



THE LAW SOCIETY
OF NEW SOUTH WALES

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13 July 2021

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

By email: alexandra.wormald@lawcouncil.asn.au

Dear Mr Tidball,

Draft National Plan to Reduce Violence against Women and their Children

Thank you for the opportunity to contribute to the Department of Social Services (**DSS**) consultation on its draft National Plan to Reduce Violence against Women and their Children.

As a general comment, we note the current phase of the consultation is relatively high-level and directed towards shaping the key priorities and focus areas of the next National Plan. We look forward to the opportunity to further contribute to the subsequent development of the more detailed aspects of the draft National Plan.

We note that the draft National Plan proposes a multi-disciplinary and multi-faceted approach to preventing family, domestic and sexual violence (**FDSV**). We agree that:

- preventing FDSV will require addressing cultural norms of gender inequality at its foundation;
- addressing gender-based socio-economic inequality will be key to both the prevention of FDSV and the recovery of victims;
- measures for responding to FDSV should be evidence-based and should be local, targeted, accessible, culturally informed and trauma-informed;
- responses should include integrated, sustainably resourced programs and services in areas such as police services, school and university based services, crisis health and accommodation services, financial assistance services, perpetrator behaviour change programs, legal services and justice responses;
- Aboriginal and Torres Strait Islander people should be at the centre of all aspects of responding to violence in their communities; and
- specialised skills will be required to understand and respond to particular cultural and linguistic contexts.

While our comments focus on law reform, legal services and legal system responses to FDSV, we note that addressing FDSV to create safer communities for women and their children requires understanding the broader social and economic factors that play into violence risk, including gender bias, economic inequality, homelessness, mental health issues and discrimination, and that justice responses to FDSV must be cognisant of these factors.

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As an overarching comment, we support the recommendation of the House of Representatives Standing Committee on Social Policy and Legal Affairs (**Standing Committee**) in its report on the Parliamentary Inquiry into Family, Domestic and Sexual Violence that, in accordance with National Priority Two of the Fourth Action Plan, any family, domestic and sexual violence policies, programs and legislative frameworks which affect Indigenous Australians must be co-designed and co-evaluated by Indigenous peoples along with government.¹ We note also targets in the National Agreement on Closing the Gap relevant to this work, and suggest that the draft National Plan must be coordinated with the state and territory implementation of the Closing the Gap targets.

Jurisdictional divide between family law, family violence and child support jurisdiction

The experience of our members is that many families experiencing family violence end up in the family law system. We have previously articulated that the divide between the family law jurisdiction for matrimonial, parenting and property matters in the federal courts and the family violence and child protection jurisdictions in the state and territory courts results in complexity, costs and delays for many families,² which tend to increase the risk of FDSV. We support measures that better integrate these jurisdictions, and measures that ensure that FDSV issues that have arisen either within family law proceedings or in separate criminal proceedings are considered as soon as possible.

We also recommend coordinated reforms to state and territory legislation that would enable the Children's Courts to make orders under the *Family Law Act 1975 (Cth)* (**Family Law Act**), including parenting orders, recovery orders and Family Law Watch List Orders. This is consistent with the Family Law Council's recommendation that ss 69J and 69N be amended to remove any doubt that Children's Courts, no matter how constituted, have the power to make orders under Part VII.³ In our view, the Children's Courts should also have the power to transfer appropriate cases to the family courts. Any reforms to this effect should be accompanied by appropriate training for Children's Court magistrates and state child protection workers, to ensure the child protection jurisdiction makes appropriate use of the family law jurisdiction as a less invasive early intervention method.

We also note in this regard our recent submission to the Law Council expressing concern about the practical impact of the proposed Federal Family Violence Orders regime, further discussed below.

Information sharing

We understand an inter-governmental project is underway to develop a national database of domestic violence orders which would improve information sharing on domestic violence orders, and strongly support this initiative. Our members report that in family law matters, the production of existing state or territory domestic violence records can cause delay, which in itself can put parties at further risk of FDSV. We agree with the Standing Committee that the national database should record provisional, interim and final domestic violence orders, any breaches, orders made under the Family Law Act and relevant child protection orders made under state or territory legislation.⁴

¹ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliamentary Inquiry into Family, Domestic and Sexual Violence, Report (March 2021) Recommendation 36.

² Law Society of NSW, letter to Law Council of Australia, 10 July 2020.

³ Family Law Council, Families with Complex Needs and the Intersection of Family Law and Child Protection Systems: Final Report (2016) Recommendation 1.

⁴ Standing Committee Report, Recommendation 81; see also NSW Joint Select Committee on Coercive Control, Report 1/57, Coercive Control in Domestic Relationships (June 2021) Recommendation 7.

It would be helpful if the national database also facilitated information sharing between states and territories. Currently, an apprehended violence order made in New South Wales for the protection of a person who is not and has not been in a relationship with the defendant (an apprehended personal violence order or **APVO**) can be registered in another jurisdiction. If the protected person moves to another Australian state or territory, they can apply to have the APVO registered with a court in that state or territory. In the absence of a national database, this process can be difficult to achieve and not straightforward for a victim to navigate. Additionally, if a protected person seeks to vary a domestic violence order or extend the order when it nears its expiry date, the process can be difficult to navigate and may place the protected person at risk of exposure to the defendant.

We note that a pilot program that co-locates state and territory child protection and policing officials in 22 family court registries is being implemented as part of the current National Plan to Reduce Violence against Women and their Children.⁵ We support the Law Council's call for funding of that program to be extended beyond June 2022.⁶ The pilot demonstrates the potential for co-location of these services to be an effective form of information sharing.

Police access to parenting orders and section 68B injunctions under the Family Law Act would also be beneficial. In matters where family court orders have been made restricting the access of a parent to children or providing for only supervised access due to risk of harm, access to this information would help law enforcement agencies to assess risk issues. This would be particularly helpful if, for example, a welfare check was requested by a parent or if there was a need to interact with a victim or perpetrator.⁷

In all cases, increased information sharing must be supported by training of the professionals involved to ensure information is managed in ways that are culturally safe, trauma-informed, and free of the risk of victim-blaming. While it is recognised that the police services in each jurisdiction have different processes and procedures, measures are required to ensure consistency in their recognition of family court orders.

Law reform

Definition

We support the Standing Committee's recommendation that there be a uniform, broad definition of FDSV, including but not limited to "coercion, economic abuse, and complex forms of violence, such as forced marriage, female genital mutilation/cutting and dowry abuse".⁸

Federal family violence orders

We have concerns about the introduction of federal family violence orders as proposed in the Family Law Amendment (Federal Family Violence Orders) Bill 2021.⁹ In our view, these orders could cause confusion and/or be misused in ways that increase risk to parties in family law proceedings. We suggest, at the very least, federal family violence orders should not be introduced before a national database is in place.

⁵ Australian Government, 'Co-location of State and Territory child protection and other officials in Family Law Court Registries' <https://plan4womenssafety.dss.gov.au/initiative/co-location-of-state-and-territory-child-protection-and-other-officials-in-family-law-court-registries/>.

⁶ Law Council of Australia, Information sharing between the family law and criminal justice and child protection systems (November 2020) 16.

⁷ See also Standing Committee Report, 341 [8.187], 342 [8.192], Recommendation 81.

⁸ Standing Committee Report, Recommendation 1.

⁹ Law Society of NSW, letter to Law Council of Australia, 11 June, 2021.

If the Commonwealth Government is minded to introduce federal family violence orders, consideration should be given to a trial, and evaluating the impact, before legislating on a permanent basis.

Coercive control

Coercive control is a broad concept and difficult to define; however it generally describes a pattern of abusive behaviours and control over time intended to create fear. As the behaviours are deeply contextual and often occur slowly over a period of time, it can be difficult to identify.

We support the recommendation of the NSW Joint Select Committee in its report on Coercive Control in Domestic Relationships that coercive control be criminalised following a considerable program of education, training and consultation with police, stakeholders and the frontline sector.¹⁰ In our view the offence should be very tightly prescribed and tailored, as a broad brush offence would risk criminalising dynamics and behaviour within couples and families that does not warrant moral, let alone criminal, sanction.

At the Commonwealth level, we support the Standing Committee's recommendation that the Commonwealth develop shared principles to guide any criminalisation of coercive control by states and territories and run a public awareness campaign on the nature of coercive control.¹¹

Coercive control can also be perpetrated through the family law system. We share the concern expressed by the Australian Law Reform Commission in the Final Report on its Review of the Family Law System (**ALRC Report**) about psychological abuse that occurs through repeated applications brought by one party, and we agree there is a need to address the difficulty in obtaining a declaration that the applicant is vexatious under s 188 of the Family Law Act.¹² Our members also report instances where one party brings multiple applications in order to exhaust their opponent's resources to retain legal representation,¹³ and instances where applications are made for more time with children in order to exert financial pressure in the form of reduced child support. We would support measures that extend the court's powers of summary dismissal to respond to these types of procedural abuse.

Statutory tort of family violence

One of the outcomes proposed in the draft National Plan is that perpetrators stop their violence and are held to account. Current measures in this regard focus on preventing and punishing domestic violence behaviour, perpetrator behavioural adjustment and restorative justice programs. However, there are few measures in place to account for the loss, damage, pain and suffering occasioned to the victim, and the perpetrator's obligation, by the principle of *restitutio in integrum*, to restore the victim to the situation that would have prevailed but for the abuse.

We note the ALRC Report recommends the development of a statutory tort of violence.¹⁴ Such a measure would recognise the financial, psychological and other impacts of family violence on victims which may include ongoing poor physical and mental health, lost income and career opportunity, sudden loss of possessions and resources, reduced educational opportunity and

¹⁰ NSW Joint Select Committee on Coercive Control, Report 1/57, Coercive Control in Domestic Relationships (June 2021) Recommendation 1.

¹¹ Standing Committee Report, 159 [4.260].

¹² Australian Law Reform Commission, Report 135, Family Law for the Future — An Inquiry into the Family Law System (March 2019) Recommendation 32.

¹³ See also J Wangmann, T Booth, M Kaye, Australia's National Research Organisation for Women's Safety Limited Research Report, Self-represented litigants in family law proceedings involving allegations about family violence (December 2020) 149.

¹⁴ ALRC Report, Recommendation 19.

increased risk of homelessness, further abuse and substance dependence. It may also support prevention of FDSV, given that financial dependence can be a significant deterrent to leaving an abusive relationship.¹⁵

As suggested in previous submissions, consideration could be given to a new compensatory tort of family violence that specifically addresses the wrong suffered by victims.¹⁶

Parenting arrangements

In our view, reform of the Family Law Act in relation to parenting arrangements would assist in cases where children are at risk of FDSV. We have previously suggested the doctrine of consideration of equal time with each parent should be abolished.¹⁷ The ALRC Report noted that research conducted on the effects of the 2006 amendments to the Family Law Act indicated that in more than half of cases where there was family violence, the non-resident parent (usually the father) maintained expectations of obtaining orders for equal time and an unhelpful focus on the 'quantity' of time they spent with the child.¹⁸ Our position remains that the best interests of the child should be the paramount consideration.

Court-based initiatives

The courts have an important role in helping to reduce the risk of FDSV. We join with the Standing Committee in welcoming initiatives such as the Lighthouse Project pilot which shows early signs of helping to address FDSV within the family law system.¹⁹ The project concerns parenting-only proceedings and involves offering to screen parties for the risk of FDSV, responding by triaging high risk cases to appropriate case management pathways so as to manage risk within the family law system, and making appropriate referrals to external legal and other support services. We understand that in over 700 cases (62% of those in the pilot), litigants accepted the opportunity to screen for FDSV, and 64% of those returned a high risk rating. In many of these cases, FDSV was previously undisclosed and the parties were receiving no support.²⁰ The Lighthouse Project pilot illustrates the benefits of:

- (a) targeting support to families who by definition are already in situations of conflict;
- (b) enabling parties to self-identify their need for assistance;
- (c) prioritising the protection of parties who are in the court system; and
- (d) co-integrating legal services and other FDSV support services.

Case management of property proceedings is another area where the courts can play an important role. Our experience is that parties who are engaged in a protracted property dispute can be at greater risk of FDSV if they have unstable or inadequate housing. We support the Standing Committee's recommendation that, subject to positive evaluation of the Priority Property Pools under \$500,000 (PPP500) pilot, continued funding be provided for a small property mediation program.²¹

Legal services

Our members report that many FDSV victims are unable to leave their abusive relationship without access to legal services. Although a victim may have entitlements to a family law

¹⁵ See for example J Stoeber, "Transforming Domestic Violence Representation", *Kentucky Law Journal: Vol 101: Iss 3 (2013)* 36.

¹⁶ Law Society of NSW, letter to Law Council of Australia, 15 April 2021.

¹⁷ *Ibid.*

¹⁸ ALRC Report, [5.112].

¹⁹ Standing Committee Report, 341, [8.188].

²⁰ Information provided at Lighthouse Project Stakeholder meetings, April and May 2021.

²¹ Standing Committee Report, Recommendation 80.

property settlement, significant power imbalance, fear or intimidation may deter them from pursuing these entitlements or from seeking child support payments. Victims may also be unaware of entitlements such as the ability to split superannuation assets.

We endorse the Standing Committee's call for sustainable funding for community legal centres and legal aid programs that help those who are at risk of FDSV to build independent lives.²² This includes funding under the National Legal Assistance Partnership and the Family Advocacy and Support Service (**FASS**).

Accessible, joined up services

We support the development of more accessible, 'joined-up' legal and non-legal services and bi-directional referrals, noting the importance of such services.²³ This should include:

1. *Free and low-cost legal services for people experiencing FDSV*

Given the disproportionate representation of disadvantaged people suffering incidents of FDSV, many victims do not have the resources to obtain legal services by themselves. There are benefits to providing duty lawyer services such as FASS and other initiatives that increase referrals more broadly.²⁴

2. *Comprehensive 'legal diagnosis' to identify the legal problems accompanying FDSV, including family, civil and criminal law problems*

FDSV compounds the severity of other family, civil and criminal law problems. Integrating these legal needs is key to unburdening victims of FDSV.²⁵

3. *Joining up between different types of legal services to address these legal problems*

This relies on shared aims, effective referral pathways, information sharing, communication and trust between service providers, as well as adequate resourcing and organisational commitment. Importantly, detecting the additional legal needs of people experiencing FDSV, and coordinating services to address these legal needs, may well increase demand for certain types of legal services and may require additional resourcing.²⁶

In this regard, we note the Standing Committee has recommended the appointment of a National Commissioner for the Prevention of Family, Domestic and Sexual violence to address the fragmentation of legal services for those experiencing FDSV.²⁷ This is supported in principle, but we suggest the role would be most effective if its functions extend beyond monitoring, evaluating and reporting on services, and include receiving complaints and making referrals.

4. *Joining up between legal services and social services to address the adverse impacts of legal problems on broad life circumstances*

The legal problems associated with FDSV create other broader problems such as significantly greater levels of stress-related illness, physical ill health, relationship breakdown and financial strain and negative impacts on housing circumstances.²⁸

²² Standing Committee Report, Recommendation 78.

²³ C Coumarelos, Quantifying the legal and broader life impacts of domestic and family violence, Law and Justice Foundation Justice Issues Paper No 32 (June 2019).

²⁴ Ibid 23-4.

²⁵ Ibid 24.

²⁶ Ibid 25.

²⁷ Standing Committee Report, 100-101 [3.217]-[3.222].

²⁸ C Coumarelos, Quantifying the legal and broader life impacts of domestic and family violence, Law and Justice Foundation Justice Issues Paper No 32 (June 2019) 25-6.

5. *Bi-directional referrals between legal and social services to facilitate streamlined access to wrap-around assistance for people experiencing FDSV*

There are opportunities for health and welfare professionals to act as a gateway to legal services for victims, which can overcome reluctance on the part of victims to approach legal services for assistance.²⁹

One example of an integrated, intensive response to FDSV is the NSW Legal Aid Domestic Violence Unit (**DVU**).³⁰ The DVU's approach to the issue of reducing the prevalence of FDSV was to set a long-term goal of providing those who are experiencing or at risk of FDSV with the legal and other assistance they require to "build lives safer from FDSV".³¹ It aims to provide services to people vulnerable to FDSV that are accessible, appropriate and proportionate, at sustainable cost.

The DVU commenced in 2016 and was evaluated after nine months of operation. At the time it operated in the Liverpool, Bankstown, Fairfield and Burwood areas of Sydney, providing duty lawyer services at four local courts, two legal advice clinics, a telephone/email/webcam legal advice line and social work support services, as well as providing grants of legal aid. The evaluation found that the DVU was largely achieving its aim of reaching disadvantaged clients by:

- forming teams which include specialist solicitors trained in trauma-informed practice together with social workers and support staff;
- locating duty lawyer services in Local courts, alongside Apprehended Domestic Violence Order lists and in Family Court registries;
- locating legal advice clinics at health centres;
- providing legal advice remotely via telephone, email or video link; and
- delivering legal education to community groups and organisations.³²

Tailoring services to each client was found to be another effective element in the DVU's approach. Each case involved an initial needs assessment followed by (as appropriate) various forms of legal services (duty, advice, minor assistance, representation or assistance with other legal issues via Legal Aid referrals) or social services through social workers and non-legal referrals. While recognising the challenges in assessing the impact of a program on its clients in the context of multiple external influences,³³ the evaluation found that a tailored approach resulted in better holistic outcomes for clients.³⁴

The importance of tailoring services to the needs of clients was reinforced in a report prepared for the NSW Department of Family & Community Services (**FACS**) concerning the Integrated Domestic and Family Violence Service program (**IDFVS**).³⁵ Recommendations for the program included:

- that each IDFVS service report to FACS on their local partnerships and at the local level to see how to best tailor services to the population demographic;
- that consideration be given to funding specific workers with the skills to work with children affected by FDSV, particularly in relation to Aboriginal children; and

²⁹ Ibid 27.

³⁰ Law and Justice Foundation, Legal Aid NSW Domestic Violence Unit: process evaluation of the first nine months: Report (2018).

³¹ Ibid 4.

³² Ibid.

³³ Ibid 6.

³⁴ Ibid 67.

³⁵ University of New South Wales, Evaluation of the Integrated Domestic and Family Violence Service Program: Final Report (2018).

- that priority be given to employing Aboriginal workers, as well as providing training on cultural safety and competency. Stakeholders noted that the absence of an Aboriginal worker in some services had resulted in unsuccessful referrals.

Community-led models

The abovementioned programs illustrate that understanding FDSV will often require an understanding of local community, language, culture and location.

We support the Standing Committee's recommendation for greater involvement of local governments in prevention and early intervention initiatives, including that:

- local government be directly involved in the development and implementation of the National Plan;³⁶
- a representative of the Australian Local Government Association be made a member of the National Federation Reform Council Taskforce on Women's Safety;³⁷
- each local government association have a dedicated policy offer for family and domestic violence;³⁸ and
- the Commonwealth, state and territory governments work with the Australian Local Government Association to determine whether additional resources are required.³⁹

In relation to CALD communities, we note a recent study conducted by the Monash University Migration and Inclusion Centre that examined the FDSV-related experiences of 1392 migrant and refugee women in Australia before and during the March-September 2020 COVID-19 lockdown. The study found that complex cultural dynamics were often a factor in relation to physical, financial or sexual abuse, and that amongst victims there were low levels of trust in services such as police. The study concluded that responses to FDSV should be local and specialised and should be co-designed with relevant communities.⁴⁰

As noted above, responses and services delivered to Indigenous communities should also be community-led and designed. We support the Standing Committee's recommendation of models such as the Maranguka Justice Reinvestment Project in Bourke, NSW - an example of a project involving Indigenous community members in the development, implementation and review of local responses to FDSV.⁴¹

Education and training of legal professionals

The experience of our members is that family violence issues can arise in the context of many areas of legal practice in addition to family law and criminal law. We have previously suggested legal practitioners should be encouraged to undertake education and training to develop competencies focused on responding to the physical, psychological and financial abuse of vulnerable people including survivors of family violence.

Training in trauma-informed lawyering responding to FDSV should provide skills to:

- recognise the indicia of trauma and its effect on FDSV-affected clients;
- build trust and the perception of safety in trauma-affected clients;

³⁶ Standing Committee Report, Recommendation 16.

³⁷ Standing Committee Report, Recommendation 15.

³⁸ Standing Committee Report, Recommendation 17.

³⁹ Ibid.

⁴⁰ M Segrave, R Wickes and C Keel, Migrant and Refugee Women in Australia: The Safety and Security Survey, Monash University (2021).

⁴¹ Standing Committee Report, 296-7 [7.242]-[7.245].

- minimise the re-traumatisation of clients in their engagement with the legal system;
- minimise the risks of physical danger and vicarious trauma to themselves and their colleagues; and
- respect the client's autonomy and right to self-determination.

Examples of this type of training include the NSW Law Society's continuing professional development programs, which incorporate skills-based training in areas such as family violence and 'fundamentals' for family law practitioners. We understand Legal Aid NSW also offers comprehensive training for panel solicitors, and that private consultancies offer training on trauma informed practice.

The above recommendations also apply in relation to professionals working in the family law courts. The critical issues continue to be adequate budgetary allocation and adequate staff time for this training to take place.

Community legal information

While legal services are a vital response to DFSV, reliable, accessible legal information for victims and perpetrators is also important. We note the NSW Government's recent release of the "Avow" app, which provides perpetrators with information about Apprehended Domestic Violence Orders and support services, including the NSW Men's Referral Service. Information for perpetrators developed by Legal Aid NSW is also being provided online through channels such as Youtube. We note that effective maintenance and promotion of these resources will be key to their uptake and success. In our view, services provided to perpetrators, particularly to Indigenous perpetrators, must be trauma-informed.

If you have any further questions in relation to this letter, please contact Sue Hunt, Principal Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'J Warner', followed by a horizontal line extending to the right.

Juliana Warner
President