

Submission by the Victorian Judicial Advisory Group on Family Violence (JAGFV) to the ALRC on the Review of the Family Law System: Discussion Paper

This submission deals with the operation of the family law system in cases where the parties to family law proceedings and/or their children have been directly or indirectly affected by family violence. As the ALRC will be aware, the terms of reference for the family law review overlap with a number of matters also discussed in the 2016 report of the Royal Commission into Family Violence (RCFV).¹ The JAGFV was established as a sub-committee of the Courts Council to oversee the approach of Victorian courts to the implementation of the recommendations made in the RCFV report.

Although this submission focuses primarily on proposals with specific relevance to those who have experienced family violence, we also make some more general comments about proposals intended to improve the experience of *all* families who seek family law remedies. In our view, these changes could reduce the factors which often contribute to violence both while the member of a couple is contemplating separation and after it occurs. Such changes are relevant to the well-being of children in separating families, a matter recognised as having paramount importance in the terms of reference of the ALRC review.

1. General comments

We express general support for the following proposals:

Proposals 2-1 to 2-8 relating to the need to develop a national education and awareness campaign to improve community understanding of the family law system

We note that one of the purposes of such a campaign should be to counter myths about how the family law system operates, and in particular, the notion propagated by some men's groups that it is biased against fathers.

Given the high levels of family violence in the Australian community, particularly among separating and separated couples, as well as the particular problems experienced by the diverse communities described in Proposal 2-2, we submit that national programs should be combined with programs and incorporate material relating to family violence and the safety of those affected by it.

We make more detailed reference to Families Hubs (Proposal 2-4) in our later discussion of Proposals 4-1 to 4-4.

Proposals 3-1, 3-9 and 3-15 to 3-16 relating to simplification of legislation, the development of information to assist separating couples in relation to care arrangements for children and superannuation splitting

Implementation of these proposals should help to reduce areas of dispute which lead to uncertainty, frustration and, sometimes, to the escalation of existing patterns of abusive and controlling behaviour. We make more detailed comments about Proposals 3-2 to 3-5, 3-8, and 3-11 to 3-14 below.

Proposal 7-1 relating to provision of information to children about family law matters

Some adults who made submissions to the RCFV spoke of the effect of family violence on them as children and of their frustration that their voices were not heard. We also heard from parents caring for children who spoke of the difficulties their child or children had experienced as the result of contact orders which meant that children continued to see a parent who had abused their carer. Giving children who are directly or indirectly affected by violence information about family law processes could reduce the sense of powerlessness they may feel during those processes.

¹ Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016).

Proposals 8-1 to 8-5 relating to the definition of family violence

JAGFV supports the amendment of the definition of family violence. The amended definition should ensure that federal and state definitions are brought into line, so far as that is practically achievable. In particular, we support the amendment of the definition of family violence to clarify that it covers exposure to family violence and includes misuse of legal and associated systems for abusive purposes.

Proposal 9-1 relating to the establishment of a supported decision-making framework for people with a disability

The RCFV heard from a number of people with a disability who were dependent on an abusive spouse to care for them. We agree that there is a need to assist people to make decisions for themselves and we support this and related proposals.

Proposals 10-1 to 10-8 relating to the development of 'a skilled and supported workforce' in the area of family law

We note and support the proposal for development of a workforce capability plan. We agree that the core competencies for the workforce set out in Proposal 10-3 should include matters which are highly relevant to people affected by family violence (for example, 'an understanding of the family violence and child protection systems and their intersections with the family law system').

We emphasise the need for co-operation with the states in this area. Victoria has already experienced difficulties in recruiting suitably qualified court staff and people to provide support to victims of family violence. Some of these problems might perhaps be reduced by appointing people with family violence expertise to family law roles, or vice versa, for example, state Magistrates' Court specialist family violence registrars would be well equipped to deal with both family law and family violence proceedings. This would require training of staff and more sophisticated processes of collaboration than currently exist between the two systems. State courts would be unable to provide additional support without receiving appropriate levels of Commonwealth funding. We strongly support Proposal 10-3, which includes understanding of family violence as a core competency.

JAGFV also strongly supports Proposal 10-8 that 'all future appointments of federal judicial officers exercising family law jurisdiction should include consideration of the person's knowledge, experience and aptitude in relation to family violence'. Indeed, we would take the proposal further and suggest that the current provision in s 22(2)(b) of the *Family Law Act 1975*, which requires Family Court judges to be persons who 'by reason of training, experience and personality' are suitable to deal with family law matters, should apply to all judges who exercise federal family law jurisdiction in the Federal Circuit Court (or whatever may replace that Court). Imposing a similar requirement on state magistrates who exercise family law jurisdiction in specialist family violence courts would also be desirable, though we recognise there may be some complex constitutional issues which arise here.

Proposals 11-1 to 11-12 relating to information sharing

JAGFV strongly supports proposals for information sharing between state and federal courts. Information sharing is vital to ensure that victims/survivors of family violence and affected children are kept safe from violence and abuse. We draw the attention of the ALRC to the *Family Violence Protection Amendment (Information Sharing) Act 2017* (Vic) the purpose of which is to overcome existing barriers to information sharing in cases involving family violence.

We note in relation to Question 11-1 that ss 94-95 of the *Family Violence Protection Act 2008* (Vic) mandates that where the Victorian Magistrates' Court intends to make a family violence intervention order, a magistrate must enquire as to whether the respondent holds a gun licence and, if appropriate, may suspend that licence. Sections 158-159 and 163-165 of the *Family Violence Protection Act 2008* (Vic) also provides police broad firearms search and seizure powers in relation to individuals subject to either a family violence safety notice or a family violence intervention order. Information held by the Magistrates' Court and Victoria Police relating to firearms held by and/or

seized from family violence perpetrators should be shared with the family courts where those individuals are also involved in family law proceedings.

2. Proposals with particular relevance to family violence

We now turn to proposals with particular relevance to family violence, which directly fall within the JAGFV's purview.

Proposal 3-2 relating to the review of family law court forms

The problems experienced by people who have to obtain both intervention orders or their equivalent in a Magistrates' Court and to seek parenting orders in the Family Court or Federal Circuit Court have been identified in research and extensively discussed for many years. An overview of the various reports is provided in Chapter 24 of Volume IV of the RCFV report. These navigational issues become even more acute when the victim of violence has to give evidence in state criminal proceedings, including in a prosecution for breach of an intervention order.

We submit that Magistrates' Courts should, wherever possible, exercise the federal family law jurisdiction conferred on them by the *Family Law Act 1975* to the fullest extent. In appropriate cases, state courts exercising jurisdiction in relation to children who are the victims or perpetrators of family violence might also consider exercising this jurisdiction. It would be desirable for a pilot of this approach to be undertaken to determine the processes and infrastructure required for this purpose.

At present the existence of separate forms covering family law applications and intervention order applications creates a barrier to people seeking the exercise of family law jurisdiction by a magistrate. In Victoria around 70% of intervention order applications are made by the police and victims are often unrepresented. Many people affected by family violence are unaware that, subject to jurisdictional limits, they may be able to seek property division or parenting orders in the Magistrates' Court. The inclusion of information about resolving family law matters on a simplified court form, which includes material relevant to parenting orders made by consent to the exercise of the jurisdiction, or by consent to the proposed order, could encourage them to do so.

The Victorian Magistrates' Court forms are currently being revised to provide more information about family law proceedings, but it would be desirable to go further and have a form approved by both sets of courts which applied across both jurisdictions. While it may be difficult to design a form covering both sets of proceedings, this may be worth considering.

In Victoria where an increasing number of intervention orders will be determined in a specialist court, this will ensure that some people will be able to resolve parenting matters without having to initiate proceedings in a separate court and may be able to avoid giving evidence in two sets of proceedings. By arrangement with the Commonwealth, they could also receive the support of the applicant and respondent support workers who assist people in intervention order proceedings in the Victorian Magistrates' Court.

This approach would of course require an appropriate level of Commonwealth funding. But alleviating the need to appear in two different courts, sometimes on multiple occasions, could result in earlier resolution of disputes and consequent savings for the federal government.

Proposals 3-4 to 3-5 relating to parenting arrangements

Statistically, a large number of cases in which couples are unable to settle their claims because they cannot agree on child arrangements involve some form of family violence. For that reason, we support the amendment of the principles in s 60B to make more explicit reference to safety and to the effects on carers and their children of being subjected to abuse. We also support the amendment of s 60CC in the manner proposed.

Proposal 3-8 relating to repeat applications for parenting orders

Unfortunately, family law processes are sometimes utilised by those who use violence to maintain control over their partner after separation. A violent parent may make repeated applications for

changes to parenting or other child orders. Amendment of the *Family Law Act 1975* to prevent system abuse for this purpose would be a positive step in cases where repeated applications for parenting orders are made to harass the other party.

Proposals 3-10 to 3-11 relating to articulation of the processes used to divide property and taking account of violence in determining contributions and extent of future needs

The RCFV heard that many victims of family violence abandoned property claims. Often, they could not afford legal advice. Some were frightened the violence would escalate if they pursued a property claim. Increasing the jurisdictional limit which applies to determination of small s 79 claims in the Magistrates' Court and using specialist magistrates to determine such claims at the same time they are considering an application for an intervention order would be a positive step forward for people who have been affected in this way.

Whilst we recognise there are some arguments against taking family violence into account in assessing 'homemaker and parent' contributions, we consider that they are outweighed by the arguments in favour of this approach. In our view, the principle in *Kennon & Kennon* [1997] FamCA 905 is too restrictive, in that it only permits family violence to be taken into account in dividing property in exceptional circumstances. Few people rely on this principle. Where a person's contributions to the family have been more arduous because they have been subjected to violence we consider this should be recognised for property division purposes. Inclusion of a reference to family violence in the provisions governing property division would alert victim/survivors that they may be able to rely on this matter. It is also arguable that the perpetrator's contributions (for example through earnings or purchase of property) should be able to be off-set by treating violence as a negative contribution to family well-being.²

We also support the proposal that family violence should be taken into account in determining the future needs of a claimant. Being subjected to family violence may have long-lasting psychological or physical effects on a victim/survivor, which reduces their earning capacity for a significant period or indefinitely. A one-off event can also have this effect. For example, a victim of family violence may suffer from a brain injury as the result of an assault.

It is beyond the scope of the JAGFV's work to comment on the proposals relating to division of debts after relationship breakdown and, in particular, to comment on Proposal 3-14 which deals with recovery of debts by third parties. The Chair of the JAGFV, along with two other organisations, prepared a personal submission on this matter addressed to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. This has been forwarded to you under separate cover.

Proposal 4-1 and other consequential proposals relating to the creation of Families Hubs

JAGFV favours the establishment of 'visible entry points' to assist families and their children to access legal and support services. The RCFV recommended the establishment of Support and Safety Hubs in each of the 17 Department of Health and Human Services Regions in Victoria. The functions of these Hubs are set out in Recommendation 37 (see also Recommendation 38) of the RCFV report. Broadly, the Hubs are intended to provide risk assessment and safety planning using information provided by a state-wide Central Information Point and to link victim/survivors of family violence with the services they need. They will also refer those who use violence to services to help them stop perpetrating family violence. The Victorian Government has already established four of these Hubs.

It is likely that there will be considerable overlap between the work of the proposed Families Hubs and the Victorian Support and Safety Hubs. Given the pervasiveness of family violence, it would be unfortunate if the confusion and complications caused by siloing of state-provided services were reduced by the creation of the Support and Safety Hubs for those affected by family violence, only to be reintroduced by creating separate Commonwealth Families Hubs for family law issues. At least in Victoria, the ideal would be for all people with family violence and/or family law issues to have a single entry point for access to relevant services and, where relevant, safety planning. If such co-operation

² See Juliet Behrens, 'Domestic Violence and Property Adjustment: A Critique of No Fault Discourse' (1993) 7 *Australian Journal of Family Law*, 9, 14-6.

could be managed (and we do not underestimate the complexities in designing such Hubs), Commonwealth funding would be required to support the provision of family law related services.

Proposal 4-5 relating to the expansion of FASS

We also support Proposal 4-5 relating to the expansion of the FASS. Again, every effort would need to be made to prevent the creation of new silos between different bodies.

Proposals 6-1 to 6-3 and 6-7 relating to the establishment of a triage process and specialist court pathways, including a specialist family violence list and the Indigenous list

The JAGFV supports the use of a triage process to direct people to appropriate specialist pathways. Where litigants are affected by family violence, a triage process may be vital to ensure the safety of victim/survivors and their children. It will be important for those involved in setting up this triage process to learn from the experience of state courts. This could be done by including both federal and state court staff and judicial officers in education programs.

We strongly support the creation of a separate specialist family violence court list in the family courts. There are currently three Family Violence Court Divisions providing specialist services in Victoria's Magistrates' Courts, and a number of other Magistrates' Court locations which feature some specialist family violence services. The RCFV recommended expansion of this approach. The 2017-18 Victorian State Budget included funding to establish specialist family violence courts at five Magistrates' Court locations. In the future more and more family violence matters will be dealt with in specialist courts, which will also be able to deal with summary criminal offences, crimes compensation and other related matters.

The RCFV recommended that magistrates sitting in specialist family violence courts should exercise their full family law jurisdiction whenever possible. Apart from ensuring that these cases would be dealt with by magistrates with expertise in the area of family violence, this approach would relieve the stress experienced by some victim/survivors of family violence who have to engage in proceedings in two (and occasionally three) different courts.

While it is difficult to predict accurately the number of cases in which magistrates would be called upon to exercise their family law jurisdiction, we consider that the Commonwealth should make every effort to encourage the exercise of federal family law jurisdiction in suitable cases.

The Victorian Magistrates' Court already has a huge case-load and could not take on more federal work unless it was appropriately funded for it. Any funding arrangement would have to address the cost of appointing additional court staff and probably more specialist magistrates. However, this approach would also have some advantages for the federal government. Earlier resolution of disputes would reduce numbers of repeat court appearances. It might also contribute to the safety of victim/survivors of family violence and their children, by reducing the time people have to wait to get orders relating to parenting issues.

Proposal 6-8 relating to co-location of family law registries and local court registries and Proposal 6-12 relating to family court buildings

We support proposal 6-8 because it will make it easier for people affected by family violence to seek family law remedies at the same courthouse. It would also facilitate information sharing between state and federal systems.

The proposal relating to court buildings could help to reduce the stress experienced by victim/survivors of family violence who have safety concerns. It could also make the process of seeking legal remedies less stressful for court users who are unfamiliar with the court system and/or have to take their children to court with them.

We note that similar facilities are being incorporated into the Victorian specialist family violence courts. Using Victorian specialist court facilities to deal with family law matters could reduce overall expenditure on court buildings. State courts would require appropriate compensation for use of their

buildings, but the amount of compensation payable is likely to be more economical than creating or modifying buildings so they are suitable for resolution of high conflict family law matters.

Proposal 7-6 relating to risk assessment for children participating in family law proceedings or family dispute resolution

We strongly support development of more accurate processes for assessing risk to children. Some work on this has already been done in Victoria and this should be taken into account in development of these processes. It is important that risk assessment not be confined to the risk of physical harm, but should also address the risk to children of being exposed to violence to their carer, and of being exposed to protracted and/or repeated family law proceedings.