often not recognised as family violence. Victim-survivors are then held to a high standard in terms of having to prove the violence happened or face the prospect of being 'labelled' as an alienating parent. It can be very difficult to prove family violence given it occurs privately and the perpetrator will frequently lie about their role in the violence or make up allegations about the victim-survivor. Some forms of family violence, such as coercive control, don't result in obvious physical symptoms and require a nuanced, flexible and detailed understanding of family violence dynamics to enable the proper identification of a pattern of behaviour motivated by entitlement, coercion and control.

Lack of training also leads to a high prevalence of systems abuse in family law, ranging from inadvertent collusion with perpetrators (arising from not recognising the underlying dynamics of family violence and control dominating the parties' relationship) through to blatant and direct abuse of the victim-survivor by the lawyers themselves. (For example, one of our members who represented a victim-survivor who was locked in a room for several days by the perpetrator was physically intimidated outside the court by the perpetrator's lawyers and accused of being professionally negligent by 'allowing' the client to allege family violence and not understanding the meaning of 'abuse'.)

We therefore advocate strongly for the compulsory training for all professionals working in the family law system with respect to family violence risk assessment and screening, trauma informed practice and cultural competency.

We also urge the ALRC to explore options to better identify and assess the risk of family violence early on in the family law system. Too often victim-survivors consider that the risk of openly disclosing family violence or filing a Notice of Risk is too high and will result in further violence to them or their children. These clients will often disengage from the system and concede to the perpetrator's wishes. (In extreme cases of family violence this may be the safest way for the victim-survivor to behave in order to keep themselves alive).

Western Australia has a common risk assessment framework known as the Common Risk Assessment and Risk Management Framework (CRARMF).[1] However, this is different from the risk assessment frameworks used in family law, which have included the DOORS model and others.

We advocate for an early and ongoing risk assessment process to identify family violence in the family law system and for risk assessment and response frameworks to be consistent between different systems. Victim-survivors would benefit from the more frequent provision of evidence by qualified professionals, so that the burden of evidence is not placed on victim-survivors alone. For example, in Western Australia family consultants could be engaged in every matter to interview the parties and their report could include their opinion of any risk assessment to ensure the Family Court of Western Australia has that evidence and the parties and their lawyers understand the level of risk posed in that family at that time. The family consultants could meet with families throughout their matter and conduct risk assessments on a continual basis as we note that risk is fluid and can easily change.

The development of such a risk assessment process would be dependent on the essential requirement that family consultants receive regular, accredited and comprehensive training in family violence, risk assessment, trauma and cultural competency. As discussed above, without such

[1] https://www.dcp.wa.gov.au/CrisisAndEmergency/FDV/Pages/CRARMF2.aspx

training there is a risk that experts can minimise violence or misinterpret trauma resulting in further harm to victim-survivors and their children.

2. *Trauma Informed practice*

There is currently limited understanding of the trauma resulting from family violence amongst family law professionals. Trauma is not always visible or easily identified, and there is a risk that trauma symptoms can be misinterpreted and used to discredit accounts of victim-survivors. Without training and education about trauma, there is a risk that the system and the professionals within it will embolden the perpetrator's control of the victim and facilitate the perpetration of family violence. It is essential for all family law professionals to understand that trauma symptoms are normal responses that arise out of abnormal situations of violence and respond to them as such.

Again, we stress there is a need for all family law professionals, including lawyers and social workers and psychologists who provide family reports, to receive comprehensive and ongoing training and accreditation in family violence and trauma informed practice. We also advocate for family violence specialists to be embedded in the Family Court system to ensure that court processes are trauma informed, and assist with identifying the need for family violence supports and services.

3. *Diversity of victim-survivors*

For many victim-survivors the trauma from family violence is compounded by the intersections of different cultural and language backgrounds and/or disability. Trauma is experienced differently by different groups within our community, including Aboriginal and Torres Strait Islander families, those from culturally and linguistically diverse (CALD) communities and those with disability. The family law system must identify and address the needs of family violence victim-survivors from different backgrounds in order to provide just and safe outcomes.

We urge the ALRC to consult with representatives from Aboriginal and Torres Strait Islander communities, CALD communities and disability advocates and organisations to identify ways to improve how the family law system can increase the safety of these victim-survivors and their children and provide just outcomes.

4. *Misuse of process / Systems abuse*

Litigation is a continued form of family violence for many of our members' clients. Perpetrators may initiate proceedings solely to maintain relations with the victim-survivor, drag out proceedings to force the victim into settlement or intimidate the victim-survivor through cross-examination.

We welcome steps currently being taken by the Federal Government to prevent the perpetrator from directly cross-examining the victim-survivor. While there is clearly a need to more effectively reduce all forms of systems abuse, we stress that any method to do so must include measures to ensure it is only used for the benefit of the primary victim-survivor. It is common for family violence initiatives, including restraining orders, be manipulated by perpetrators and used against the very primary victim-survivors they were developed to protect. We caution against this when considering developments to protect against systems abuse.

Comprehensive training of family law professionals about the intricacies of family violence, as well as the identification of primary and secondary offenders, will assist with the identification and response to systems abuse.

Exploration should also be given to mechanisms to allow professionals working in the system to identify other professionals who may be, inadvertently or blatantly, colluding with a perpetrator or otherwise facilitating systems abuse. We suggest the colluding professional should be reviewed and held to account in an initially confidential way to encourage those within the legal profession to practice in a safe way for the families concerned. If the colluding conduct continues, the utilisation of existing mechanisms, such as a complaint to the Legal Practice Board of Western Australia, could be investigated. (We caution that unless the process is confidential the utilisation of this complaint system could expose the lawyer making the complaint to harassment or intimidation from the opposing lawyer or possible disciplinary action against them if their complaint was not believed.)

Given the complexities involved with systems abuse and the risk that measures to reduce it could be used against the primary victim-survivor, we recommend the commissioning of research to further understand systems abuse, and how it can be prevented. Such research should evaluate the measures discussed above, as well as consider the impact of abuse of process on victim-survivors alongside the right of parties to participate in court proceedings.

5. *Difficulties in navigating numerous court systems*

In Western Australia family violence victim-survivors frequently have concurrent proceedings in different courts. There may be family law proceedings in the Family Court of Western Australia, restraining order proceedings in the Magistrates Court and criminal or civil matters in either the Magistrates Court, District Court or Supreme Court. The need to participate in proceedings in multiple courts is confusing, time intensive and results in victim-survivors having to re-tell their story numerous times.

As Western Australia did not refer its powers to the Commonwealth and has its own State Court with respect to family law matters, there may be opportunity in Western Australia to trial a court system for families where the Family Court of Western Australia has increased powers to determine:

- family law matters;
- family violence restraining orders; and
- care and protection matters.

This would allow families experiencing or at risk of family violence to only have to engage with one Court. It would reduce the burden on victim-survivors of repeating their story and lessen the risk of inconsistent outcomes from different courts.

Ideally, the DVLWN members consider there should be specialist family violence courts (which did exist in Western Australia but stopped operating in around 2010 due to expense), or at least family violence lists in the Family Court of Western Australia. Specialist courts could consider all matters related to the family violence, and all staff within the system (lawyers, non-legal workers and the Bench) would be family violence and trauma informed and culturally competent.

In the interim period, our members report a lack of clarity and certainty around the intersection between family law orders and restraining orders, and there is a need for clarification in this regard. In particular, there needs to be a clear ability for courts making restraining orders to be able to suspend, vary or revive parenting orders. (For example, to protect children under restraining orders it is necessary for these courts have the clear ability to suspend Family Court 'spend time' orders.)

6. ***Complicated procedures and laws***

In more than half of parenting cases that come before court one or both parties are unrepresented for some or all of the proceedings.[2] Many victim-survivors therefore need to navigate the complexities of the family law system on their own and face a myriad of procedures, forms, rules and laws. Forms and processes are complex, lengthy and legalistic, and many victim-survivors are simply not able to understand what is required of them in order to pursue their matter. Even when victim-survivors have legal representation, they can find the system difficult to understand as the experience of ongoing trauma and family violence can impact their ability to retain information.

These complexities lead to emphasis being placed on the form, rather than the substance of applications. Prioritising form over substance results in increased risks for victim-survivors and their families. For example, our members report that clients are frequently turned away from filing urgent parenting applications where children are at risk because the forms have not been completed properly. The current lack of adequate funding for the community legal centre sector means that most community legal centres lack the resources to help clients complete all of the forms required and often community legal centres are unable to provide family law advice and assistance beyond one-off appointments.

There is an urgent need for the simplification of family law procedures and the redesign of forms to allow victim-survivors to tell their story and provide information to the court in a less legalistic and more natural and intuitive way.

7. Need for safe ADR and FDR options for families experiencing family violence

The power imbalance between the victim-survivor and the perpetrator means that mediation is often inappropriate and unsafe. The current FDR system is not designed for matters where there is family violence and it is appropriate for parties experiencing family violence to be excluded from the requirement to participate in it. However, the default effect of this for victim-survivors who cannot afford private mediation is that they are then forced to either engage in complex court proceedings or give up on their claims. In this sense, victim-survivors are effectively excluded from one of the core functions of the family law process.

The DVLWN members strongly advocate for:

- the option of a specialised model of ADR which is safe for parties experiencing family violence so they have the opportunity to explore settlement options; and
- Further funding for parties to attend legally assisted mediation;

This specialised ADR must be supported by expert mediators and lawyers who are comprehensively trained in family violence, trauma informed and culturally competent in order to remove the power imbalance and provide a real alternative to court proceedings.

8. Removal of the presumption of equal shared parental responsibility

The DVLWN supports the removal of the presumption of equal shared parental responsibility. The presumption leads to the perception by perpetrators that they are entitled to or have rights in

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[2] Family Law Council 'Families with Complex Needs and the Intersection of the Family Law and Care and Protection Systems' Final Report – June 2016 at https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF

relation to spending equal time with their children. This perception is inconsistent with the best interests of the child and the safety of victim-survivors and their children. It also puts pressure on victim-survivors to agree to consent orders for equal shared parental responsibility and equal time which can increase risk and lead to dangerous outcomes.

We are also concerned that the concept of equal shared parental responsibility does not reflect how all families decide important issues for children. The focus on biological parents rather than wider kinship or family groups may be culturally inappropriate for some cultures within Australia, including Aboriginal and Torres Strait Islander communities and CALD communities.

The frequency of orders made for children to have contact with family violence perpetrators is also of concern. In many cases the court appears to place the risk of potential psychological harm of a child not having a relationship with their father ahead of the safety of the victim-survivor or the child. It is essential for the family law system to acknowledge that harm caused to the adult victim-survivor is also harm caused to the child, and that contact with children can provide the perpetrator with the means to continue abuse.

9. Inadequate property settlement for family violence victim-survivors

The power imbalance arising from family violence has a significant impact on the victim-survivor's ability to negotiate a property settlement. Difficulties in negotiation are often exacerbated by financial abuse and the non-disclosure of interests by the perpetrator. The burden arising from the complex and lengthy process of property settlement and the continued connection with the perpetrator results in many victim-survivors accepting unjust outcomes or disengaging from the process altogether. This contributes to the reality that women are at a higher risk of poverty then men, and more at risk of financial hardship after separation.[3]

When the property pool is small, victim-survivors are unlikely to have legal representation and it is common for victim-survivors to simply walk away rather than contend for a fair distribution of assets. If there is superannuation the process for obtaining a superannuation split is complicated and hard to navigate without legal assistance. Physical possessions such as cars and furniture may be the only assets and can be disposed of rapidly unless there is a fast and straightforward process to prevent this. We therefore urge the ALRC to consider the option for small claim property matters to be dealt with in a separate list and to review the procedures, evidence and disclosure requirements. We support a case management system which enables these matters to be fast tracked to facilitate victim-survivors having access to either property settlement entitlements, spousal maintenance or relief from joint debts sooner to assist them to develop financial independence. This is a precursor for many victim-survivors to be able to move on from the relationship and break free from the cycle of violence.

We refer the ALRC to the Women's Legal Service Victoria report 'Small Claims, Large Battles' and endorse the recommendations therein.[4]

When the property pool is large, and even when victim-survivors have legal representation, family violence is often not taken into account despite it being clearly relevant to the victim-survivors' ability to contribute and to their future needs. Our members report that the *Kennon* adjustment[5] has several limitations. Firstly, as noted above family violence may not have been identified in the family

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[3] Goward P, Human Rights and Equal Opportunity Commission and Sex Discrimination Unit, 'Striking the Balance: Women, Men, Work and Family: Discussion Paper', 2005.

[4] Women's Legal Service Victoria, 'Small Claims, Large Battles' 2018 at http://www.womenslegal.org.au/creating-change/small-claims%2c-large-battles.html

[5] *Kennon* [1997] FamCA 27.

law system. If it is, proving a causal connection between family violence and contributions is difficult or impossible for some forms of intangible family violence such as coercive control. Finally, it does not take into account negative contributions such as the destruction of property by the perpetrator.

Furthermore, a significant amount of evidence is required and the onus is on the victim-survivor to 'prove the allegations' in order to argue for a *Kennon* adjustment. This process is traumatic and usually not considered worth the outcome even if the victim-survivors' arguments are accepted. The outcome of successful *Kennon* arguments (an adjustment of perhaps 5-10%) also sends the message that family violence is not considered important in family law.

The DVLWN members therefore recommend that family law legislation expressly requires the court to take family violence into account when determining just and equitable outcomes, and this should include a greater consideration of the long term socio-economic impacts of the family violence on the victim-survivor as compared to the perpetrator.

Finally, we note that while child support was not included in the Issues Paper it is an essential part of the family system and is frequently used as a means for ongoing financial abuse.

10. ***Chronic under-funding of courts and the community legal sector***

Inadequate funding for courts means that some courts, particularly those in regional and remote areas, do not have appropriate facilities such as safe rooms and separate entry-ways to keep victim-survivors separated from perpetrators and this results in the risk of further violence. It additionally results in lengthy delays and is a further cause of victim-survivors disengaging from the family law system without adequate resolution of matters.

Furthermore, our members report that the pressure faced by the courts leads to pressure being put on victim-survivors and their lawyers by judicial officers to agree to 'spend time' arrangements at preliminary hearings, leading to further risks of conflict and family violence. Additionally, for courts making restraining orders there is pressure to agree to parenting-type arrangements that are in effect exercising a de facto Part VII jurisdiction without having regard to the best interests of the child.

Chronic under-funding for legal services including the community legal sector only leads to further downstream costs and must be reversed for a future effectual and robust family law system. We note that in 2014 the Productivity Commission recommended the legal assistance sector receive an annual $200 million increase in funding for civil law and we strongly advocate for further funding to services which provide holistic advice and assistance to clients in the areas of family law, family violence (restraining orders), criminal law and care and protection. There also needs to be increased funding and support for families experiencing family violence to seek non-legal assistance, including counselling and support to obtain housing, food, education and financial independence, all of which are required to increase safety and enable victim-survivors to pursue their legal options.

Conclusion

On behalf of DVLWN members we thank the ALRC for the consideration of the issues raised above.

We urge the Commission to place the safety and needs of family violence victims-survivors and their children at the centre of the redevelopment of the family law system.