**Review of the Family Law System**

A submission to the:

**Australian Law Reform Commission**

Prepared by:

Ms Jo-Anne Knight, Court Coordinator and Ms Megan Summers, Woman’s Advocate

Domestic Violence Prevention Centre, Gold Coast Inc

November 2018



**REDUCING HARM**

**Proposal 8-1 DEFINITIONS OF FAMILY VIOLENCE AND ABUSE**

**Question 8-1 What are the strengths and limitations of the present format of the family violence definition?**

The current format of the family violence definition is gender neutral.

It is the case that in Australia, both at a Commonwealth and State level the law is applied from an ‘objective’ perspective within a democratic society where citizens are considered to be ‘equal’ before the law. At least that is what we have been taught through our education system, faculties of law, via our Governments, their representatives and media.

Our past understandings of Commonwealth and State based legal systems and women’s lived experience of navigating courts of criminal law, family law, together with domestic violence has evidenced that the application of law has been handed down within a context of a paternalistic culture without female Magistrates and Judges in equitable numbers at the bench to provide judicial leadership in significant areas of women’s lives such as their personal, family and sexual wellbeing.

This fact has led to poor outcomes for women and children, and in part the legal system has had the unfortunate impact of mirroring the authoritative, diminishing abusive relationships the women are in or leaving; empowering the perpetrator and increasing the woman’s risk of further violence and violence toward her child/ren, (to name only a few impacts of systems intervention). Further, such delivery of law continued to embed social stereotypes harmful to women and children and permission male dominance, socially and in the private realm.

Advocates assisting women and children who are experiencing domestic and family violence can state at least on an anecdotal basis that reform, both culturally and legally is still required to create just and fair treatment before the law for women and children experiencing abuse.

It is this understanding that has driven the advocacy of specialist domestic violence services and individual advocates in Queensland to seek change in legislation to ensure that legislation provides for recognition of intimate partner violence, as being a form of violence predominantly perpetrated against women by men. The Preamble of the Domestic and Family Violence Protection Act 2012 is an example of the contemporary advancement of domestic violence theory both nationally and internationally and it makes visible to our society the factual experiences of thousands of abused women and children.

To acknowledge the contemporary understanding that violence against women and children is gendered within the Family Law Act, would be a significant step in the following ways:

* in establishing the impetus for change in legal education and current legal practice for more comprehensive understandings of the dynamics and use of power and control in society and the detrimental impacts on men, women and children;
* that the psychological, emotional and physical safety of children is paramount, and that critical examinations by the Court are required to investigate risks to the child/ren. This can be enhanced by an integrated approach with State based Domestic Violence Courts, legislation, Police and child psychologists etc trained in domestic violence;
* inform legal practitioners, Judges and Magistrates that they cannot operate in a siloed manner and attain pro-social outcomes and safe outcomes for men, women and children accessing the Family Court. Integrating with specialists with domestic and family violence qualifications and experience is essential, with a view to deliver service in the short, medium and long term for family stability and at the very least a reduction in violence through perpetrator visibility and accountability;
* to open pathways to explore how the Family Law Act and broader legal protagonists can play a part in influencing cultural stereotypes with a view to curbing those that are not helpful or safe, for example the significant stereotype that women alienate their children from their fathers or that they falsify allegations of sexual abuse by fathers toward children.

**Question 8-2 Are there issues or behaviours that should be referred to in the definition, in addition to those proposed?**

The DVPC GC Inc believes that the definition of family violence can be both strengthened and limitations reduced through a broader professional community understanding of the types of domestic violence that occur and refinement of practice to recognise domestic and family violence.

The DVPC GC Inc is of the view that the current definition of family violence in the Family Law Act Section 4AB(1) has strengths in that it essentially recognises “*violent, threatening or other behaviour by a person that coerces or controls a*[*member*](http://classic.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s90md.html#member)*of the person's family (the****family***[***member***](http://classic.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s90md.html#member)*), or causes the family*[*member*](http://classic.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s90md.html#member)*to be fearful.”*

In defining types of domestic violence the DVPC GC Inc incorporates internationally recognised best practice from the Duluth Model, developed by Dr Ellen Pence.

Dr Ellen Pence discusses three types of domestic violence namely:

1. coercive controlling domestic violence (battering)
2. resistive violence
3. non-battering related intimate violence

Coercive Controlling Domestic Violence

The current definition in Section 4AB(1) falls within the first category Dr Ellen Pence described. Coercive controlling behaviour that has a patterned and repetitive quality to it, such that it causes the victim or victims to be forced to adapt how they live in order to protect themselves from the forms of intimate violence they are experiencing. The victim’s life is no longer determined by them, but by the perpetrator of abuse, choice and free will become extremely limited.

It is our submission that Section 4AB(1) could be augmented by describing the behaviour as patterned and repetitious together with a qualification that not all acts of domestic and family violence will be coercively controlling to cause fear, however acts no less can still be lawful or unlawful acts of violence within a domestic setting or retaliatory or resistive in nature.

Resistive Violence

This relates to forms of violence used by victims of coercive controlling domestic violence to resist violence being perpetrated against them and defend themselves or their children.

The major goals of such violence are to: (1) escape and/or stop violence that is being perpetrated against them, and (2) establish a semblance of parity in the relationship as a method of protecting themselves and their children against escalating abuse.[[1]](#footnote-1)

Many women are currently engaged with the family law system and are identified in Queensland as respondents to both Police and Private Applications for Protection Orders. The DVPC GC Inc works closely with respondent women in South East Queensland from Beenleigh, the Gold Coast through to Coolangatta, and delivers a women respondents group called *Turning Points: A Non-Violence Curriculum For Women*.

This group specifically caters to women experiencing coercive controlling violence in their intimate personal relationship and in turn these women are using resistive violence against their abuser.

The majority of the women engaging in this program are identified within the Specialist Domestic Violence Court at Southport Magistrates Court. Women are both encouraged by duty lawyers and Magistrates to consider undertaking the program at an interim point in their civil proceeding, or women are directed to attend as part of their criminal sentencing.

It is extremely important, in our submission, that if our society is to experience fair and just outcomes from legal proceedings, especially proceedings that determine the long-term future of parenting arrangements for children where domestic and family violence and child abuse are alleged, there must be a whole of system understanding as to the importance of:

* the definition of domestic violence,
* identifying domestic and family violence,
* contextualising the nature of intimate violence perpetrated by men and that perpetrated by women,
* an understanding of what the intention of the acts of violence are, the impacts and the motivation for using the violence.

The Pie Chart below illustrates the percentage of women referred to the Turning Points group during 2017-2018 as respondents who have experienced coercive control from the other party. The statistics are taken from a sample size of 85 women.

The Pie Chart below illustrates the percentage of women referred to the Turning Points group during 2017-2018 as respondents who were alleged to have or used some form of violence that has precipitated an Application for a Protection order or Police Protection Notice.

Specialist domestic violence advocates are essential in this process to ensure the voices and lived experience of both aggrieved women and ‘respondent’ women, many marginalised, some criminalised and often from CALD backgrounds have a conduit through which their experience of domestic and family violence is narrated as accurately as possible (taking into account the debilitating impacts of trauma, including systems trauma, on women’s ability to recount their experiences) through the complex web of Commonwealth and State Courts they find themselves in, through their engagement with Police services, child protection agencies and health services. Further, that their children are afforded some protection from future abuse or exposure to abuse through these concentrated and committed efforts to define and name the violence at play.

**Case Study:**

Client presented to the Specialist DV Magistrates Court and DVPC as a respondent client. Upon consultation with our service DVPC identified her as an aggrieved to long term domestic and family violence. However, it was unknown to the court that historically the father had already been named a respondent to two (2) separate Police applications in the Queensland jurisdiction across a four (4) year period.

Interim family law orders were in place enabling contact between father and children every second weekend.

Client was primary carer of two children upon presentation to our service and had been responsible for the long term and daily care of the children.

The father had a history of homelessness, instability and was involved in serious drug related activity involving Police investigation.

The historical relationship between the parties was punctuated by domestic violence perpetrated by the father against the mother, and resistive violence including:

* strangulation of client when she was seven months pregnant, father was intoxicated. Multiple strangulations throughout relationship
* accusations whilst pregnant that client was having affair
* self-harm by father. He stabbed himself in front of pregnant client
* strangulation of family pet dog by father, to point of animal urinating
* verbal abuse and intimidation by father toward his own mother in presence of client
* threat to kill client with a gun and the father had access to firearms due to rural location
* stalking
* held the client against her will
* property damage, punching holes in walls of home
* children were exposed to violence against the mother
* children disclosed their fear to their mother of the father, stating he was harsh in his behaviour towards them
* children disclosed witnessing domestic violence by their father toward their step-mother
* Client was required to ‘drag’ children from car to facilitate contact
* One child spent two hours hiding to avoid weekend contact
* Ongoing harassment and verbal abuse from the father and his new wife at child handovers

The client used resistive violence toward her ex-partner historically and was named a cross applicant to a Police Application for Protection Order, for throwing a shovel (after being strangulated). She also physically assaulted her ex-partner, which led to a DVO against her initiated by her ex-partner more recently, to which she responded with a cross-application based on ongoing coercive controlling behaviour by the ex-partner. She further used social media to vent her frustrations which were used by the father in the family court proceedings to indicate she was the aggressive party in the matter.

The father re-partnered in the past few years, to a woman who had significant finances. The couple commenced family law proceedings with the assistance of private legal representation, including a barrister at the family law trial.

The private solicitors further represented the father when our client filed a private cross-application for a protection order. No TPO was made against the father, and our client was seen as using the system in a retaliatory manner. (Despite a historical DVO initiated by Queensland Police Service against her ex-partner). The parties contested each other’s application. Our client disclosed that she made a decision to withdraw her application for a DVO when the father’s private legal representation made a proposal to her that they would withdraw the family law proceedings if she withdrew her application for a DVO. Further, she consented to a final DVO against her with mandatory conditions.

The father and his representatives did not withdraw the family law proceedings. The matter went to trial with the client being unrepresented due to lack of financial means. The father was represented by a solicitor and barrister. The historical facts relating to the client’s experience of domestic violence were detailed in her affidavit evidence, however, these were not sufficient to overcome skilful legal representation her ex-partner had access to.

A private Family Report Writer (FRW) was involved in the proceedings and was nominated by father’s solicitors; he further paid a significant fee to request a second session for himself from the same report writer. The client described a sense of bias by the (FRW) in favour of the father and she states found it difficult to articulate her story of violence and its impacts. She later described that the FRW had noted in her report a comment about the father’s favourable physical appearance. What relevance this had to the safety and wellbeing of the children is impossible to know, however it does raise questions about the potential for systemic and professional bias to obscure experiences of domestic and family violence.

The children were removed from the care of the mother who was successfully portrayed as alienating the children from their father and as being morally superior about her parental abilities with the children. The mother was refused all contact with the children for many months, to enable the children to adjust to their new parenting arrangements, with graduated contact to recommence in a supervised setting.

Upon the first recontact with the children in a supervised setting our client has disclosed:

* The children were extremely distraught and screaming not to return to the father, and clinging to her body.
* Her male child disclosed being hit and thrown from the top of his bunk bed onto the floor and being whipped with clothes by the father.
* Her female child disclosed being threatened to be thrown across the room into a wall by her hair for ‘disobeying her step mother’.
* Her female child has commenced self-harming
* The supervision centre has made its own independent notification to the Department of Child Safety (DoCS) based on their concerns for the children’s safety and wellbeing.

Referrals to Legal Aid Queensland by our service to seek advice to appeal the outcome of the case proved unsuccessful, with advice stating that there was no avenue of appeal.

In this case study example the client experienced an inability to have her historical and current experiences of domestic violence recognised by both the domestic violence and family law jurisdiction.

There was a strategic disregard of the client’s experience of violence by the solicitors for the father to ensure his success in obtaining full parental responsibility of the children. The context of the violence that had been perpetrated against the client for 10 years was invisible in the system and the children’s fears of the father and the violence they had witnessed were not sufficient to persuade the court the mother retain full parental responsibility.

There remain significant questions as to how an outcome like this has reduced harm to the client and her children and it is a sobering reality that since this decision an independent supervision centre has reported their concerns for the children’s safety to DoCS.

Non-battering related intimate violence

Dr Ellen Pence described this kind of violence as acts of violence that are more situational and cannot be located within an experience of ongoing coercive controlling behaviour for the purpose of forcing another person to live their life for their partner.

Certainly there may be many examples of acts such as these occurring after a separation and we observe numerous of them through the Specialist Domestic Violence Court on the Gold Coast.

For instance, examples include persons who may suffer a culmination of extreme stress together with infrequent alcohol misuse, however disclose quite adamantly that the incident was the first of its kind and that they have not sought to harm the other party or control them. The person further shows signs of proactive help seeking to ensure nil further incidents arise.

The use of evidence based risk assessment tools is an essential element to identifying, defining and contextualising the lead up to an incident, the incident itself and what behaviours have occurred between the parties after the incident ended.

The DVPC GC Inc strongly recommends that education be prioritised for students and professionals within the human services and legal fields by specialist domestic violence services, academics and practitioners to forward a broader knowledge base of how to identify coercive controlling domestic violence and family violence.

Educative Resources:

Currently the DVPC GC Inc is exploring the application of a resource developed in 2015 by the *Battered Women’s Justice Project* which was funded by the Office of Violence Against Women, U.S. Department of Justice. It is a product for the specific use by stakeholders in the family law jurisdiction

The resource provides Practice Guides for Family Court Decision-Making in Domestic Abuse Related Child Custody Matters[[2]](#footnote-2) with respect to adults and children.

Included in the material is:

* Screening tools
* Interview guide
* Charts to prompt investigation of a range of alternate explanations for allegations of abuse and make observations
* Charts to assist in the specific analysis of parenting in the context of domestic and family violence
* Best interest of the child analysis
* Guides to come to decisions about the best interests of children and parenting plans with the knowledge gained about the violence present

With some adjustment to suit the Australian jurisdiction this Practice Guide may be a very useful tool in developing practitioner’s domestic and family violence micro-skills education.

**Family violence as child abuse**

The DVPC GC Inc is in favour of the co-location of provisions in relation to family violence and child abuse as noted in *Paragraph 8.43* of the Issues Paper and for decades have supported and recorded the stories of women who have endured coercive controlling domestic violence inclusive of all forms of abuse. These women have had to suffer through the experience of observing their parenting skills decline, their bonds with their children lessen, their children removed from their care by child safety services, abuse from their own children who are traumatised by those who have been directly and indirectly exposing them to abuse. Women and their children have become homeless, have been reduced to poverty and lost otherwise reasonable lifestyles due to perpetrators who were more fixated on ceasing their former partner’s access to money as a means of power and control over her, post separation.

In 2018 the Court Advocacy Program of the DVPC GC Inc, located at the Southport Specialist DV Court offered a small survey for women to complete who were entering, had been through or were going through both the domestic violence jurisdiction and family law jurisdiction to seek their views on the two experiences.

The following responses were made to the below questions:

***Are you seeking to reduce or stop contact between your children and their father with a protection order? If so, under what circumstances have you come to this decision?***

*N-1: “I am not seeking this as family court orders are already in place. In a previous DVO case, I did seek to stop contact between the child and father. The child was a baby and the father had made threats to her life. The father then used my request to stop contact (through the DVO) in family court as “proof” I did not want him to have a relationship with the child.”*

*N-2: “No. I am seeking for him to get help. I want him to see how his behaviours have affected his family. I am done with the relationship after 20 years of abuse. I would encourage the children to have contact if their father addresses his substance and anger issues.”*

*N-3: “Yes. As a family my children have seen and heard enough of abuse from physical, verbal and emotional and I am now protecting them so they are not subjected to any more violence.”*

***Have you agreed at any time to verbal or written agreements about the children’s contact with the other parent that have left you feeling concerned for your children’s safety or your safety?***

*N-1: “Absolutely!! There is always a lot of psychological pressure from the father to agree (with him), plus the pressure of being presented as unreasonable in the family court system if I don’t agree with the father.”*

*N-2: “Yes. He secured a lawyer soon after I lodged my DVO. Through them he has been able to bully me. There have been times when I have agreed to something but he has managed to manipulate it to his advantage. E.g. Not doing a requested drug test before having children for school holidays.”*

*N-3: “Yes. He tried to put forward to the federal court for contact and they were 13 and 15 years old and have said they do not want to see him again. It concerns me that the courts don’t properly look at all the physical and emotional abuse. I am concerned that the federal court could overturn the Magistrates Court decision to put the protection order in place.” (QPS application naming woman and children).*

***If the domestic violence court and family law courts are to acknowledge risks posed to children by the other parent, what do you think they need to do or understand in order to make orders reducing risks?***

*N-1: “They need to understand the way abusers change their tactics once they have been exposed, and that the risks still exist for the mother and children despite how well the abuser presents. I have observed and experienced that Family Law Report Writers and ICLs are often not suitably qualified to assess whether or not children are even at risk or what the dynamics of abuse even are. This needs to change.”*

*N-2: “The perpetrator of DV destroys lives. They destroy the family unit. How is family law and DV not connected? My ex-partner wants the children 50% of the time. If I allow this, he will carry on with his selfish behaviours and brainwash the children about their mother. Me. It already happens. Our life with him was a war zone and we all came out of it changed. Then I have to try and heal myself while trying to navigate the legal system. The courts need to understand the damage DV perpetrators do to the people brave enough to leave. Children being the biggest victims. So I want to know if a mother takes the leap of faith by leaving an abusive relationship – who is going to catch her.”*

*“I want the ability of older children to voice their experiences with a third party much sooner and without the legalities involved. My son just wants to be heard.”*

*N-3: “Depending on the age of the children the courts should offer the children the right to choose which parent, if necessary, they would like to live with to feel safe.”*

*N-4: “I would like not to see my ex-partner or to come in contact with me e.g. in person or at my home in order to avoid domestic violence or expose me to it. With our child, I would like to see the federal court/ family court allow us to have changeover at a supervision centre to enable our child to spend time with both parents.”*

The DVPC GC Inc are strong advocates for the building of Integrated Responses (IR) to address harm reduction in intimate personal relationships and families, and to prevent domestic homicides. Our service has been a leader in the South East Queensland region, providing for strategic vision and an operational Integrated Response since 1996.

The IR further provides substantial opportunities for stakeholder education internally and externally regarding identification of domestic violence, analysis and presentation of best practice with regard to the contextualisation and nature of violence.

Stakeholder engagement includes the Domestic and Family Violence Taskforce, Police Prosecutions and QPS, Corrective Services, Department of Child Safety, Act for Kids, Refuge, Department of Housing, Legal Aid Queensland, Department of Justice, Gold Coast Legal Centre to name some of the partnerships.

What has become apparent is that a partnership between our IR and family law representatives is absolutely necessary to begin to exchange understandings about roles and practice. It is time to critically examine the gaps that exist with regard to harm reduction and how the success or failure of harm reduction is linked to how the family law, child protection and domestic violence systems operate or fail to operate in a synchronised manner.

**Conclusion**

To conclude, it is essential that the family law jurisdiction and those stakeholders that work directly within this system and others that intersect it, have a deep understanding of how to correctly identify, and contextualise the nature of the domestic and family violence. An understanding of the elements of power and control is pivotal to understanding domestic and family violence, in intimate personal relationships and family relationships, as is the knowledge that acts intending to maintain power and control over partners, ex-partners and children occurs along a continuum of the relationship i.e. it is not confined to an intact relationship.

A comprehensive definition of domestic violence that captures the nuances of the types of violence perpetrated by men and women is crucial to ensure fair and just outcomes and accountability for these parties, and safety for children. The DVPC GC Inc posits that these nuances can be captured within an integrated response using the evolved workings of the Duluth Model, which seeks to influence change in social and cultural beliefs and values rather than taking a linear individualistic view of the experience of violence in each family.

1. Pence, Ellen, Das Dasgupta, Shamita: Re-examining ‘Battering’: Are All Acts of Violence Against Intimate Partners The Same? Praxis International, Inc 2006, p9. [↑](#footnote-ref-1)
2. Davis, G, Frederick, L and Steegh, N: Practice Guides for Family Court Decision-Making in Domestic Abuse-Related Child Custody Matters (Forms and Instructions), ©2015 Battered Women’s Justice Project. [↑](#footnote-ref-2)