



Peninsula
Community
Legal Centre

RESPONSE TO AUSTRALIAN LAW REFORM COMMISSION REVIEW OF THE FAMILY LAW SYSTEM DISCUSSION PAPER

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INTRODUCTION

Peninsula Community Legal Centre (PCLC) welcomes this opportunity to respond to the Australian Law Reform Commission's Family Law Review Discussion Paper (the Discussion Paper).

In this document, PCLC will be briefly responding to those questions in the Discussion Paper of particular relevance to our practice and clients, as well as offering some additional observations in relation to the ALRC's proposal to establish Families Hubs.

FAMILIES HUBS

While no specific questions were asked in relation to the Families Hubs in the Discussion Paper, PCLC would like to express strong support for the concept as an effective single and visible entry point to the family law system, and one which is likely to form the foundation for many of the reforms proposed throughout the Discussion Paper.

PCLC has been involved in the shaping of the single entry point concept locally at the Bayside Peninsula Orange Door Support and Safety Hub which recently commenced operations in Frankston in October 2018. The Bayside Peninsula Hub is one of the first four hubs to be launched in Victoria following Victorian Royal Commission on Family Violence's recommendation to establish Support and Safety Hubs to locate family violence service providers in a single location to connect people directly to services which would help them navigate the system and provide a coordinated response to a range of different needs.

There has been significant discussion about the role that legal service providers are intended to play within the Hubs. Based on our lengthy experience with family law system users with complex needs, in particular those experiencing family violence, PCLC has taken the view that legal service providers must have a regular on-site presence at the Hubs so that legal advice can be readily obtained and clients can be referred to ongoing casework and social support services if necessary.

In the initial stage of the Orange Door's operations PCLC will be providing secondary consultation services (ie: generalised legal advice) to social support services present at the Frankston Orange Door Support and Safety Hubs. The provision of secondary consultation services is a key initial step in relationship building between a range of legal and non-legal service providers, many of whom may not previously have had a direct relationship. It is expected that eventually this role will expand to the provision of direct client advice, as well as secondary consultation services.

On this basis, PCLC supports ALRC's Proposals 4-1, 4-2 and 4-4 that, inter alia, "the Australian Government should work with state and territory governments to establish community based Families Hubs...", and that "this should include on site, out-posted

workers from a range of relevant services...”.

SCOPE OF SUBMISSION

This document addresses the following three questions:

Question 5-2 Should the provisions of the Family Law Act 1975 (Cth) setting out disclosure duties be supported by civil or criminal penalties for non disclosure?

Question 6-1 What criteria should be used to establish eligibility for the family violence list?

Question 6-2 What are the risks and benefits of early fact finding hearings? How could an early fact finding hearing process be designed to limit risks?

DETAILED RESPONSES TO QUESTIONS

Question 5-2 Should the provisions of the Family Law Act 1975 (Cth) setting out disclosure duties be supported by civil or criminal penalties for non disclosure?

PCLC endorses recommendation 4 of the Women's Legal Services report, Small Claims, Large Battles – Achieving economic equality in the family law system, March 2018 which, inter alia, recommends the strengthening of mandatory financial disclosure that will enable family violence victims and decision makers to access the financial information necessary to resolve small claims matters efficiently and fairly. In particular, we support the report's proposal to amend the Family Law Act 1975 (Cth) to enable the forfeiture of assets as an additional measure in the absence of proper disclosure.

PCLC also believes that supporting the disclosure provisions of the Family Law Act 1975 (Cth) with civil or criminal penalties may be a useful measure and may provide parties with greater incentive to disclose, even prior to litigation. In turn, if full disclosure is made, parties could then obtain early advice about their entitlements and have greater confidence to mediate or negotiate on a fully informed basis.

It is also our view that civil and criminal penalties would complement existing measures the courts have at their disposal to deal with parties who refuse to disclose. These penalties may provide a powerful mechanism of last resort for recalcitrant parties where other consequences are rendered less effective due the size of the net asset pool, the vulnerability and disadvantage of the client, the costs of litigation and legal representation, and the resource limitations of free legal assistance.

PCLC contemplates that criminal penalties (for contempt of court) would most appropriately apply where despite the making of orders requiring disclosure, a recalcitrant party simply refuses to disclose. PCLC contemplates that such penalties would be used as measures of last resort, in addition to other measures courts typically employ when faced with non disclosure.

In matters involving larger asset pools, a non disclosing party may be quite prepared to accept a fine or adverse adjustment of property in order to keep a specific asset out of the property pool. Where this occurs it would be clear that financial penalties may be insufficient to prevent the party from continuing to refuse full and frank disclosure and as such the further measure of criminal penalties may be necessary.

We stress that it is important that such remedies only be available to the court where it is proven that a party had knowledge of a financial asset and has failed to disclose it. This would protect those litigants who are accused of not-disclosing information that they could not have had access to.

Please also note our recommendation that the provision of the Family Law Act 1975 (Cth) setting out disclosure duties should be supported by civil or criminal penalties for non disclosure is made specifically in the context of the work the Centre conducts.

In essence, due to funding constraints, that work is limited to small property claims where there are welfare concerns for the client or a child and the client is experiencing

vulnerability or disadvantage by reason of family violence, physical or mental disability, cultural or linguistic diversity, homelessness or ATSI status. In other words, our work in this area is conducted on behalf of disadvantaged clients with complex needs.

The importance of cost effective, enforceable disclosure in small property cases is magnified in relation to disadvantaged clients with complex needs, because without it, it is usually impossible to advise a client of their entitlements and to achieve a fair property settlement. This is particularly the case for a majority of our clients who usually have little or no knowledge of the former relationship's finances, and where they have been the victim of financial control and other family violence during the relationship. Additionally, it should be noted that our clients often lack the resources to enforce civil orders, and so criminal penalties of last resort may incentivise disclosure from an otherwise recalcitrant party.

PCLC's view is that the issue of disclosure highlights the need for dedicated funding to be made available to the community legal sector to help address the significant disadvantage experienced by women in property matters after separation.

Question 6-1 What criteria should be used to establish eligibility for the family violence list?

In its submission, PCLC recommended the establishment of a separate and dedicated management pathway in the family law courts for family matters involving family violence. This in part would involve the implementation and conduct of a dedicated family violence list.

In our view a dedicated list must be established cautiously, especially considering that "family violence is the most commonly raised factual issue in litigated proceedings" (see Discussion Paper page 132).

The consequence of this fact is that a dedicated list is likely to only be reserved for matters involving high risk cases, with the resources dedicated to that list potentially detracting from those otherwise available for other cases in which family violence is alleged.

Another potential drawback might be that the high demand for dedicated family violence listings may mean that the list will need to be capped. In this Centre's experience, list capping in the Magistrates' Courts can have undesirable consequences, including long delays, extra sitting days (sometimes with little notice to the parties and service providers) thus placing additional strain on parties and already under-resourced agencies.

Another need for caution is that such a list may also see the minimisation of more-difficult-to-prove forms of family violence, such as economic and emotional abuse, with a preference for the more obvious and immediately impactful forms such as physical abuse.

On balance, however, and notwithstanding these potential shortcomings, the implementation of a dedicated family violence list would seem to be necessary to identify and assess risk, and to ensure that the issue of family violence is not diminished or lost during the conduct of family proceedings. A dedicated family violence list may also partially address the tendency of family violence to be seen as historical, the risk of which is that any parenting orders made do not adequately address future family violence risk factors.

PCLC also proposes that it should be possible to transfer a matter into the dedicated family violence list at any stage of the proceedings. PCLC has assisted in cases where the victim has denied or minimised family violence at the time documents are drafted for fear of polarising the other party or inflaming the matter. This can occur where time spent is occurring during the conduct of parenting proceedings. Usually in such matters, the client has not applied for an intervention order for similar reasons.

It is also PCLC's view that the effective operation of a dedicated family violence list is likely to require the conduct of internal risk assessments by family violence specialists at the time of filing and throughout the conduct of the matter. This would enhance the ability of the court to triage the matter appropriately, and provide some support to registrars with the onerous responsibility of triaging into the dedicated list. PCLC also envisages that Family Consultants could take account of any internal risk assessments in preparing short and long reports on families whose matters are heard in the list.

The criteria for the dedicated family violence list should take account of the following:

- The criteria listed on page 134 of the Discussion Paper, namely:
 - “the level of urgency and risk;
 - whether the family is involved in court proceedings in other jurisdictions in relation to civil or criminal family violence matters;
 - whether the family is involved with child protection agencies;
 - whether either or both parties are self-represented; and
 - whether either or both parties are from Aboriginal or Torres Strait”
- With suitable amendment, the provisions of section 60CC(3)(k) Family Law Act 1975 (Cth):

If a family violence order applies, or has applied, to the child or a member of the child's family, any relevant inferences that can be drawn from the order, taking into account the following:

- (i) the nature of the order;
- (ii) the circumstances in which the order was made;
- (iii) any evidence admitted in proceedings for the order;
- (iv) any findings made by the court in, or in proceedings for, the order;
- (v) any other relevant matter.

To this list, we propose that the following should also be included:

- family violence undertakings should also be included considering that some victim survivors feel pressured to accept these as means of placating the other party, especially in the context of ongoing parenting disputes.
- A provision in terms similar to section 60CC(3)(k) but applicable to any prior Family Law Act 1975 (Cth) orders or state Children's Court orders;
- The written and verbal recommendations of internal family violence specialists
- The parties' relevant criminal history, including whether any family violence intervention orders have been breached in the past.

Question 6-2 What are the risks and benefits of early fact finding hearings? How could an early fact finding hearing process be designed to limit risks?

In its Submission, PCLC recommended that if family violence has been alleged, matters should be set down for contested hearing as soon as possible (to avoid current delays between filing and hearing) on the issue of family violence alone. As stated at page 134 of the Discussion Paper, the family courts already have the power to make early determinations about issues of fact pursuant to section 69ZR Family Law Act 1975 (Cth), including whether family violence has occurred, but this power is not often exercised, perhaps due to limited listing time and high judicial workloads.

PCLC sees the risks of early fact finding hearings as follows:

- Family violence, especially psychological, emotional and verbal abuse, can be difficult to prove. If no finding can be made that family violence has occurred, or that the family violence proved was 'low level', matters may be transferred from any dedicated family violence list to make way for 'more serious' matters. Consequently, there may also be a tendency to disregard contested allegations of family violence altogether in cases where no findings can be made at an early fact finding hearing.
- Such hearings may engender an historical "incident based" approach to family violence (and hence steer the enquiry toward more obvious forms of abuse), rather than understanding family violence as a manifestation of power, control and coercion which, in children's matters, can be dynamics that persist after the conclusion of legal proceedings.
- There may be judicial reluctance to conduct fact finding hearings due to high workloads and a perception that such hearings take up too much judicial time, or a perception that findings of family violence are unlikely to be relevant to the parenting arrangements proposed by the parties, especially where changeover does not involve face to face contact between the parties.
- Similar to the conduct of contravention hearings where judges often ask applicants to prosecute their 'best' contraventions rather than every contravention, judges may adopt a similar approach with family violence fact finding hearings. This might result in findings of fact that record only some of the history of family violence due to listing constraints, with the risk that parenting orders may not adequately account for the full history of, and context in which, the family violence has occurred.
- Consequently, such hearings may have the effect of limiting the evidence that can be raised at future hearings about any family violence which occurred prior to that interim fact finding hearing.
- As with family violence intervention order hearings, there may be an incentive for perpetrators to agree to a few incidents of family violence to avoid the need for a contested hearing where the full history of family violence might jeopardise a perpetrator's time with the child, or significantly conditionalise it on an interim basis.

- Increased polarisation of, and acrimony between the parties may jeopardise the likelihood of reaching interim consent orders and make co-parenting after the making of orders less likely.

PCLC sees the benefits of early fact finding hearings as follows:

- Such hearings are likely to facilitate the earlier determination of family violence allegations, enabling those issues to remain prominent throughout the proceedings. This is especially important when interim parenting arrangements are being negotiated between lawyers. Currently, no findings of fact mean that family violence remains an allegation and tends to get ‘lost’ due to the focus of negotiations on “spend time”.
- Positive findings of family violence will enable orders to be tailored to risk factors and the safety of women and children, thus improving the appropriateness and durability of orders, and hence reducing the likelihood of further litigation.
- Early identification of family violence would enable the progression of the matter to be supported with the necessary services for victim survivors, including ongoing risk assessment, and therapeutic interventions for perpetrators. This may assist the resolution of the case.
- Considering that the risk family violence is greatest around the time of separation and during the conduct of parenting proceedings, early fact finding hearings are necessary to ensure that any family violence is not just viewed as an historical occurrence, but as an ongoing feature of the post separation relationship between the parties, and relevant to any parenting orders made.

To limit the risks of early fact finding hearings, PCLC proposes:

- Make mandatory, comprehensive, core competency family violence training for judicial officials and lawyers, including common risk assessment framework training
- Related to this, make compulsory the completion of at least 2 CPD units of family violence and risk identification training annually for family lawyers and family violence lawyers.
- Expand judicial resources to ensure dedicated family violence lists are properly resourced.
- Modify VLA’s family law guidelines to allow victim survivors to obtain a grant of aid on the basis they satisfy the priority FDRS test (where family violence alone is sufficient) solely for the purpose of the conduct of the early fact finding hearing.
- Ensure that perpetrators cannot cross examine victims.
- Allow perpetrators to raise evidence of family violence throughout the conduct of proceedings so that family violence that was ‘missed’ in an earlier fact finding hearing can be raised later.
- Allow victim survivors to make application for an early fact finding hearing at any stage in the proceedings but prior to directions.

We also view early fact finding hearings as critical to satisfying the obligation under section 60CC(2) of the Family Law Act 1975 (Cth) which requires that children be protected from

physical or psychological harm and from being subjected to, or exposed to, abuse, neglect or family violence.

Whilst there are risks with any litigation process as a means of determining family violence, PCLC believes that early fact finding hearings are likely to be on balance preferable to the existing “one size fits all” approach to the management of parenting matters where family violence is a significant feature.