

INQUIRY INTO DOMESTIC VIOLENCE TRENDS AND ISSUES IN NSW

Organisation: Women's Legal Services NSW

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3 July 2012

The Hon. N Blair
Chairperson
Standing Committee on Social Issues
Parliament House
Sydney NSW 2000

By email: socialissues@parliament.nsw.gov.au

Dear Mr Blair,

Domestic violence trends and issues

1. Women's Legal Services NSW (WLS) thanks the Legislative Council Standing Committee on Social Issues for the opportunity to provide a supplementary submission to the Domestic violence trends and issues inquiry, following the Committee's discussion paper for consultation and roundtable discussion on 18 June 2012.

Definition of domestic relationship

2. As noted at the roundtable discussion, we are concerned to lose the broader definition of domestic relationship as a result of Possible recommendation 4. We reproduce below [at paragraphs 4 – 10] our arguments against this, relating to sections 5(d), 5(e) and 5(f) which were made in the WLS NSW submission to the Department of Attorney General and Justice in relation to the Statutory Review: Crimes (Domestic and Personal Violence) Act 2007 dated 18 November 2011 (copy attached).
3. Our concerns are raised in more detail below, however they focus on the need to provide protection for very vulnerable women including women with disabilities and women in institutions.

Section 5(d), (e) and (f) – flatmates, carers and residential facilities

4. We note that the inclusion of these relationships was considered in detail at the time that they were introduced in 1999 (in the now repealed section 562A(3) of the *Crimes Act 1900*).¹ The policy rationale for including these relationships remains the same. That is, women with disabilities are particularly vulnerable to abuse, especially within residential facilities, group homes, institutions and boarding houses. The reality of their home life can differ from traditional family settings but, nonetheless, a power imbalance can exist between carers and residents, and violence occurs in the context of

¹ See, for example, Attorney-General's Department (Criminal Law Review Division), *Apprehended Violence Orders: A Review of the Law*, August 1999.

power and control that makes it a form of domestic violence.² As former Attorney-General Jeff Shaw put it when introducing the amendments, the current definition 'recognises the range of domestic contexts in which people live'.³ We are concerned that if the definition were narrowed, the power to obtain the greatest level of protection would be removed from the most vulnerable and disadvantaged groups of women, including women with intellectual disabilities living in group homes, women with mental illness and elderly women living in hostel accommodation.

5. We are concerned that removing the relationships covered by subsection (d), (e) and (f) would reduce the access to justice for women who are already disenfranchised and marginalised. These women would need to seek protection under APVOs. In our experience, police are less likely to apply for an APVO and these women will need to navigate the legal system themselves in order to seek protection from abuse. Further, a police initiated application is more likely to result in an interim or provisional AVO than a private application, so a woman trying to obtain a private APVO would be less likely to obtain interim protection from a person who continues to live in their home. Classifying the relationship as 'personal' rather than 'domestic' may also result in the woman being unable to access community and government services established to assist victims of domestic violence.
6. In addition, in our experience, the nature of relationships that involve co-habitation are not always clear or straightforward. Narrowing the definition of 'domestic relationship' may also exclude relationships that should be covered by the domestic violence provisions. For example, we have had clients who have described themselves as a boarder or a carer but subsequent investigation has revealed that the relationship is in fact an intimate one, with high levels of dependency. Further, some same sex couples who share flats do not want the nature of their relationship to be revealed but are in fact in an intimate personal relationship. They may appear as flatmates but the relationship is in reality more than that. The removal of flatmates from the definition of 'domestic relationship' may make responding to violence in that situation more difficult.

Case study – labels for relationships – Magda

Magda approached our service for assistance at court. She was seeking an ADVO to protect her from Keith, who had a history of violence against her, including screaming at her, destroying her property and threatening to hurt her. She described Keith as her carer and best friend but on asking her more questions about her situation, the WLS solicitor advising her learnt that their relationship was an intimate personal relationship involving sexual intercourse.

7. We are aware others have argued that the wide definition of 'domestic relationship' detracts from the original concept of domestic violence as between intimate partners. However, we submit that viewing domestic violence within the context of an abuse of power and control within a relationship justifies the broad definition and the protection of people in relationships that currently fall within the definition.
8. The relationships in subsection (d), (e) and (f) are distinguishable from other types of relationships that are generally captured by APVOs. They are characterised by living together in confined spaces with nightly proximity that cannot be avoided, dependency

² Ibid

³ NSW Legislative Council, *Hansard*, J Shaw, 25 November 1999 page 3675

in the case of older women or women with disabilities. Flatmates and residents in the same facility share common areas of accommodation with other people. They may share a lounge room, kitchen, bathroom and bedroom. This makes it easy for intimidation or control by one person over another to become an issue. People may be dependant upon the facility in which they live. In the case of nursing homes or residential facilities for the elderly, it may be difficult to find alternative accommodation, or the person being threatened may not have the capacity or support to move. In the case of shared accommodation, issues of tenancy arise and people may also be unable to leave for financial reasons.

New partners of ex-partners

9. New partners of ex-partners should be covered by the definition of 'domestic relationship'. We have had clients who have been subjected to violence from the ex-partner of their current partner. As the relationship does not fall within the definition of 'domestic relationship', the APVO process must be used to obtain protection for that person. The context of power and control exists in such relationships and, as such, these relationships should be included within the definition.

Recommendation

1. *The current definition of 'domestic relationship' should:*
 - a. *retain the relationships already covered by the definition; and*
 - b. *include the additional relationship of being a partner of an ex-partner.*

10. Other steps must be taken to communicate more clearly to the legal profession, media and public the difference between the two orders and the seriousness and particular dynamics of domestic violence. One approach may be to address confusions in terminology by using more distinct names for the different types of orders. There is already a lot of confusion between the terms 'private' AVOs and 'personal' AVOs. Other approaches include appropriate resource allocation to domestic violence and ADVO processes; comprehensive education programs, particularly education and training for police, the judiciary and court staff; and separate reporting of data on ADVOs and APVOs. From a practical perspective, it is useful to have the schemes within one piece of legislation, rather than as parallel schemes, particularly in cases where the nature of the relationship is not entirely clear.

Recommendation

2. *Separate legislation for the APVO and ADVO schemes is not necessary but other steps should be taken to ensure the seriousness and particular dynamics of domestic violence are understood, and that the response to domestic violence is appropriate, prioritised and resourced adequately.*

Recommendation by CEDAW committee

11. In July 2010 the UN Committee on the Elimination of Discrimination against Women made a number of concluding observations with respect to Australia obligations under CEDAW. The Committee expressed its concern about 'the high levels of violence experienced by women, particularly those living in institutions or supported accommodation' and recommended, 'that the State party address, as a matter of priority, the abuse and violence experienced by women with disabilities living in institutions or

supported accommodation.’⁴ We submit that to remove the current protection for women as outlined in sections 5(e) and 5(f) of the *Crimes (Domestic and Personal Violence) Act 2007* is contrary to the CEDAW Committee recommendation.

The Victorian definition of domestic relationship

12. We note that in evidence to the Committee Ms Martin referred to consideration being given to the Victorian definition of family member.⁵ We generally support the Victorian approach, particularly as it provides for a person with a disability and for residential care arrangements. Adopting this approach does however, we believe omit reference to ‘flat mates’ and we reiterate the issues arising from this outlined above at paragraphs 7-10.

Possible recommendation 38

13. We support the policy intention behind the proposal to maintain the same protections if the definition of domestic relationship is narrowed, as envisaged in Possible recommendation 38, however see that there is a risk that this aspect of the recommendation would not be adopted. It is also unclear how the issue of costs would be addressed.

Possible recommendation 39

14. As indicated at the roundtable discussion we are concerned about a proposal to introduce ‘police issued apprehended domestic violence orders’.
15. The increase in women victims of domestic violence as defendants as a result of Police pro-arrest policies highlights the need to retain the accountability inherent in requiring a Justice to approve the application for a provisional order. We refer to our primary submission to this Inquiry dated 16 September 2011 and note that the Committee also addresses this issue at 3.10 – 3.16 ‘Increase in proceedings against women’.
16. We respectfully submit that further work and consultation is needed to outline the details of how the proposal for ‘police issued apprehended violence orders’ will work in practice; and to identify the need for and benefits of the proposal.

Information sharing and Possible recommendation 11

16. We take this opportunity to outline our concerns in relation to information sharing in the context of domestic and family violence. The question arises in response to the Audit Office⁶ recommendation and the Committee’s Possible recommendation 11.
17. In summary our concerns include the potential for increased risk and the need for accuracy and informed consent to information sharing.
18. WLS NSW supports efforts made to improve the system’s responsiveness to disclosures of family violence. Many women report to us the difficulties that they experience in bringing evidence of domestic violence before the courts. The lack of available evidence

⁴ Committee on the Elimination of Discrimination Against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women –Australia*, 30 July 2010, CEDAW/C/AUL/CO/7 at paragraph 43 accessed on 3 July 2012 at: <http://www2.ohchr.org/english/bodies/cedaw/cedaws46.htm>

⁵ *Family Violence Protection Act 2008 (Vic)* Section 8

⁶ NSW Auditor-General, *Responding to Domestic and Family Violence*, Audit Office of NSW, November 2011, p3.

regarding domestic violence and sexual assault is a significant hurdle for victims in court proceedings including family law, ADVO and sexual assault prosecutions.

19. Also, many women expect that their disclosures to people working in the domestic violence and family law systems will be listened to and acted upon.
20. However, there are real concerns about a range of issues that arise in moving towards a system where there is more disclosure and sharing of information. These include potential risk of harm to the person disclosing violence; the integrity of counselling relationships and family dispute resolution processes; and the possibility that failure to indicate family violence could inappropriately lead to an assumption that there is no family violence. These and other concerns must be fully considered.
21. Central to a move towards more disclosure and sharing of information is a requirement for prior informed consent. The makers of disclosures must be fully informed of the consequences of disclosure and have control over the accuracy of the information and how the information is used.
22. We are also concerned by the risk of unnecessary sharing of confidential information, particularly in small towns or communities where everyone knows each other.

The risks of information sharing

23. Contacting a woman who has not given informed consent to be contacted by other agencies may endanger her further. Our service ensures that we take instructions on the safety of returning phone calls or sending mail. To make a phone call without first checking that it is safe to do so may jeopardise a woman's safety or discourage her from seeking assistance in the future.
24. Incorrect information may be exchanged and circulated. If done without consent the woman may not be aware of what needs to be corrected and this could have adverse consequences, for example, if called as evidence in a subsequent ADVO hearing or sexual assault prosecution.
25. Where this might include a statement made to the police, there are many instances where a woman in calmer circumstances might provide a more thought-through statement to include a pattern of previous abuse or to recall the details of the incident, in particular, dates and times. This evidence is often critical in hearings and the subject of cross-examination regarding credibility.
26. Given the increased number of women victims of violence who are inappropriately before the courts as defendants to an ADVO, we wonder how this information will be dealt with when the woman is the defendant and/or also subsequently becomes a defendant in a cross application or has charges laid against her.
27. Undue reliance on documentation instead of action to protect a woman's safety poses a risk. Relying on the fact that information has been passed on may be a way of passing off responsibility. For example, police may not check on safety prior to a court date because information has been sent to a WDVCS and they presume WDVCS will provide follow-up.
28. There is a real potential for information to be used against a victim of domestic or family violence in proceedings such as care proceedings, family court matters and defended

AVO matters. This can act as a barrier to disclosing domestic violence and women seeking assistance in the first place.

29. A woman dealing with domestic violence is likely to feel disempowered and isolated. A compulsory notification to agencies without her knowledge or consent is likely to compound that feeling and make her less likely to attempt to form relationships of trust outside the abusive relationship. This is especially so where: the consequences may include Community Services intervention or even removal of children; the woman may come from a community which views contact with government agencies with suspicion; she may be seen as a 'traitor' to the community for disclosing violence or seeking assistance and risk ostracism or further abuse.
30. It is our experience that a woman is likely to respond negatively to an intrusion on such a sensitive issue without prior consent. Engagement will only be effective with a victim's consent and commitment to working with such services.
31. A woman may not agree with the version of the events the Police has given the helper and may perceive the helper as having taken the police side and therefore is not to be trusted.
32. There is a real likelihood that a failure to indicate family violence could inappropriately lead to an assumption that there is no family violence and opportunities to be asked about family violence will be reduced.

Evaluating ad hoc information sharing programs first

33. We are aware that there are currently some ad hoc information sharing programs in place for victims and/or survivors of violence in NSW known as the 'yellow card' system and also known by other names. We understand that these cards can be provided by police to a third party, such as a WDVCAS worker, as an indication that the woman has consented to her information being shared.
34. We support these initiatives since they are aimed at improving responses to domestic violence and when all goes well, can result in an earlier resolution of an application for an ADVO – with fewer court appearances. They rely on prior consent.
35. However, at present these systems are not uniformly administered nor demonstrably effective. Service feedback to us includes that information may not reach the WDVCAS until after the first court date; only one side of a 2-sided document is on occasions faxed to the WDVCAS which then has no information about the court and date that the matter is listed; there are lengthy delays in the referrals (as also noted in the Draft Issues Paper).
36. If there are current interagency efforts not working as effectively as they could, the proposed information sharing will be more risky. Furthermore, efforts should be directed towards addressing current issues before concluding that information sharing is an appropriate policy response.

Potential to undermine the efficacy of the Sexual Assault Communications privilege

37. An increase in the circulation of information about victims of domestic violence could have the potential to undermine protections for the confidentiality of victims in criminal and civil proceedings in NSW and in the Commonwealth family law jurisdiction.

Consideration should be given to impacts this could have on the sexual assault communications privilege (SACP) located in the *Criminal Procedure Act*, the *Evidence Act* (126H) and also the professional confidential relationship privilege contained in the *Evidence Act* in NSW.

38. The broader the sharing of information with agencies outside a counselling relationship, the more easily confidential and sensitive communications can be subpoenaed and potentially used against a victim of violence in a sexual assault hearing. Additionally, such information may be used by the perpetrator of violence in other court proceedings as a way of continuing the violence.

The need for control over the information

39. It is not clear how a woman can get access to information about herself held by various agencies and what avenues of redress she has if that information is incorrect. We foresee that it would be practically very difficult to correct wrong information that is in the hands of a number of different agencies – all of which may not be known to the woman.
40. There must be control over how the information is used and the right to access and view the information prior to and after it has been shared and a right to amend the information.
41. We note however, that there is not a practical 'cure' for the inappropriate release of information leading to adverse consequences for the woman, for example, if information about her whereabouts is accidentally released to the perpetrator. Such release of information has potentially serious consequences.

Information sharing not a solution to practical or systemic problems

42. Sharing information will not solve practical or systemic problems such as delays in referrals from police to other agencies and housing issues.
43. Non-government agencies are currently insufficiently resourced to respond to the demand for their services.
44. It is imperative that any model involving the sharing of information has the victim of domestic or family violence at the centre and the needs of agencies as secondary.
45. WLS NSW believes that fully informed consent is the cornerstone of a policy response for the appropriate exchange of information to keep victims safe and perpetrators accountable.

Victims compensation

46. WLS NSW submits that a comprehensive response to domestic violence must include adequate compensation. The NSW victims compensation scheme is currently under review, and we call on the Committee to recommend that compensation for victims of domestic violence and sexual assault be prioritised. We attach a copy of our submission dated 4 May 2012 in full, however we extract below our argument [paragraphs 18 – 27] for the need to retain and strengthen compensation as a particular reparation measure for women and children who have experienced domestic/family violence and/or sexual assault.

47. Violence against women is one of the most widespread human rights abuses. In Australia:
- domestic violence puts more women aged 15-44 years at risk of ill health and premature death than any other risk factor;⁷
 - one in three Australian women will report being a victim of physical violence and almost one in five will report being a victim of sexual violence in their lifetime according to the Australian Bureau of Statistics.⁸ We also know that family violence and sexual assault are under reported.
 - approximately 350,000 women will experience physical violence and 125,000 women will experience sexual violence each year.⁹
 - some groups of women experience higher rates of violence. These include Indigenous women¹⁰, women with disabilities¹¹, women from culturally and linguistically diverse backgrounds¹², younger women and older women.¹³
 - whatever the form violence takes, it has serious and often devastating consequences for victims, their extended families and the community.
 - domestic and family violence is the biggest single cause of homelessness among women and children.
 - almost one in four children in Australia have witnessed violence against their mothers or step-mothers.
 - violence against women also comes at an enormous economic cost. Research released by the Government shows that each year violence against women costs the nation \$13.6 billion.¹⁴ This figure is expected to rise to \$15.6 billion by 2021.
48. Under international human rights, States are required to act with due diligence to protect, promote and fulfil their human rights obligations.¹⁵

⁷ VicHealth and Department of Human Services, *The Health Costs of Violence. Measuring the Burden of Disease Caused by Intimate Partner Violence – A Summary of Findings*, 2004 at 10 accessed on 1 May 2012 at: <http://www.vichealth.vic.gov.au/~media/ResourceCentre/PublicationsandResources/Mental%20health/IPV%20BOD%20web%20version.ashx>

⁸ Australian Bureau of Statistics (2005) *Personal Safety Survey*, ABS Cat. No. 4906.0, Canberra: Commonwealth of Australia. (ABS 2005).

⁹ ABS 2005, Note 2.

¹⁰ ABS 2005, Note 2; Mouzos, J. and Makkai, T. Women's experiences of male violence: Findings from the Australian component of the International Violence Against Women Survey, *Research and Public Policy Series*, No. 56, Canberra: Australian Institute of Criminology, 2004.

¹¹ ABS 2005, Note 2; Lievore, D. 'Prosecutorial Decisions in Adult Sexual Assault Cases' *Trends and Issues in Crime and Criminal Justice, Issue.1* 2005 at 291.

¹² ABS 2005, Note 2.

¹³ ABS 2005, Note 2.

¹⁴ KPMG, *The Cost of Violence against Women and their Children. Safety Taskforce*, Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government, 2009.

¹⁵ Human Rights Committee, *General Comment No. 31*, CCPR/C/74/CRP.4/Rev.6, para. 8; Committee on the Rights of the Child, *General Comment No. 5*, CRC/GC/2003/5, 27 November 2003, para. 1; Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, E/C.12/2000/4 (2000), para. 33.

49. Significantly, States may be held responsible for private acts, such as domestic and family violence, if they fail to act with due diligence to prevent, investigate or punish acts of violence.¹⁶
50. In her first thematic report to the United Nations Human Rights Committee, the current Special Rapporteur on Violence Against Women, its causes and consequences, Ms Rashida Manjoo focused on the right of individuals to reparations for the violation of their human rights, a right 'firmly enshrined in the corpus of international human rights and humanitarian instruments.'¹⁷
51. It is important to draw a distinction between reparations measures and other rehabilitation measures, such as social policy and development measures, which are measures addressed at the entire population, eg social security, as distinct from victims of crime.¹⁸
52. 'Given the disparate and differentiated impact that violence has on women and on different groups of women, there is a need for specific measures of redress in order to meet their specific needs and priorities. Since violence perpetrated against individual women generally feeds into patterns of pre-existing and often cross-cutting structural subordination and systemic marginalization, measures of redress need to link individual reparation and structural transformation. Additionally, women who experience violence have traditionally encountered obstacles to accessing the institutions that award reparations.'¹⁹
53. We note in the F2011 Victims Compensation Tribunal *Chairperson's Report* that 25% of awards for statutory compensation related to victims of sexual assault and 32% related to victims of domestic violence.²⁰ While recognising that men also experience sexual assault and domestic violence, predominantly this is a crime perpetrated against women and children.
54. Given the significant human rights abuse that violence against women constitutes, the Special Rapporteur's comments above, and that over half of NSW victims compensation payments are made to victims of domestic violence and sexual assault, WLS NSW believes that the NSW victims compensation scheme should prioritise victims of domestic violence, sexual assault and child abuse.
55. These crimes are rarely one off, often continuing over an extended period of time of many years; often involve a pattern or cycle of abuse; are often perpetrated by someone the victim knows; and are a means of coercion, control and dominance of the victim. In

¹⁶ CEDAW *General Comment 19: Violence against Women*, as contained in UN Doc A/47/38 (1992) at paragraph 9.

¹⁷ *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, Human Rights Council, A/HRC/14/22 accessed on 16 April 2012 at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.22.pdf> See also: the *Universal Declaration of Human Rights* (art. 8), the *International Covenant on Civil and Political Rights* (art. 2, para. 3), the *International Convention on the Elimination of All Forms of Racial Discrimination* (art. 6), the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (art. 14), the *Convention on the Rights of the Child* (art. 39), CEDAW *General Comment 19* at paragraphs 9, 24(i), 24(t)(i).

¹⁸ Note 15 at paragraphs 20-21

¹⁹ Ms Rashida Manjoo, Note 15 at paragraph 24

²⁰ Victims Compensation Tribunal, *Chairperson's Report 2010/2011*, Victims Services, Department of Attorney General and Justice, Sydney at 20.

our experience of working with victims, the impact of these crimes is long lasting and the need for support and rehabilitation, including compensation is very important as outlined further below.

56. Additionally, in 1985 Australia endorsed the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Basic Principles)*.²¹ While not legally binding, by endorsing this Declaration, States, including Australia, have committed to:

- a. endeavouring to provide financial compensation to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; (Article 12(a))
- b. encouraging the establishing, strengthening and expansion of national funds for compensation to victims; (Article 13)
- c. strengthening judicial and administrative mechanisms to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible (Article 5), including avoiding any unnecessary delay in granting awards to victims; (Article 6(e))
- d. taking measures to protect [a victim's] privacy and ensure their safety from intimidation and retaliation; (Article 6(d))
- e. reviewing practices, regulations and laws to consider restitution as an available sentencing option in criminal cases; (Article 9)
- f. training for police, justice, health, social service and other personnel concerned to sensitise them to the needs of victims, and guidelines to ensure proper and prompt aid;(Article 16)

57. If you would like to discuss any aspect of this response, please contact me on 02 8745 6900.

Yours faithfully,
Women's Legal Services NSW

Janet Loughman
Principal Solicitor

Attachment:

1. WLS NSW submission to the Department of Attorney General and Justice in relation to the Statutory Review: Crimes (Domestic and Personal Violence) Act 2007 dated 18 November 2011
2. WLS NSW submission to the Review of the NSW Victims Compensation Scheme dated 4 May 2012

²¹ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, General Assembly Resolution 40/34 of 29 November 1985, available at <http://www2.ohchr.org/english/law/victims.htm>