Wirringa Baiya Aboriginal Women's Legal Centre

Submission to the Consultation Paper "Family Violence: Improving Legal Frameworks"

4. Family Violence: A common Interpretative Framework

Proposal 4-1
We agree with proposal (a). We also submit that the conditions and wording of protection orders should be standardised across the states and territories.

We also think that a protection order should automatically be registered across all states and territories to remove the onus on the protected person to register her protection order in another state. This is particularly an issue for Aboriginal communities. Some Aboriginal people tend to be quiet mobile, especially when looking for work or visiting family. Some Aboriginal women are made homeless because of family violence and can move from family member to family member until she finds safe and stable accommodation.

Question 4-1
Yes, we think so.

Proposal 4–2
We agree with this proposal.

Proposal 4-3
We agree with this proposal.

Proposal 4–4
We agree with this proposal.

Proposal 4-5
We agree with this proposal.

Question 4-2
We are unable to comment.

Proposal 4-6
We agree in principle but are unable to comment on the law in South Australia.

Proposal 4-7
We think definitions across the states should be uniform. We are unable to specifically comment on the law in Queensland and Northern Territory.

Proposal 4-8
We think definitions across states should be uniform. We are unable to comment on the law in Tasmania.

Proposal 4–9
We agree that the law in New South Wales should be amended and think that the law across the states should be uniform.

Proposal 4–10
We agree in principle that the definition of family violence should include exposure of children to family violence as a category in its own right. However, we have some concerns that the definition may be used against mothers who are victims, as raised by the Commissions. We are particularly concerned about this for Aboriginal women. Recent statistics from Community Services NSW (now part of the Department of Human Services) showed that 30% of children in out-of-home care were identified as Aboriginal.

We suggest that safeguards against this include educating the police and courts about the cycle of violence and its complexities. We think that legislation should clearly state that this refers to the exposure to the violence by the perpetrator/offender, not the non-offending parent/carer of children, who are also victims of the perpetrator.

Proposal 4–11
We agree with this proposal.

Proposal 4–12
We agree with this proposal.

Proposal 4–13
We agree with this proposal.

Proposal 4–14
We have no comment, except to say definitions across states should be uniform.

Question 4–3
We are unable to comment.

Proposal 4-15
In principle we agree but we cannot comment specifically on law in Queensland and Northern Territory.

Proposal 4–16
In principle we agree but cannot comment specifically on law in South Australia

Question 4–4
We cannot comment, as we do not have experience litigating family law matters in federal family courts.

Question 4–5
We cannot comment.

Proposal 4–17
In principle we agree.

Proposal 4–18
We agree.

Question 4–6
We cannot comment.

Proposal 4–19
We cannot comment.

Proposal 4–20
In principle we agree that all states should recognise all protected persons who fall within the definition of Indigenous concepts of family. We cannot comment specifically on the law in Tasmania and Western Australia.

Question 4–7
In principle we agree that a person who is being abused by a carer should be afforded protection, but we have reservations about defining this type of abuse as family violence. We prefer the Victorian definition of a family member (section 8(3)).

Proposal 4–21
We agree.

Proposal 4–22
We agree.

Proposal 4-23
We agree.

Proposal 4-24
In principle we agree, but cannot specifically comment on the law in Western Australia.

Proposal 4-25
We agree

Proposal 4-26
No comment

Question 4–8
We agree, as long as the focus is on ensuring minimal disruption to the victims of the family violence.

Proposal 4–27
We agree that the laws should be uniform.

Proposal 4–28
We agree.

Question 4-9
We agree with the NSW test.

---

5. Family Violence Legislation and the Criminal Law-An Introduction

Question 5-1
We are unable to comment; we have no experience in Commonwealth prosecutions.

Question 5–2
We are unable to comment.

Proposal 5–1
We are unable to comment.

Proposal 5-2
We agree.

Proposal 5-3
We agree.

Question 5–3
We agree. We are not able to suggest how to set up proper training, except to introduce Mandatory Community Legal Education training courses on such subjects.

Question 5–4
We find that they are being used as alternatives. We often find that police are not laying appropriate charges where they could, or should. We also have spoken to women where charges have been laid but no protection order was sought for the protection of the victim. We think that in some instances individuals are not being charged when they should because it means more work for police. This may in part be attributed to resources, that is, police not having the time and resources to investigate matters that are more difficult or challenging. Some examples of such offences would be stalking offences or incidents involving telecommunications. But equally we think that this can be attributed to an attitude problem, especially towards Aboriginal women. We often find that police are indifferent to Aboriginal women because there is a perception that Aboriginal women are unreliable.

We submit that the practice of when charges should be laid should be addressed in police standard operating procedures (SOPS). We submit that there needs to be comprehensive and ongoing education of all police officers about: a) family violence and its complexities, especially in the context of Aboriginal communities; b) Aboriginal cultural awareness; and c) the importance of identifying and preventing family violence very early on to prevent the progress of more serious and severe violence.

Question 5–5
In principle we agree that such offences would be desirable. However, in practice we believe that such offences would be very difficult to define and prove. In particular we see it would be difficult to define what types of economic and emotional abuse should be criminalised.

Our clients experience a range of family violence and many report that the damaging and long term psychological impact of emotional and economic abuse. Furthermore, these forms of abuse are sometimes more manipulative than physical violence and less well understood and can result in significant poverty.

We acknowledge the Commission's comments that it would be difficult to police and prove offences such as economic and emotional abuse however we note that economic abuse appears to be on the rise particularly in relation to older clients. We would like to be advised about any assessments of the effectiveness of such measures in other jurisdictions before we make a final comment on such a proposal.

Question 5–6
We can't comment because this is not the case in NSW. However, we would imagine that such a measure would more than likely increase victim safety.

We can say that many Aboriginal women and children live in remote areas. In these circumstances police issued protection orders may afford them protection in a more timely fashion.

However, we are concerned that where police wrongly identify the primary aggressor, Aboriginal women (who are the primary victims of violence), could be subjected to a police issued protection orders which leads to their further victimisation. We are also concerned about entrenched systematic racism in relation to Aboriginal women and children and abuse of police power in this context.

Proposal 5–4

We don't support the Tasmanian model at all. However we think that on the spot police issued protection orders are something worth considering for emergency or crisis situations. In NSW the police can apply for an urgent provisional order to an Authorised Justice who is available on 24 hour call. We understand the difficulty for police in NSW is in the service of these protection orders. We suggest police officers attending family violence incidents be equipped with telephones, with email capacity, that enable them to seek urgent interim orders approved by an Authorised Justice. We suggest that an appropriate application and software could be developed for police to apply to an Authorised Justice for protection orders from a mobile phone.

Proposal 5–5
We agree.

Question 5–7
We agree with the NSW model that police have an obligation to make an application for a protection order where a person is charged with a family violence offence, or

where a family violence offence, stalking offence, or a child abuse matter is likely to be committed, is imminent or has been committed.

Such an obligation should be imposed by family violence legislation as well as be included in police standard operating procedure manuals.

Question 5–8
Most of the Aboriginal women that we speak to want the police to be involved. The issue is that the involvement must be appropriate, responsive, respectful and culturally sensitive. For the many Aboriginal women we speak to police involvement relieves them of the burden of having to be responsible for making a decision to seek a protection order. There is protection from pressure from the offender, his family or community not to pursue a protection order.

However, we agree that there should be appropriate resourced Indigenous specific support services available to Indigenous women who do want to seek a protection order without police involvement.

Indigenous specific support services should be in courts to enable Aboriginal women to apply for protection orders without police involvement. This should also include an outreach to more remote courts. In our experience our clients want the police to take out orders on their behalf however where this does not happen it is important Aboriginal women have choices in obtaining protection orders. Aboriginal women want to be able access mainstream services that are sensitive to their needs and culturally appropriate as well as have the option of using Indigenous specific services. The choice should be the women's choice, and we submit that just because you are Indigenous you should be pressured in any way to use an Indigenous service if you don't want to. This is particularly important for clients who live in remote areas and are worried about confidentiality issues.

Question 5–9
We are unable to comment about when the Director of Public Prosecutions has conducted proceedings on behalf of a victim, but we think it would be appropriate for it to conduct proceedings when the defendant is a police officer. We also think it is appropriate that it should represent victims in appeals to the District Court where there is merit.

Question 5-10
We have no comment other than what we have said below.

Proposal 5–6
It is our view that service of protection orders is a frequent problem, which prolongs proceedings for many weeks, sometimes months, and which causes more stress for victims.

Question 5–11
We agree.

Question 5–12
We think that there is a problem with some police incorrectly identifying whom the primary aggressor is when turning up to some incidents. Anecdotally we are aware of

a number of incidents where Aboriginal women have been arrested and charged for family violence offences, when in fact she has been the primary victim of family violence for a long period of time. We think this should be addressed by comprehensive training of police officers about how offenders operate and how they will deflect blame by suggesting that his partner is the one who is violent and mentally unstable. Often victims are very distressed and sometimes incoherent when police turn up after an assault. Whereas the offender, who is in control of the situation, comes across as reasonable and persuasive.

We think that having skilled counsellors attend family violence incidents would be very useful and we support this recommendation.

We do not at this stage have a definite opinion as to whether there should be legislative amendment. We think this issue is a very important one and we do not have the time to research and consider how it should be best addressed in terms of legislation.

Question 5–13
We think that there should be a presumption against bail in relation to family violence offences. The issues raised in the paper refer specifically to Tasmania, which refers to offences is economic and emotional abuse. We do not think there should be a presumption against bail for economic and emotional abuse.

While there is a justifiable concern in the Aboriginal community about the numbers of Aboriginal people in custody, we speak to many Aboriginal women who are upset about offenders of family violence being given bail.

Question 5–14
It is our view that women are often not told that and offender has been bailed, nor what are the bail conditions. This of particular concern where a protection order has been issued.

We believe that victims of violence should be advised verbally and in writing of decisions about the bail of the offender. The onus of advising victims about the bail conditions should lie with the police.

Proposal 5-7
We agree that there should be such an obligation and that victims should be advised both in writing and verbally as soon as possible. We think any variations in bail conditions should be advised as well.

Question 5–15
We are unable to comment.

Proposal 5–8
We agree but we note in NSW that interim protection orders must be made on charges for offences that appear to court to be serious (section 40(1) of the *Crimes (Domestic and Personal Violence) Act 2007*).

6. Protection Orders and the Criminal Law

Proposal 6-1

We agree with the proposal.

Question 6–1
We cannot comment.

Proposal 6–2
We agree with this proposal.

In NSW it is our understanding that most offence and protection order proceedings are listed at the same time. However, we note that although the court should be making a protection order upon conviction this is not always happening.

Question 6–2
We cannot comment about the law in Queensland.

Question 6–3
We cannot comment.

Question 6–4
We cannot comment.

Question 6–5
We have concerns about having such an exception as often pressure is put on Aboriginal women by the offender and/or his family and community not to have a protection order. It is also experience that some women minimise the violence they have experienced, especially in the early stages of the relationship.

In NSW, even if a victim objects to the making of an order, the court can make an order, if there is evidence of violence and the Court thinks a protection order is necessary for the protection of the victim. We support this arrangement as there is often pressure being placed being placed on a victim from family and community. The decision rests with the police to apply for an order, and court to make such an order, and we are of the view that this recognizes the impact of family violence.

Question 6–6
We cannot comment.

Proposal 6–3
We agree.

Proposal 6–4
We agree.

Question 6–7
We do not think so, but we think that the problem in part is police and police prosecutors not seeking the appropriate orders for the person in need of protection.

We find that children are often not included on protection orders when they should be. We think that many Magistrates are reluctant to include children on protection orders perceiving this as a family law issue.

In NSW general duties police draft the applications for protection orders. As they have less training around family violence issues than specialized family violence liaison officers, the effectiveness of these applications and the orders sought can be an issue. For example, such protection orders may only include mandatory orders when more orders are required to protect the victims. Sometimes this problem may be rectified at a latter date when the victim has the opportunity to liaise with other services at court, however we submit that care should be taken to get the orders right in the first place.

Proposal 6–5
We agree with this proposal.

Proposal 6–6
We agree with this proposal. See previous responses in relation to uniformity across state and territory borders in relation to the application process and enforcement of orders.

Proposal 6–7
We agree with this proposal.

Proposal 6–8
We agree that the court should consider the effect on parties and any children.

However, we would resist any proposal that considered a party's equitable or legal interest in a property over the right of women and children to remain in their homes without the threat of violence.

We note that recent amendments to the *Residential Tenancies Act 1987* (NSW) will enable renting parties to remain in their home and vary lease arrangements when one party has been excluded from the home because of family violence. We support these amendments and other measures that enable women remain in their homes. One of the key risk factors for homelessness is relationship breakdown. Some of our clients remain in violent relationships for fear of breaking a lease and losing their home. Equally, some women leave the home and become homeless because they are not aware of the ability for them to remain at home and seek exclusion orders for the perpetrator.

Question 6–8
We disagree with any proposal to put this obligation on police, as we do not think it is the role of the police.

Proposal 6–9
Yes, we agree.

Question 6–9
We cannot comment, as we do not have practical experience of Northern Territory legislation.

Question 6–10
We think there should be a presumption. However, in the end, whether a woman and her children who have experienced violence should stay in the home is a choice she needs to make. In some cases, the safest option for a woman is to leave the home and stay in a refuge or with others.

The recent amendments to the *Residential Tenancy Act 1987 (NSW)* will make it easier for a victim to remain in the home and vary a tenancy agreement to remove a perpetrator. We would support this proposal and endorse the changes to tenancy legislation to make this possible for women in other states and territories.

Proposal 6–10
We are unsure about the effectiveness of these programs, and in our experience, it has not yet been established that these programs are useful in changing violent offenders. We note that some programs predict short term behaviour change, however these types of offences, attitudes about the acceptance of violence and behaviours are part of long-held, entrenched views about violence and power that are not able to be changed through 6 week or 1 month long programs.

Counselling and rehabilitation programs need to be measured in both short -term and long -term offender behaviour change. We would be interested in rigorous assessment and review of such programs to assess their effectiveness and whether there are any long or short- term behavioural changes in offenders.

Additionally, we would be concerned if a defendant was 'rewarded' for participation in such a program by the court varying conditions on protection orders, or bail conditions, or early release from custody. We would object to the use of such programs to replace incarceration and would be resistant of a defendant's participation in such a program as having an effect on early release or to be taken into consideration prior to sentencing.

We want funding of services for victims to remain the priority and have concerns if any funding towards perpetrator programs undermines this priority.

Proposal 6–11

Aside from our concerns raised in 6-10, we would support any proposal to consult more with, and hear from, victims.

However, we would resist any proposal that seeks to reward defendants for completing 'behaviour change programs'. We would caution against the consideration of such programs in the offender's sentencing, bail or parole conditions.

Question 6–11
We are not aware of this happening in NSW.

Question 6–12
We cannot comment.

Question 6–13
We cannot comment.

Question 6–14
We cannot comment.

Proposal 6–12
We are not really sure what issue this proposal is raising, however, we would like to raise a particular concern we have protection orders and offenders being sentenced to a custodial sentence.

It is our experience that problems arise for women who have an effective protection order at time that the offender is sentenced, regardless of whether the sentence is in relation to an offence against her or not.

In one case we are aware of (where there had been a long history of family violence) the offender was given a custodial sentence for unrelated violent offences and the protection order expired during the custodial sentence. When the offender was released into the community the victim still harboured fears for her safety, but the victim was not easily able to apply for a protection order, as there was no 'recent' act of violence. Additionally, she was not able to extend the order during the time that he was in custody, as the police (and the court) did not consider it necessary when he was already being held in custody.

The victim continues to feel scared, threatened and intimidated by the offender but is not able to obtain a new order easily.

Our suggestions would be for all protection orders to be suspended for the period of incarceration. Once the person is released, any protection orders in existence at the time of the custodial sentence commencing would be reactivated upon the release of the defendant.

Proposal 6–13
We agree with this proposal.

Proposal 6–14

a. We disagree. We are not aware of this being a significant issue and do not understand why this proposal is necessary. A breach of a protection order is not necessarily evidence that the orders are unsatisfactory and should be varied, revoked or cancelled.

   In NSW there is also a requirement that when children are named on a protection order, only police can apply to the court to vary, revoke or cancel the order, we note that it is difficult for children to be named on protection

orders in the first place. We would have concerns about protection orders being revoked on this basis.

b. We disagree, as there may be many reasons why a victim may suggest she wants an order to be revoked. Courts and legislation in NSW have come a considerable way in recognizing the complex effect of power and control in relationships of family and family violence. There may be many instances in which a victim 'changes her mind' or purports to be no longer in fear of a defendant. However, we note that the nature of family violence is to go through cycles where sometimes the violence subsides and she may well believe that there is no need for her protection.

We note that there may be circumstances in which variation should be considered, particularly in situations where parties are attempting to reconcile and an exclusion orders may cause more tension for the couple rather than less. However, revocation or variation of a protection order should only be considered if a separate application is made by the police, or either party, to vary or revoke the protection order. We note that in NSW, where children are included as protected persons on a protection order only the police can apply to the Court to vary or revoke a protection order.

Proposal 6–15
We agree with this proposal.

Question 6–15
We cannot comment.

Question 6–16
A protection order is an order directing a defendant what he can and can't do, rather than imposing restrictions on the victim's behaviour. The victim's alleged 'consent' to a breach should not be an issue; rather the defendant should follow the orders that were placed upon him/her.

There may be very exceptional circumstances such as medical emergencies, or urgent family matters where the court may wish to consider how the breach arose. However, we would rely on the common sense of the court to use discretion when considering such breaches.

Question 6–17
Anecdotally we aware of cases where police are sometimes only charging defendant with the breach of a protection order rather than charging them with the other offence. This seems to happen in less serious matters such as breaches of protection order through contact by text messages or emails.

Question 6–18
We think the answer is regular training, not just at the police cadet training, but regular and ongoing training to ensure all police have understanding of the nature of domestic and family violence and cultural awareness training around Aboriginal and Torres Strait Islander culture and communities.

Proper awareness of the complexity of family violence offences is required, and the particularly manipulative and calculated manner in which perpetrators operate. Many women report to our Centre instances where the defendant has been stalking them, or they have been intimidated by family members. These types of reports to police are rarely followed up or considered to be 'real breaches'. However, proper training and better awareness of police of the ways in which perpetrators intimidate and control victims would ease this burden on victims. There may be many breaches that are indeed, hard to prove and difficult to prosecute, however, failure to properly consider the psychological and damaging emotional impact other less 'serious' forms of abuse has on the victim risks further victimization.

Additionally, we hear from our clients that some police fail to investigate telecommunication offences such as texting, 'sexting' or email harassment. We are aware that this failure in part relates to proper resourcing, however these are genuinely threatening breaches for victims, even if they don't get considered as serious as an assault by police.

Proposal 6–16
We agree with this proposal.

Question 6–19
Yes, there should be consistency across all state and territory jurisdictions. We cannot comment about what would be the appropriate maximum penalty be

Question 6–20
We do not have extensive experience or knowledge about sentencing considerations.

However, we do wish to submit that failing to properly penalise defendants who breach orders undermines the seriousness of the situation that they are in and the difficulty that the victim had to go through in order to get the order in the first place.

Question 6–21
While we do not feel able to comment on sentencing, we do feel that the courts should recognise the seriousness of family violence and the severe effect of a defendant's actions on a victim, particularly in matters where there is a protection order in force. We agree in principle, but this should apply to matters where there is no act of violence as well.

We submit that there should be proper recognition of the effect of relatively 'minor' breaches (such as stalking). This type of breach is harder to prove and more innocuous than a physical assault, however, the effect on the victim can be equally intimidating and the courts and police should do more recognise the psychological effect that these kinds of breaches have on victims.

In our experience, police do not take stalking seriously and often minimise the effect on the victim, which re-victimises her. We acknowledge that some breaches may be difficult to prove, but courts and the police should be more aware of the nature of family violence and the subtle intimidation techniques that the defendant may use.

Failure to act on breaches undermines the effect the breach has had on the victim and the steps that she had to go through in the first place to get the protection order in place. Women can be re-victimised when courts do not consider or turn their minds to the effect of the breach, particularly when there's no new offence (and the breach is considered 'minor'), but the defendant's behaviour is threatening and intimidating nonetheless.

Question 6–22
We do not feel that we are able to comment.

---

7. Recognising Family Violence in Criminal Law

Time did not permit us to address the questions and proposals raised in this section.

8. Family Violence Legislation and Parenting Orders

Proposal 8 – 1
We agree.

Proposal 8–2
We agree, but note that Part F of an 'Initiating Application' form already addresses this issue.

Proposal 8–3
We agree, although this is already the case in NSW. However, for the many Aboriginal women we give advice to, there are often not any family court orders in place when they are seeking a protection order in a local court. The lack of family court orders often hinders the progress of their orders, especially when a victim wants to include children as protected persons on her protection order.

We anecdotally hear of women, both Aboriginal and non-Aboriginal, being forced to work out a parenting plan at a local court in the relation to the children, at the behest of the Magistrate. These parenting plans are being negotiated with the assistance of the NSW Police Family violence Liaison Officer, with little or no family law training. In other cases children are not being included because the defendant strongly objects and Magistrates view the issue of children as primarily matter for the federal courts.

Question 8–1
We cannot comment.

Proposal 8–4
We agree.

Proposal 8–5
We cannot comment.

Proposal 8–6
We cannot comment.

Question 8–2
We cannot comment.

Question 8–3
We cannot comment.

Proposal 8–7
We cannot comment.

Question 8–4
We cannot comment.

Question 8–5
We cannot comment.

Question 8–6
It is our experience in local courts that Magistrates are very reluctant to exercise this power. It is our experience that Magistrates are reluctant to make decisions about parenting orders when asked to do so. There seems to be a general view that this is a matter for the federal courts.

It is also our view that police prosecutors in NSW who would appear in the large majority of protection order matters in NSW, given that most are initiated by police, are very reluctant to make an application under s68R. We suspect that this can also be attributed to lack of knowledge about family law and fear of delving into area of law that is not their normal practice.

Question 8-7
We are not able to comment, as regrettably we do not have the time to research and consider the merits of a specialised family violence court.

Proposal 8–8
We cannot comment.

Proposal 8–9
We cannot comment.

Question 8–8
We cannot comment, as most protection orders are initiated by police in NSW.

Proposal 8–10
We cannot comment.

Question 8–9
We agree.

Question 8–10
After considering s68R of the *Family Law Act 1975*, we don't understand the question.

Question 8–11
Our understanding is that this is an issue. We don't know what a reasonable time frame would be.

Question 8–12
Yes, as it would be in the best interests of the child.

Proposal 8–11
We cannot comment.

Proposal 8–12
Yes, we agree.

Question 8–13
We speak to some Aboriginal women who say that they want the father/defendant to maintain a relationship with, and have contact with, the children of the relationship. However, these women tell us that they want this to be done in a safe and controlled way.

Proposal 8–13
We agree.

Question 8–14
We don't feel able to comment.

---

9. Family Violence Legislation and the *Family Law Act*: Other *Family Law Act* Orders

Question 9–1

We in principle agree that injunctions for protection orders are separated from other family law injunctions. In principle it sounds like a good idea for a victim to bring all proceedings in one court, however, we are unsure of how this would work in practice.

For example, how would applications for a family law injunction be funded? Would a victim need to apply for a second grant of legal aid? If this was means tested, and a separate grant was required, this would make a protection/injunction order less accessible than a protection order sought in a state court.

Proposal 9–1

We agree that a breach of an injunction should be treated as a criminal offence, as is the case with the breach of a protection order. A breach of a Family Court injunction should be considered with the same seriousness as a breach of a local court protection order.

Question 9–2

We do not have any knowledge of this.

Question 9–3

We do not see a reason why not.

Question 9–4

We have no knowledge of this.

Proposal 9–2

It would make sense for this to occur to the extent of the inconsistency between the order and the injunction.

Proposal 9–3

We agree that this language is totally inappropriate. We are alarmed that in 2010 terms like 'conjugal rights' persist in the *Family Law Act 1975*.

Question 9–5

We are unable to comment.

Proposal 9–4

We agree that there should be an express provision in this section of the *Family Law Act 1975.*

Proposal 9–5

We agree and would support such an inquiry.

We do not understand the interaction of property proceedings with other schemes, such as victims compensation, as this is a scheme to compensate victims, rather than a consideration in the division of shared assets. We would be opposed to any proposal that considered an award of victims compensation as part of the assets of the relationship.

Question 9–6

We cannot comment.

Proposal 9–6

a. yes we agree.

b. yes we agree.

c. yes, we agree.

Question 9–7

We would only think that property of the child should be recovered if the child was in the care of the excluded person, and there was a risk or suspicion that the other party intended to destroy property.

In regards to other property - we do not consider the protection order proceedings to be the appropriate forum.

Proposal 9–7

We generally agree, but observe that some applicants may not be aware of the progress of their family law matter.

Proposal 9–8

If Proposal 9-7 is to advance, we agree that this information should be sought on the application form. We note our previous comment that some applicants may not have good understanding of the stage of their family law matter.

Proposal 9–9

We have looked at s 87 of the Victorian legislation and we agree and endorse this approach.

Proposal 9–10

We have looked at s 88 of the Victorian legislation and we agree and endorse this approach.

Question 9–8

We can't comment about what issues arise, but have some practical experience of this. We feel that the presumption should apply.

Some women who contact our service talk about wanting to relocate or move near family and community for support, following family breakdown where family violence has been a feature. Women talk to us about feeling trapped by family court orders.

We believe that there should be a presumption in matters where there has been physical violence, although we are unsure of what the procedure should be in matters where there is no allegation of physical violence.

Question 9–9

Yes, as above.

Question 9–10
We don't have any practical experience in relation to the issues that arise.

Question 9–11
Yes, this sounds like a good idea.

10. Improving Evidence and Information Sharing

Time did not permit us to make any submissions in relation to this section.

11. Alternative Processes

Time did not permit us to make submissions to issues raised in the section, except for below.

Question 11–7
We do not think it is ever appropriate to be used in the family violence context.

Restorative justice is about involving the victim and perpetrator in a joint consultation and we would have serious concerns about this. We refer to the work of Julie Stubbs, of the Institute of Criminology, in this regard and note the engendered nature of domestic and family violence makes it highly inappropriate for restorative justice.

Most of our clients have no desire to engage in any restorative justice process. Most never want to have anything to do with the offender, even if their children are having contact with the offender. However, for those women who want to reconcile with their offending partner, restorative justice may be considered, but we agree with the Commission that the appropriate models need to be based on rigorous research.

Question 11–8
It is never appropriate for restorative justice practices to be used for sexual assault offences.

---

13. Child Protection and the Criminal Law

Question 13–1
The approach taken by legislation in NSW should be followed.

Question 13–2
We cannot respond.

Question 13–3
We cannot respond.

Question 13–4
We cannot respond.

Question 13–5
We cannot respond.

Question 13–6
We note that some Aboriginal women are fearful of the implications of reporting violence due in part, to the historical context of children being removed from families.

This is true for our clients and this fear sometimes stops women reporting violence at all, or reporting the seriousness of the violence.

We note that in NSW changes have been made to the reporting requirements in child protection matters and that the law now refers to 'risk of significant harm'. We note that one of the reasons for this reform was that Community Services were being swamped with reports from police. We think it is appropriate for police to make a report when there is a child exposed to family violence and there is a risk of harm to that child. How significant that risk should be is something we are not able to answer at this point. However, we think that the severity of the violence and the duration of the violence should be considered when making a decision as to whether make a report or not.

Proposal 13–1
Yes we agree with (a) and (b).

Proposal 13–2
We agree with this proposal.

Proposal 13–3
We agree with this proposal.

Proposal 13–4
We agree with this proposal.

Question 13–7
We cannot answer this question but note that the child protection regime in NSW is new and there is not very much information about how it is working to date. We would welcome more information and training for agencies working with children and families.

Question 13–8
We cannot comment.

Question 13–9
We assume that this question relates to matters where a joint interagency team is not involved. In such matters, we are of the view that the police should consult with the child protection agency. In NSW we have Joint Investigate Response Teams, which are a joint team of police and Community Services workers.

Question 13–10
We are not clear about what the effect of this consultation would mean. Does this mean that the child protection agency has some say in whether charges should be laid, or is it simply referring to the police receiving information about reports and notifications to Community Services?

We have concerns that in matters where Community Services are working to keep families together and address child protection issues, that the involvement of police and possible charges, would undermine the work of the community services workers.

However, we are not of the view that 'keeping the family together' should come at a

cost to the safety and welfare of the child. We note that in less serious matters (such as some neglect cases) it may not be useful to charge a parent with an offence when steps may have been taken to address parenting skills and improve the family environment. The causes of the neglect may be due to real issues of poverty or the temporary poor mental and physical health of the parents/carers.

Proposal 13–5
(a) We agree with a collaborative approach.
(b) We agree.
(c) We agree.

Question 13–11
We agree.

Question 13–12
We feel that the definition of 'siblings' should be refined.

We note that in Aboriginal families there are often children of similar ages residing in the same household, sometimes in the care of an aunt, grandparent or other family member. We agree that if the court considers such an order necessary for the protection of a child it should have the capacity to make such an order for siblings, but this should be a discretionary power used to protect children from real risks of family and family violence, not simply a blanket policy that will apply across the board.

Proposal 13–6
We are not in a position to comment in any meaningful way.

Proposal 13–7
We are not in a position to comment in any meaningful way.

Proposal 13–8
We are not in a position to comment in any meaningful way.

Question 13–13
We are not in a position to comment in any meaningful way to this question.

---

14. Child Protection and the *Family Law Act*

Question 14–1
There have been recent changes in NSW to the care and protection legislation. Where children have been removed by Community Services, the Children's Court can no longer make contact orders except for where there is the consent of Community Services and instances where there is a permanency plan for the restoration of the child to the family.

We are of the view that the new regime limits the contact between parent and child on the Community Services say-so and we would support measures that reinstated the previous regime that enabled the Children's Court to make orders for contact between parents and children. We think that this power to make contact orders not only apply

to parents of the child but equally should apply to grandparents and other significant people in the life of a child. We have spoken to grandparents whose grandchildren have been removed from the care of the parents who have not contact with a grandchild for months, sometimes years.

In one case we know of a child was removed from her mother's care due to family violence and alcohol abuse. The child had a good relationship with her grandparents, and was trying to support the mother as much as possible to address her alcohol problem. The grandparents were assessed as carers but considered unsuitable as they were already fostering other grandchildren. The child was subsequently placed with a foster family some distance away from the grandparents. These grandparents have not seen their grand-child for over two (2) years. The Community Services worker has not facilitated any contact between the child and the grandparents, despite their requests.

Question 14–2
We would suggest that most local court magistrates don't have a background in family law matters and we would be concerned about these magistrates being given this power without safeguards or proper training and background in family law to be able to make appropriate and well considered decisions.

We note that in rural areas, where many of our clients live, local court magistrates may be having to do this more often and we would support proper training and support for magistrates working in these areas.

Question 14–3
We do not understand the context of this question and cannot respond.

Question 14–4
We are not in a position to comment.

Question 14–5
In principle we agree that it would be a good idea to have one court handling all issues relating to children. However, we would like to give this idea more consideration and we have not had enough time to consider the implications of this proposal, or indeed, how such a regime would operate in practice.

Proposal 14–1
We agree with this proposal.

Question 14–6
We cannot comment.

Question 14–7
We cannot really comment. Perhaps the court could request a report from the child protection agency, but we are not in a position to know what the current process is.

Question 14-9
Child protection agencies should be involved in family law proceedings, and should cooperate with family law proceedings to provide information about the care and protection concerns for a child or family.

Question 14-10
We would hope that child protection agencies cooperate as requested in this regard. We cannot really comment with practical experience, however.

Question 14-11
We cannot comment.

Question 14-12
We cannot comment.

Proposal 14-3
This sounds like a good idea.

Question 14-13
We cannot comment.

Question 14-14
We cannot comment.

Proposal 14-4
a. We don't understand the implication of this question; in NSW there is no choice about which court to commence proceedings in matters where Community Services have removed a child. These matters must be commenced in the Children's Court.

b. this is a good idea
c. yes
d. yes, we agree

Question 14-15
We would support moves to apply the principles of the Magellan Project to other courts including the Federal Magistrates Court.

Question 14-16
This is an important and far-reaching question, which regrettably we do not have the time to answer without extensive research and consideration.

Question 14-17
Regrettably we do not have the time or capacity to answer this question.

Proposal 14–2
We agree.

---

16. Sexual Offences

Question 16-1
We are unable to comment.

Question 16-2
We are unable to comment.

Proposal 16-1
We agree with this proposal.

Question 16-3
We would be concerned about two 15 year olds who engaged in sexual activity with each other, being prosecuted for any sex offences, unless there was an allegation of coercion or violence. We think that similarity in age should only be a defence if the complainant is no younger than15 years old and the alleged offender is no older than 16 years old.

Question 16-5
As we are not prosecutors we are not able to answer this question.

Proposal 16-2
We agree with this proposal.

Proposal 16-3
We agree with this proposal.

Question 16-6
It is our view that sexual violence is very common in relationships where there is family violence.

Many of our clients tell us that they frequently had sexual intercourse with their violent partner because they were too scared to say no. We agree that in relationships where there has been long-term and serious violence the environment is so coercive and threatening that victims can never freely and voluntarily consent to sexual intercourse. We submit that actual threats or coercive behaviour need not be immediately present to vitiate consent. We submit that a list of vitiating factors should refer to a recent history of force and intimidation against the complainant, but need not have been immediately present at the time of the sexual activity.

Proposal 16-4
We agree with this proposal.

Question 16-7
We suspect that an honest belief in consent is more likely to be raised in cases where the parties were in an intimate partner relationship, although we have no practical knowledge of this being the case.

We submit that there needs to be an element of objectivity, however the challenge is still dealing with the gendered perspectives of female sexuality. What men may objectively view as an honest and reasonable mistake may be quite different to what women view. Additionally, objectivity is not immune to bias and prejudice about the sexuality of certain of groups of women, such as Indigenous women.

Proposal 16-5
We agree with this proposal.

Proposal 16-6
We agree with this proposal

Proposal 16-7
We agree with this proposal.

Question 16-8
We submit that Indigenous women should be referred to as a particular vulnerable group, given the significant over-representation of Indigenous women as victims of sexual assault. We also submit that the guiding principles should acknowledge that sexual violence could occur in intimate relationships.

Part 17. Reporting, Prosecuting and Pre-Trial processes

Proposal 17-1
We agree with this proposal.

Question 17-1
We are unable to comment.

Question 17-2
We are unable to comment.

Question 17-3
We cannot comment as to whether specialized police generally have been effective in reducing the attrition of the sexual assault cases during the police investigation phase. However, we wish to comment on how concerned we are by the indifferent and non-responsive attitude of some non-specialised police are when investigating sexual assault offences, especially those deemed 'historical'. We have spoken to Aboriginal women who have been treated appallingly by some police officers who have given the complaint the lowest of priorities, or, in some cases have actively discouraged victims from making complaints in the first place.

We think that all sexual assault matters, due to the sensitivity and complexity of these crimes, especially when committed in the context of family violence, should be investigated by specialist police or units. We think this is imperative for Aboriginal women, who find it very difficult to disclose sexual abuse in the first place due to the cultural issue of 'shame' and the distrust of police.

Question 17-4
We are unable to comment.

Question 17-5
Yes, we think they should be.

Proposal 17-2
We agree with this proposal.

Question 17-6
With respect to Aboriginal women there needs to be regular, ongoing and culturally

appropriate support throughout the whole process from the beginning of the investigation phase to the end of the prosecution phase. There is enormous pressure placed on Aboriginal women who report family violence by her partner/ex-partner, his family and sometimes their community. In cases of sexual violence, where the legal stakes and consequences can be even higher, that pressure can be unbearable.

Question 17-7
We are unable to comment due to time constraints.

Proposal 17-3
We agree with this proposal.

Proposal 17-4
We agree with this proposal.

Question 17-8
We are unable to comment.

Question 17-9
Yes, if it is being used to prevent joint trials being held in relation to multiple allegations of sexual assaults against the same accused.

Proposal 17-5
In principle we agree with this proposal, however we cannot comment on the effect, positive or negative, of the use of pre-recorded evidence on juries and conviction rates.

Proposal 17-6
As above.

Proposal 17-7
We agree with this proposal.

---

18. Trial Processes

Question 18-1
Yes, we agree.

Question 18-2
We are unable to comment.

Proposal 18-1
We agree with this proposal.

Question 18-3
We are unable to comment.

Proposal 18-2
We agree with this proposal.

Proposal 18-1
We agree. It is our experience that offenders, especially child sex offenders in

Aboriginal communities, target children from the same extended family or local community. In Aboriginal communities it would be very common for complainants to know each other.

Proposal 18-11
We agree with this proposal.

Proposal 18-12
In principle we oppose any warnings that suggest a delay in complaint may affect the credibility of the complainant. It is our experience that most Aboriginal victims of sexual assault and child sexual assault delay in making complaints about the assaults. It is the norm rather than the exception. Delay is even greater when the offender is a family member or intimate partner of the victim.

Proposal 18-13
We do not have the trial experience to comment on which option is preferable.

Proposal 18-14
We agree this proposal.

Question 18-13
We are not able to answer this question.

Question 18-14
In principle we agree with any reform to minimise the trauma and distress of a complainant in a re-trial. However, we are not able to comment on the effect of pre-recorded evidence on the new jury, and the rates of convictions where pre-recorded evidence was used.

---

19. Integrated Responses and Best Practice

A number of our responses to the questions and proposals raised in this part were not recovered, when our original on-line submission was lost. We did not have time to re-do our submissions, other than what is below.

Proposal 19 – 4
We agree with (a).

Proposal 19 – 5
We agree with this proposal.

It is our experience from our case-work that Aboriginal women are frequently the victim of multiple acts of family violence over a long duration by the same offender. These acts of violence may vary in the nature of the violence, the degree of the violence, the site of the violence, the duration of the violence and the injuries inflicted. Whether it is family violence and or sexual assault, the victim has little or no opportunity to escape the violence for reasons well known and referred to in the relevant literature that can be obtained through the Family violence Clearing House and the Australian Centre for the Study of Sexual Assault.

We submit that it is grossly unfair and unjust that a victim of multiple acts of violence should be disadvantaged by the fact that her offender happens to be the same person, as opposed to another applicant who was the victim of different acts of violence committed by different offenders. Why should the victim of multiple acts of family violence or sexual assault committed by the same offender be less deserving of more than one award of compensation?

Many of our clients are victims of both family violence and sexual assault by the same offender. We submit that it is grossly unjust, offensive and sexist to deem that these two acts of violence are the same and should be treated the same simply because the offender happens to be the same person. In NSW under the current legislation the Victims Compensation Tribunal frequently finds that a sexual assault and a family violence assault by the same offender are related and only makes one award of compensation, which in itself is an ongoing and significant concern to us.

The NSW legislation is currently under review and we are concerned that one of the issues that is being been flagged by Victims Services is tightening section 5 (3) of the *Victim Support and Rehabilitation Act 1996.* This section was recently considered in a Supreme Court decision of *Moore v Victims Compensation Fund Corporation [2009] NSWSC 1300*, in which Rothman J found that the Victims Compensation Tribunal had made an error in that "it treat[ed] a relationship as defined, simply, by the formal positions of perpetrator and victim, and treat[ed] the fact of the relationship as mandating a finding that the acts were related, without regard to the changing circumstances of the victim.." (at para 47). However, it is our understanding that the Victims Compensation Fund is appealing this decision.

Proposal 19 – 6
We agree with this proposal.

Reporting to police for Aboriginal women is often very difficult. Aboriginal communities have historically had a very problematic relationship with police, and although there have been improvements, many Aboriginal women still experience racism and indifference by police. This is particularly the case for women in more remote communities. We continue to advise and assist Aboriginal women who get very poor responses from police when they report family violence or sexual assault.

There is also enormous pressure on some Aboriginal women from their own family and communities not to report to police. By doing so they are seen as traitors to their community. Aboriginal women are also apprehensive to contact police about family violence for fear of their children being removed.

Proposal 19 - 7
We agree

Proposal 19 - 8
We agree

Proposal 19 - 9
We agree with this proposal. State and territory victim's compensation legislation should not exclude claims on the basis that offenders might benefit from the claim.

Proposal 19 – 10
We believe state and territory legislation should reflect section 26(3) of the NSW *Victims Support and Rehabilitation Act 1996*, which recognizes that victims of sexual assault, domestic should and child sexual assault be allowed to bring late claims unless the Director finds there is a good reason not to do so. This presumption benefits Aboriginal women and children who face extra barriers in disclosure of these types of offences.

We have concerns for any proposals to amend legislation that caps or limits eligible applicants making historic claims.

Research by the New South Wales Bureau of Crime and Statistics (NSWBOCSAR) consistently show that Aboriginal women and children are over-represented as reported victims of sexual assault and child sexual assault. Of course the true extent of sexual assault and child sexual assault in Aboriginal communities is unknown. The report of the Aboriginal Child Sexual Assault Taskforce called *Breaking the Silence: Creating the Future (2006),* commissioned by the NSW Attorney-General's Department (hereafter referred to as the *Breaking the Silence Report*), reported that child sexual assault was considered to be a 'huge issue' in every Aboriginal community consultation (page 48).

It is well know that child sexual assault and sexual assault by their very nature are hidden and secret crimes. These crimes are rarely disclosed until many years later after they occurred. The *Breaking the Silence Report* made a number of findings about the significant barriers to disclosure by Aboriginal victims of child sexual assault. These barriers include the following:

- Child sexual assault was not well understood in Aboriginal communities (page 51)
- Child sexual assault was inter-generational and in some communities normalized (pp 50 – 51 and p 61)
- Child sexual assault was seldom reported by Aboriginal victims due to many factors including: fear, shame and guilt; lack of understanding about what is sexual assault; threats from the perpetrator; pressure from their family; confusion about their relationship with the perpetrator; fear of not being believed; actual experiences of not being believed and disclosures not being acted upon; having no-one to tell; and/or not knowing who to tell (page 52)
- The devastating effects of sexual abuse which led to severe depression, self-harm, substance abuse and suicide attempts (page 56)

It is noted that this report was released in 2006 and therefore shows the contemporary picture of the significant barriers to disclosure. We submit that that these barriers were even greater and even more pronounced thirty and forty years ago when there was systemic racism towards the Aboriginal community, paternalism and the forced removal of Aboriginal children.

Furthermore, the *Breaking the Silence Report* also highlighted a profound lack of knowledge about Victims Services and victims compensation within the Aboriginal community (pp216-217). This report also noted that Victims Services' own review of service delivery to the Aboriginal community for 2001 to 2003 showed that although Aboriginal people are 2-6 times more likely to become victims of crime, they are 5

times less likely than a non-Aboriginal victim of crime to lodge a victims compensation claim (p 213).

It is only now that many older Aboriginal women have the courage, knowledge and psychological well-being to come forward to disclose sexual abuse. We submit that it would be de-moralising, unjust and tragic if older Aboriginal women were unable to make an application for victims compensation for the sexual abuse they experienced as children or young women. Many of our clients tell us of the critical role the compensation process played to assist them to heal. Many of our clients have cried with the news of the decision that the Victims Compensation Tribunal (NSW) believed that they were sexually abused many years ago, and acknowledged the harm it caused.

Proposal 19 – 11
We agree that family violence victims should not be required to be present at a hearing with an offender.

Proposal 19 – 13
We agree with this proposal. In NSW this is currently happening in a number of courts via the distribution of information about victims compensation by the Women's Family violence Court Assistance Services (WDVCAS).

Question 19 – 2
In practice we have limited experience of these measures. However, in principle we support these measures particularly for victims under significant financial hardship because of family breakdown.

Question 19 - 3
It is our view that all victims should have the option of being supported in managing their victim's compensation awards. This could include, with their consent, adopting measures that ensure that the offender does not have access to their award monies.

We would object to any quarantine or forced financial management of compensation awards without the express consent of the compensation applicant.

…….

Rachael Martin

On behalf of Wirringa Baiya Aboriginal Women's Legal Centre

Dated: 23 June 2010