



Peninsula
Community
Legal Centre

SUBMISSION TO AUSTRALIAN LAW REFORM COMMISSION Review of the Family Law System

7 May 2018



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INTRODUCTION

Peninsula Community Legal Centre (PCLC) welcomes this opportunity to contribute to the Australian Law Reform Commission's review of the family law system.

ABOUT PENINSULA COMMUNITY LEGAL CENTRE

PCLC is an independent, not-for-profit organisation that has been providing free legal services to vulnerable and disadvantaged people in Melbourne's outer south east since 1977. Today, it is one of the largest community legal centres in Australia, spanning a catchment of over 2,600 square kilometers, six local government areas and a population of almost one million people, with larger catchments for some programs. The Centre's head office is in Frankston, with branch offices in Bentleigh East, Cranbourne, Pines (Frankston North) and Rosebud, and visiting outreach services in Chelsea, Clayton South and Hastings.

As is typical of community legal centres, PCLC provides legal information, advice, ongoing legal assistance and representation and undertakes community legal education, community development and public advocacy activities.

In addition to its general legal services, the Centre operates programs and services in family law, family violence, fines, tenancy and rooming house outreach, with a social worker and a visiting financial counsellor to support the legal programs.

Of particular relevance to this review, the Centre has specialist programs in family law and family violence services and has one of the most comprehensive community legal centre family law and family violence practices in Australia. Contrary to a common misunderstanding about the work conducted by community legal centres, these specialist programs involve complex and significant casework where our family law and family violence lawyers conduct cases from start (negotiations/pre-action procedures) to finish (settlement/trial).

We provide clients with free and accessible legal services, particularly the most disadvantaged and marginalised in our community who may otherwise 'fall through the gaps' as they cannot afford private lawyers and would not qualify for legal aid. Our clients are low income earners with 75% on no or low income (less than \$26,000 gross per annum). Given the level of family breakdown and family violence in Australia, it is not surprising that the most common legal problem for our clients is family law (54%), with more than a third reporting family violence. Typically, our clients' family law and family violence problems are complicated by the risk of homelessness, welfare concerns for children, disability or a history of substance abuse.

PCLC is primarily funded through the Community Legal Services Programme of the Australian Attorney General's Department and Victorian Department of Justice and Regulation. It also receives funding from local governments and private foundations.

SCOPE OF SUBMISSION

Our submission highlights areas in the family law system that we believe need improvement based on our clients' experiences. We will provide examples of what has and hasn't worked for our clients in case studies, some of which are individual client cases and others examples of types of cases that we commonly see. We will also provide recommendations with the aim of improving the family law system for the most disadvantaged and vulnerable clients in our community.

Our submission addresses the following questions from the Issues Paper: 3, 4, 11, 12, 13, 14, 15, 20, 22, 23, 24, 25, 31 and 41.

SUMMARY OF RECOMMENDATIONS

Question 3

1. Centralise family law and family violence information in one central website which: provides legal and non-legal information and referral in a range of languages; is easy to navigate and presents information in plain language; is interactive so that information can be tailored to address individual users' circumstances; and is accompanied by an awareness-raising campaign to alert people to its existence so that it is highly visible and well-known.
2. Develop a series of official plain language fact sheets about the family law and family violence system to be posted on the website and made widely available at the courts in a wide range of languages.
3. Fund legal assistance services adequately, as proposed in recommendations 21.4 and 21.5 of the 2015 Productivity Commission Access to Justice Arrangements Inquiry Report. In particular, provide additional and increased levels of funding for community legal centres and Legal Aid Commissions for family law and family violence matters to enable them to better respond to the anticipated increased demand for family law legal assistance flowing from the proposed jurisdictional and other amendments contained in the *Family Law Amendment (Family Violence and Other Measures) Bill 2017*.

Question 4

4. Subject to the pilot receiving a positive evaluation, expand the Family Advocacy and Support Service (FASS) program to a greater number of locations including all family law courts, as proposed in recommendation No 1 of the SPLA Committee report.
5. Create a court navigator to assist people navigate the family system from the time of first contact to resolution.

Questions 11 & 12

3. (same as recommendation 3 under Question 3) Fund legal assistance services adequately, as proposed in recommendations 21.4 and 21.5 of the 2015 Productivity Commission Access to Justice Arrangements Inquiry Report. In particular, provide additional and increased levels of funding for community legal centres and Legal Aid Commissions for family law and family violence matters to enable them to better respond to the anticipated increased demand for family law legal assistance flowing from the proposed jurisdictional and other amendments contained in the *Family Law Amendment (Family Violence and Other Measures) Bill 2017*.
6. Establish a Family Court and Federal Circuit Court program, in consultation with Legal Aid Commissions and community legal centres, to develop resources and procedures designed to assist unrepresented litigants.

Question 13

7. Implement measures to improve the physical design of the courts to provide greater accessibility and security as set out in recommendation 70 of the Victorian Royal Commission into Family Violence, in all family law courts.
8. Locate safe waiting rooms close to court rooms to reduce the opportunity for perpetrator intimidation and ensure security is available to escort court users to the court room.

9. Increase the number of interview rooms to ensure clients are not interviewed in public spaces and that service providers have adequate facilities to deliver services in a safe environment.
10. Provide child friendly waiting spaces and child minding facilities.
11. Provide dedicated discrete areas for court users to access online and printed information, and to draft their own documents.

Question 14

12. Remove the language of “equal shared time”, “substantial and significant time” and “equal shared parental responsibility” from the *Family Law Act* to shift culture and practice towards a greater focus on safety and risk to children.
13. Establish a separate and dedicated management pathway in the family law courts for family law matters involving family violence.
14. Amend the *Family Law Act* to require the court to make a determination in relation to allegations of family violence at an earlier stage in proceedings.
15. Incorporate specialist family violence services in the family court system, in particular family violence specialists to make risk assessments and recommendations to the court.

Question 15

16. Amend section 4AB(2) of the *Family Law Act* to include “misuse of process”, “physical or electronic stalking”, “spying on a family member or using electronic means to locate a family member”, and “psychological abuse” as types of behaviour that might constitute family violence.
17. Amend section 4AB of the *Family Law Act* to remove the requirement of coercive and controlling behaviour and make it consistent with state and territory family violence legislation.
18. Increase the use of section 68R in state and territory courts to fill the current gap in the protection of victims of family violence caused by the interaction between family law and state and territory family violence legislation, as proposed in recommendations 16-1, 16-2 and 16-3 of the Australian and NSW Law Reform Commissions’ Final Report A National Legal Response to Family Violence.
19. Remove the 21 day limit on a state or territory court’s power to vary, discharge or suspend a family law order in interim domestic violence order proceedings as proposed in the draft *Family Law Amendment (Family Violence and Other Measures) Bill 2017*.

Question 20

20. Establish a triaging process so that urgent matters can be heard earlier.
21. Encourage greater use of orders diverting matters to legally assisted family dispute resolution such as Victoria Legal Aid’s Family Dispute Resolution Service in matters where resolution might be possible after proceedings have commenced.
22. Establish a small claims property list for the resolution of small property matters with simplified procedures and short return times to facilitate early resolution.
23. Encourage greater scrutiny by judicial officers of whether exemptions to the requirement in section 601 of the *Family Law Act* to attempt family dispute resolution prior to lodging an application for parenting orders are sufficiently evidenced.

24. Encourage greater preparedness by the bench to penalise parties and their lawyers for failure to comply with court rules, particularly in the case of late service of documents which has disadvantaged the other party.

Question 22

25. Promote early resolution of small property disputes through a streamlined case management process with simplified procedural and evidentiary requirements as proposed in recommendations 1, 2, 3, 11 and 12 of the Women's Legal Service report Small Claims Large Battles.

26. Extend the requirement in section 60I of the *Family Law Act* to attempt family dispute resolution prior to lodging an application for parenting orders to property matters.

27. Establish a dedicated Federal Circuit Court list for small property claims.

Question 23

28. Provide dedicated family violence support workers to assist victims on the day of the hearing.

29. Limit public access to the court rooms during family law proceedings.

30. Provide family violence training for court network workers.

31. Provide more judicial training on family violence as proposed in recommendations 12 and 15 of the Family Law Council Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems.

Question 24

32. Increase funding to make legally-assisted family dispute resolution that is appropriate for family violence cases more widely available, and ensure that this funding not be limited to legal aid eligibility requirements.

Question 25

33. Amend s.4AB (2) of the *Family Law Act* to include 'misuse of process' in the list of examples of behavior that might come within the definition of family violence.

34. Strengthen penalties, including costs orders, to respond to instances of misuse of court processes.

35. Provide protection to stop victims of family violence from being directly cross-examined by perpetrators in all family law proceedings, as proposed in the draft *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017*.

Question 31

4. (same as recommendation 4 under Question 4) Subject to the pilot receiving a positive evaluation, expand the Family Advocacy and Support Service (FASS) program to a greater number of locations including all family law courts, as proposed in recommendation No 1 of the SPLA Committee Report.

36. Extend the FASS program to include a child safety service attached to the family courts.

37. Provide increased levels of recurrent funding for more programs like Victoria Legal Aid's Family Law to Family Violence Pilot to provide ongoing legal advice, representation and referral to non-legal support services in more locations.

38. Increase funding for health justice partnerships providing a link between family violence support services and family law assistance services. We recommend that health justice partnerships conducted by community legal centres and health service providers, including Peninsula Community Legal Centre's partnership with Peninsula Health and the maternal health service, be considered as possible program models.

Question 41

39. Make regular family violence training compulsory for all judges and court staff from the family courts and state and territory courts dealing with matters involving family violence.

DETAILED RESPONSES TO QUESTIONS

Question 3: In what ways could access to information about family law and family law related services, including family violence services, be improved?

Information about family law and family related services is scattered in numerous, disparate locations and is difficult to access for many users of the family law system, particularly those who are disadvantaged and with complex needs.

Many of the currently available sources of information assume that users have some kind of knowledge about family law service providers in order to find the information they provide, which is not the case for many system users and certainly not for most of our Centre's disadvantaged clients. Even when our clients do manage to access information, it often does not link them with services that they might need to help them navigate the system. In most cases, clients require advice about where their issues locate them within the system and what services they need to access to resolve those issues.

Centralised website and fact sheets

The creation of an official "one stop shop" centralised website compiling key information about family law and family law related services, including family violence services, would significantly improve the current information system. Online resources are increasingly utilised by members of the public with internet access and sufficient literacy and language skills to do so. They are also utilised by workers in family law related support services to locate information and services for clients. Online information is also useful for family lawyers, particularly in the legal assistance sector where client queries can be diverse and, for volunteer lawyers, may be outside of their usual areas of practice. A recent survey of our volunteer lawyers asking what resources they used for their volunteer work with Centre indicated that 85% used the internet.

We note that National Legal Aid has received funding to develop a community legal education resource, including a website, about interactions between the family law, family violence and the child protection system, which could provide a useful starting point. In order to truly increase access to information, the website would need to be highly visible and well-known and overcome common gaps in understanding about family law service providers and what they do. For example, Victoria Legal Aid provides one of the most useful sources of family law system information in its' publication '*How to Run Your Family Law Case*', but we have found that many of our clients have been unaware of the availability of this (and other) resources on the Victoria Legal Aid website especially when they are not eligible for legal aid. (This publication, which is only available in English, also highlights the fact that there are considerable linguistic and cultural barriers to accessing information). The website would therefore need to be accompanied by a high profile awareness-raising campaign to promote general public knowledge of its existence.

We also recommend that a series of official plain language "Fact Sheets" about the family law system, available in a wide variety of languages, should be developed which could be

posted on the website. As the range and availability of printed materials presently available at the courts is very limited, these fact sheets should also be broadly distributed at the courts.

Ideally the website should also have an interactive component in order to tailor the information to the client's needs given the limitations of generalised information. Some years ago, PCLC trialled the provision of generalised legal and non-legal information packs to clients at interview. We found that the information packs were of limited value and needed to be supplemented with tailored information to address clients' unique circumstances, particularly in the case of vulnerable clients with complex needs. Clients often became overwhelmed or confused by generalised information and in most cases required a lawyer or other family law system professional to contextualise it or to explain how it was relevant to their particular situation.

In summary, a centralised website should be created and it should:

- provide legal and non-legal information and referral in a range of languages
- provide official, plain language fact sheets about the family law system
- be easy to navigate and present information in plain language
- be interactive so that information could be tailored to address individual user's individual circumstances
- the subject of a broad awareness-raising campaign to alert people to its existence so that it is highly visible and well-known

Free legal services

While enhanced information sources such as a central website and official fact sheets would be a significant improvement, they would not provide a panacea to the current difficulties in accessing information about family law and related services. Online information is usually insufficient for vulnerable and disadvantaged people, not only because they may lack computer access and language or literacy skills, but because they may not have knowledge of where to look to find useful information, and may lack other characteristics of legal capability such as the confidence to take action. Online information cannot replace the critical role that is played by free legal service providers in providing information and advice to family law system users at key entry points to the system.

PCLC has a broad range of family violence and family law services designed to assist clients with complex needs when and where they are most likely to require that assistance. Each service is offered at a critical entry point to the system to help clients navigate the family law system and related services.

Our services include:

- Family law and family violence duty lawyer services
- Family Advocacy and Support Services (FASS)
- Family Violence to Family Law Continuity Pilot
- Health justice partnerships with Peninsula Health and a local maternal health service

These services are analysed in more detail under Questions 4 and 31. In terms of their relevance to this question, since PCLC first started providing family law duty lawyer services in 2005, we have observed a large increase in the number of clients arriving at court with limited if any knowledge of the family law system and their rights and responsibilities under that system. This is due to a combination of factors, including an increasing tendency for clients to see the courts as a first port of call when they have a family law or family violence issue, both in urgent and non-urgent matters. We have also observed that other stakeholders such as Victoria Police, the Department of Health and Human Services, Family Dispute Resolution providers, and even private legal practitioners have been increasingly referring clients directly to these courts. The situation has been dramatically compounded by the diminishing number of private practitioners prepared to conduct such work on a legally aided basis in the Dandenong and Frankston areas.

The following case studies illustrate the negative impact of a lack of information about family law on two of our recent clients.

A client believed that because she had a Family Violence Intervention Order (FVIO) which included the children as protected persons, the respondent father would be prevented from spending time with the children. After a contested hearing resulted in the children being listed on the order, the father made a successful application to the Federal Circuit Court to seek time with the children. This caused distress to the mother and facilitated the father's continued abusive behaviour towards her and the children. As a result, the client wished she had not pursued the order to include the children, as she felt it had made the situation worse, not better.

Along a similar vein, a client of East African background, with no family in Australia, and five children was reluctant to make an application for a FVIO, as her understanding of such orders was that it involved criminal law and would ruin the perpetrator's life by affecting his reputation and his ability to work and travel.

For this reason, we believe that duty lawyer and other free legal services provided at the courts by community legal centres and Legal Aid Commissions will continue to be required on an ongoing basis in order to ensure users' access to information about family law and related services.

Continued and increased funding for legal assistance will therefore remain a critical element of any measures to improve the current family law system. We join the many organisations that have expressed concern about the serious consequences of significant reductions in legal aid funding on families going through family law and family violence proceedings¹. We join their recommendations that increased levels of funding for legal assistance providers are required, including those contained in the Productivity Commission Access to Justice

¹ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, A Better Family Law System to Support and Protect Those Affected by Family Violence (2017), 126

Arrangements Inquiry Report.²

Recommendations

1. Centralise family law and family violence information in one central website which: provides legal and non-legal information and referral in a range of languages; is easy to navigate and presents information in plain language; is interactive so that information can be tailored to address individual users' circumstances; and is accompanied by an awareness-raising campaign to alert people to its existence so that it is highly visible and well-known.
2. Develop a series of "official" plain language fact sheets about the family law and family violence system to be posted on the website and made widely available at the courts in a wide range of languages.
3. Fund legal assistance services adequately, as proposed in recommendations 21.4 and 21.5 of the 2015 Productivity Commission Access to Justice Arrangements Inquiry Report. In particular, provide additional and increased levels of funding for community legal centres and Legal Aid Commissions for family law and family violence matters to enable them to better respond to the anticipated increased demand for family law legal assistance flowing from the proposed jurisdictional and other amendments contained in the *Family Law Amendment (Family Violence and Other Measures) Bill 2017*.

Question 4: How might people with family law related needs be assisted to navigate the family law system?

Family Advocacy and Support Service (FASS)

In May 2017, PCLC received funding from Victoria Legal Aid (VLA) to provide Family Advocacy and Support Services (FASS) at the Dandenong Registry of the Federal Circuit Court. A key element of the FASS program is its ability to assist families to navigate complex and fragmented jurisdictions through access to integrated legal and non-legal services. Under the FASS service, clients who have experienced family violence are triaged by a VLA Information Referral Officer for their legal and non-legal needs. If required, warm referrals can be immediately made to male and female specific non-legal support services which also have a presence at the Court. Referrals are also made to our FASS duty lawyers who assist with advice, negotiations, the drafting of documents and representation on the day. The service regularly assists clients in urgent and distressing circumstances, some of whom have had no prior contact with the family legal system.

A key feature of the FASS program is that families receive advice about the interaction between federal *Family Law Act* orders, State family violence intervention orders and child protection orders. In addition to potentially de-escalating conflict, this also serves to assist clients in navigating between the federal and state systems. In functioning as a legal and non-legal "one-stop shop" or integrated service, FASS has also facilitated closer relations between stakeholders to achieve better outcomes for families.

² Productivity Commission Inquiry Report "Access to Justice Arrangements" (2014) recs 21.4 and 21.5

Based on its experience of implementing the FASS program, PCLC believes that it plays a significant role in assisting clients to navigate the family law system. PCLC endorses the recommendation of the SPLA committee that, subject to the pilot receiving a positive evaluation, the program be expanded to a greater number of locations.³ However, while the FASS program plays a significant role in assisting families with their immediate legal and non legal needs, it can be difficult, especially for duty lawyers whose priority it is to deal with listed and urgent matters on the day, to deal with the demand for information and referral to assist clients to navigate their way through the system. We therefore support the concept of establishing a navigator to help clients co-ordinate and maintain engagement with a range of support services.

We envisage the navigator would have a role similar to a social worker in the sense that they would provide ongoing, holistic support and referral for the client, but also have legal knowledge and skills. Ideally, they would be aware of the limits of information sharing and be conversant with legal ethics and solicitor/client obligations. The navigator would also be aware of initiatives used to date to co-ordinate family law services by State and Federal Governments, such as the Victorian Family Law Pathways Network iRefer App Information and Referral Kiosks.

The role could also encompass the monitoring of the client's engagement with court ordered therapeutic services, and that if required they could report back to the Court about that. In particular, a navigator would go some way to countering the 'once off' nature of duty lawyer services and may mitigate the need for duty lawyers to provide time consuming non- legal information and direction. It may be that the navigator could attend lawyer and client interviews and be present at any court hearing.

The monitoring provided by a navigator could also potentially improve the client's understanding of legal advice given, the likelihood of that advice being followed and thus the client's legal outcomes. In the interim, a navigator could assist with monitoring the client's compliance with supervision orders, drug and alcohol testing and rehabilitation and court ordered therapeutic interventions. Potentially, the progress and earlier resolution of cases could therefore be enhanced.

Recommendations:

4. Subject to the pilot receiving a positive evaluation, expand the Family Advocacy and Support Service (FASS) program to a greater number of locations including all family law courts, as proposed in recommendation No 1 of the SPLA Committee report.
5. Create a court navigator to assist people navigate the family system from the time of first contact to resolution.

³ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n1, rec 1.

Question 11: What changes can be made to court procedures to improve their accessibility for litigants who are not legally represented?

Question 12: What other changes are needed to support people who do not have legal representation to resolve their family law problems?

Legal Assistance

We welcome the fact that these questions refer to “litigants who are not legally represented” rather than “self-represented litigants”. Many people seek and are unable to obtain legal representation because they do not have the means to pay for private representation and cannot obtain legal aid or their grant of aid has been exhausted. Self-representation is an absolute last resort for many vulnerable and disadvantaged people in this situation. We believe such people should more properly be described as unrepresented.

Lack of legal representation is a significant disadvantage and undermines access to justice, particularly for people with complex needs, despite efforts by courts and tribunals to accommodate and assist unrepresented litigants appearing before them. It also compromises the efficient operation of the family law system given the additional strain it places on over-worked courts in having to ensure that the party understands the process and the consequences of choices they make. In short, it can make the process unfair, slow and more expensive.

Unrepresented litigants accessing our services are almost overwhelmingly experiencing disadvantage, including low income, lack of education, disabilities, limited or no English and family violence. When combined with the stress and sometimes trauma of court proceedings, these clients have great difficulty handling their legal case. Many experience considerable difficulty filling out forms or even articulating their problem, let alone identifying and gathering supporting evidence.

Without legal representation, it can also be difficult to negotiate with opposing parties and resolve the matter before a hearing. For example, our duty lawyers have come across situations where unrepresented applicants have been bullied or pushed into parenting orders by the lawyers for the opposite party, or even succumbed to pressure to agree by a judicial officer, in a context where the opposite should be happening.

We therefore believe that one of the most effective ways to assist unrepresented litigants is to increase funding for free legal services. The federal government, working together with the state and territory governments, should implement recommendations 21.4 and 21.5 of the 2015 Productivity Commission Access to Justice Arrangements Inquiry Report to fund civil (including family) legal assistance services adequately. This increase in funding should comprise specific increases in funding for family law matters.

Recommendation (as above in relation to Q. 3):

3. Fund legal assistance services adequately, as proposed in recommendations 21.4 and 21.5 of the 2015 Productivity Commission Access to Justice Arrangements Inquiry Report. In particular, provide additional and increased levels of funding for community legal centres

and Legal Aid Commissions for family law and family violence matters to enable them to better respond to the anticipated increased demand for family law legal assistance flowing from the proposed jurisdictional and other amendments contained in the *Family Law Amendment (Family Violence and Other Measures) Bill 2017*.

Development of self help resources and dedicated court procedures for unrepresented parties

While better resourcing for legal assistance would go a considerable way to addressing this issue, we acknowledge that continuing reductions in Commonwealth and State funding levels for legal assistance, coupled with the unaffordability of private legal services and the difficulties obtaining legal aid, mean that the numbers of unrepresented litigants are likely to increase. Other measures will therefore be required to provide them with better support.

Accordingly, PCLC proposes that the Family Court and the Federal Circuit Court, in consultation with Legal Aid Commissions and those Community Legal Centres who have a demonstrated history of providing quality family law and family violence duty lawyer and self help legal services, establish a project in which resources are developed and procedures designed to assist unrepresented litigants.

Resources - PCLC's self help clients would benefit most from:

- Centralised information resources (see questions 3 and 4);
- Easily locatable pro-forma initiating/responding documentation, redrafted into plain English, including affidavits in support of initiating applications where parties are directed by headings to the information the Court is likely to require, and sample orders with explanatory notes detailing how those orders might be tailored to the client's circumstances;
- In divorce matters, the ability to be able to file Applications for Divorce in hard copy due to the current complexity of online drafting and filing, requiring court users to have technological capabilities that many do not, particularly those who are disadvantaged and with complex needs. Legal assistance providers now spend too much time having to provide technological assistance with drafting and filing forms at the expense of our core function of providing legal advice. Under the previous hard copy system, we estimate that our lawyers would spend roughly one hour assisting clients to fill out divorce applications, whereas they now can spend roughly two to three hours doing this electronically, depending on the complexity of the matter.

Procedures:

- Extend legally assisted mediation to community FDR providers in both children's and property matters;
- Request family courts to more actively scrutinise whether s60I exemptions are sufficiently evidenced;
- Prevent perpetrators from relying on their own family violence to exempt matter from FDR/mediation;

- Establish a dedicated unrepresented litigant list, where the judge works closely with Legal Aid and Community Legal Centre duty lawyers, who can provide legal advice, referral, and other assistance during the case;
- In preparing for trial/final hearing, make provision for the issue of standard directions in plain language which direct the parties' attention to the matters required to be dealt with under the *Family Law Act 1975*, and the evidence in chief required to support them, but in a way that the parties can understand;
- Use Division 12A of the *Family Law Act 1975* to re-introduce greater use of the Less Adversarial Trial;
- Appoint a Registrar to provisionally accept filing of self represented initiating documentation. This would allow the Registrar to ensure the documentation has been completed correctly. If not, the Registrar can then refer the matter to a duty lawyer for further advice and assistance;
- Establish a dedicated list for the hearing of self represented matters presided over by a judge skilled and interested in managing self represented litigants. Allow for the judge to meet the parties to discuss the Court's expectations about procedure and evidence.

Recommendation

6. Establish a Family Court and Federal Circuit Court program, in consultation with Legal Aid Commissions and community legal centres, to develop resources and procedures designed to assist unrepresented litigants.

Question 13: What improvements could be made to the physical design of the family courts to make them more accessible and responsive to the needs of clients, particularly for clients who have security concerns for their children or themselves?

We join with the many organisations that have voiced concerns in a number of inquiries, policy reviews and research about the fact that the physical design of the family courts can compromise the safety and accessibility of the court for attendees.⁴

PCLC welcomes the fact that a number of initiatives to address these concerns have already been made or are underway, including for example the creation of safe waiting places in the Federal Circuit Court and the allocation of funding to create safe waiting areas in the Magistrate's Court of Victoria. However, we note that the location of safe rooms and access arrangements in some courts still present opportunities for survivors of family violence to come into negative contact with perpetrators. PCLC acknowledges that the courts face a complex range of legal and fiscal impediments to the customisation of current facilities to better accommodate client and service providers. Nonetheless, current arrangements in a number of courts require major improvement.

⁴ See for example Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol III, 130

The location of the safe room at the Dandenong Registry of the Federal Circuit Court, for example, requires clients to enter the court building through the main entrance, cross a public foyer and go up a floor to the court reception desk where they must request the use of the secure room which they need to have booked prior to the court date. Clients are advised to arrive early in the morning prior to their hearing time to avoid coming into contact with the perpetrator. Despite arriving early, a number of our clients have still had intimidating contact with perpetrators in these public areas on the way to the safe room. In addition, there is only one public door to the secure room meaning users have to pass through the public waiting area in order to access the court. In practice, this means that perpetrators and their family and friends often choose to sit outside the safe room door in order to intimidate clients as they leave the safe room to enter the court.

Our experience with such safe rooms in a number of courts is that confrontations between applicants and respondents in public areas remain all too common, as does harassment and intimidation by respondents, their friends and family. Even where this could be said to be low level, such as threatening gestures or insults or even standing or sitting very close by, such intimidation makes clients fear for their safety and often negatively affects the evidence that they give in court and the choices that they make about their legal proceeding.

The secure rooms in some courts are also very small and are shared by a number of clients at the same time. The lack of private space can compromise the confidentiality of the advice provided by our lawyers. It can also impede a frank and complete exchange with our clients, or mean that they have no choice but to divulge traumatic personal information within the earshot of others. For similar reasons, there continues to be a need for courts to increase the number of interview rooms that are provided to duty lawyers so that clients are not interviewed in public spaces and legal services can be provided in a safe environment.

We also have significant concerns about the lack of adequate child care facilities resulting in children attending court with their parents or family members being exposed to fear and trauma. Our lawyers regularly witness children of our clients listening to traumatic information provided by their parents or witnessing frightening exchanges between their parents in the court environment.

As noted above, PCLC acknowledges the legal and fiscal impediments to the customisation of current facilities to better accommodate client and service providers. Nonetheless, additional measures continue to be required if the safety and security of clients and their children is to be ensured.

Recommendations

7. Implement measures to improve the physical design of the courts to provide greater accessibility and security as set out in recommendation 70 of the Victorian Royal Commission into Family Violence, in all family law courts.
8. Locate safe waiting rooms close to court rooms to reduce the opportunity for perpetrator intimidation and ensure security is available to escort court users to the court room;

9. Increase the number of interview rooms to ensure clients are not interviewed in public spaces and that service providers have adequate facilities to deliver services in a safe environment;
10. Provide child friendly waiting spaces and child minding facilities.
11. Provide dedicated discrete areas for court users to access online and printed information, and to draft their own documents.

Question 14: What changes to the provisions of Part VII of the *Family Law Act 1975* could be made to produce the best outcomes for children?

Equal Shared Parental Responsibility

PCLC acknowledges that the 2006 amendments to the *Family Law Act* have already been the subject of considerable critique. We share the concerns that have been widely expressed regarding the reforms in relation to the equal shared parental responsibility presumption.

While we acknowledge that in most situations children benefit from a relationship with both parents, as section 61DA presently operates the presumption potentially increases parental conflict and the risk of family violence or child abuse because of the legal requirement that parents must jointly make decisions, involving a degree of cooperation that is inherently not possible in cases involving family violence. These risks are increased in the current situation where family courts do not have a dedicated pathway for addressing family violence issues and do not presently determine the issue of family violence or child abuse until final hearing or trial.

The current provision has also given rise to a community misconception that equal shared parental responsibility means ‘equal time’. This misconception has created significant concern for many of our Centre’s clients and resulted in them agreeing to unsafe arrangements.

In one recent matter, for example, police obtained a final intervention order on behalf of our client against the father, with exceptions that permitted the father to spend limited time with the two young children pursuant to a written agreement about parenting arrangements. The father, who had been violent to the mother in the presence of the children, had a history of alcohol addiction, mental health issues and gambling. After the final intervention order was obtained, the mother continued to allow the father to spend unsupervised overnight time whenever he wished, despite the fact that this was not permitted under the parenting agreement. She only agreed to this because the father told her that if she did not allow him to see the children he would obtain ‘sole custody’ and she would lose the children. Due to her misunderstanding of the equal parental responsibility presumption, the mother thought that the father would get “at least 50/50 custody” if the matter went to Court and so felt compelled to placate the father by giving in to his demands.

Additionally, the provision may be of questionable practical benefit during the conduct of most cases, until a matter is finally resolved. In our experience, for evidentiary reasons and in the absence of agreement between the parties, many judges are simply unable or unwilling to deal with the issue of equal shared parental responsibility until the matter is significantly advanced. In the context of most proceedings where the parties are highly polarised, Judges regularly acknowledge the artificiality of the obligation the legislative presumption creates for parents, that they must co-operate. Instead, most matters progress against the background of a presumption of cooperation and mutual decision making. This is frequently meaningless in the context of parties who cannot or will not communicate.

Accordingly, PCLC believes that the Part VII of the *Family Law Act* should promote a culture of safety and the protection of children from harm rather than a culture of ‘equality’ of shared parental responsibility and time.

To this end, we support the recommendation made by Women’s Legal Services Australia to remove the presumption of equal shared responsibility and the language of equal shared time and substantial and significant time from Part VII of the *Family Law Act*.⁵ While we also see some value in the proposal made by Professor Chisholm regarding removal of the need for parents to co-operate if the presumption were to be maintained, we note that Professor Chisholm’s formula relies on the judge being in a position to determine the child’s best interest in a system where there are great difficulties, including for the judge, in identifying family violence. We therefore believe that a more radical step is necessary in order to shift culture and practice away from the parents’ interests towards a greater focus on safety and risk to children.

Recommendation:

12. Remove the language of “equal shared time”, “substantial and significant time” and “equal shared parental responsibility” from the *Family Law Act* to shift culture and practice towards a greater focus on safety and risk to children.

Creation by Courts of Management Pathway for Family Violence Matters

PCLC also endorses the establishment by the courts of a separate and dedicated management pathway for family law matters involving family violence.

Currently, the courts have no dedicated management pathway for family law matters in which family violence is alleged. Consequently, family violence and the risk of family violence may not be adequately considered in interim proceedings and no finding of family violence occurs in most cases until the matter reaches final hearing or trial. Where an

⁵ Women’s Legal Services Australia, Submission to House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into a better family law system to support and protect those affected by family violence, Recommendation 9, and WLSA, *Safety First in Family Law: Five Steps to Creating a Family Law System that Keeps Women and Children Safe*

allegation of family violence is denied by the other party at interim hearing, often the Court is simply unable to make a finding of fact on that issue due to the absence of corroborating evidence, and the limited listing time available at interim hearing. In some instances, the issue of family violence gets 'lost' in the proceedings for these reasons.

The following case study of one of our clients provides an example of such a situation.

Zara's story

Zara was a young woman with a small child who recently separated from her violent husband. She was from a culturally and linguistically diverse background, present in Australia on a temporary visa, and had no family support in Australia. Zara applied for a family violence intervention order (FVIO) and was granted an interim FVIO to protect herself and her child. However, the application was settled by way of undertaking as Zara was frightened to continue with proceedings. The father initiated proceedings for parenting orders in a federal family court, and denied the family violence alleged by Zara in his affidavit material. In fact, he alleged that Zara had been violent to him. Before the first return date of the family law proceedings, the father breached the undertaking. Zara applied to reinstate her intervention order application and obtained a further Interim FVIO.

At the first return date, the Court made interim parenting orders allowing the father to have long periods of unsupervised contact with the child and forcing Zara to attend changeovers with him. This was despite Zara alleging extensive family violence in her affidavit. After hearing submissions, the Court indicated that the only source of independent third party evidence in the matter was a Department of Human Services report. In this, the Department stated that it had no concerns in respect of the child being in either the care of the father or the mother and that there was no reason for them to intervene. This was the only independent evidence available as there was no family consultant available to conduct an urgent Child Dispute Conference pursuant to s11F of the *Family Law Act*. Furthermore no adjourned listing date was available for 12 weeks. The court therefore decided it was important that an interim parenting order be made rather than the father having to wait for 12 weeks, notwithstanding Zara's previous intervention order and the serious nature of the allegations she made about the father's family violence.

Currently, the court does not have dedicated family violence specialists who could conduct internal risk assessments and make recommendations to the court in parenting matters. Instead, victim survivors rely heavily on external, community based family violence and FDR services to provide family violence risk assessments and it is up to victim survivors to ensure these are adduced. If a risk assessment made by court family violence specialists had been available, this might have benefited Zara and arguably the interim order allowing the father contact with the children would not have been made.

We therefore propose that a management pathway for family law matters in which family violence is alleged should be established along the following lines:

- Once proceedings have been filed, and family violence has been alleged, matters should be referred to internal family violence specialists for risk assessment;

- If family violence has been alleged, matters should be set down for interim contested hearing as soon as possible (to avoid current delays between filing and hearing) on the issue of family violence alone. Alleged perpetrators who are self represented should be prevented from cross examining victims.
- If family violence has been found to have occurred, a further risk assessment should be conducted by internal family violence specialists. Recommendations about interim parenting arrangements can then be made by them to the Court in conjunction with family consultants.
- Conduct ongoing risk assessments should occur and be conveyed to the court as the matter progresses especially where interim orders gradually increase the time a child spends with a perpetrator or relax previous conditions on that time.

Recommendation:

13. Establish a separate and dedicated management pathway in the family law courts for family law matters involving family violence.

14. Amend the *Family Law Act* to require the court to make a determination in relation to allegations of family violence at an earlier stage in proceedings.

15. Incorporate specialist family violence services in the family court system, in particular family violence specialists to make risk assessments and recommendations to the court.

Question 15: What changes could be made to the definition of family violence or other provisions regarding family violence in the *Family Law Act* to better support decision making about the safety of children and their families?

As noted previously, PCLC has one of the most comprehensive family violence community legal centre practices in Australia. This is due to the fact that there is a high prevalence of family violence in our catchment, with two locations having the second and fourth highest rate of family violence in Victoria.

Since we first started providing one family violence duty lawyer at the Frankston Magistrate's court in 2005 there has been a steady increase in the need for the service, with the court increasing its family violence listings from three to four days a week in 2015. We have also had to expand our services over the years to other Magistrates and Family Courts to cover increased demand. Our lawyers assist both applicants for and respondents to family violence intervention orders, and our experience accords with research that family violence is predominantly committed by men against women and children.

Changes to definition of family violence under the Family Law Act

Our extensive family violence casework has clearly illustrated that the current definition of family violence in the *Family Law Act* is outdated and needs to be brought into line with new forms of family violence that have emerged, for example as a result of technology and social media, and state legislation such as the *Family Violence Protection Act 2008 (Vic)*.

We therefore recommend expanding the definition of family violence to include:

a) Misuse of process

Our family violence lawyers regularly see misuse of court proceedings and other family law system processes. We strongly endorse the SPLA's recommendation to include 'abuse of process' in the list of examples of behavior that might come within the definition.⁶

The following case study is a typical example of how perpetrators misuse court procedures as a tactical measure to continue a dynamic of abuse. See also the case study in our response to Question 25 which clearly illustrates the need for stronger penalties to respond to this form of abuse.

Zoe's story

Zoe and her ex-partner had two young children when they separated due to the father's family violence. The father was extremely aggressive and controlling. After separation, the father unilaterally decided that the children were to live with him and spend time with Zoe. Zoe was too frightened of the father to object to the parenting arrangements. After a few months of ongoing violence, Police applied for a Family Violence Intervention Order ("FVIO") on behalf of Zoe and the children, which was resolved by consent. The father was convicted of breaching the FVIO by verbally abusing Zoe at changeovers in front of the children and Police applied to vary the conditions of the FVIO. The FVIO was varied on an interim basis and adjourned to a mention hearing.

After the Police application to vary and before the mention hearing, the father made a cross-application for a FVIO against Zoe with a "grab-bag" of family violence allegations, none of which were compelling. The father did not obtain an Interim FVIO. However, Zoe felt very intimidated and stressed by the father's application. The father was also represented by both an instructing solicitor and a barrister at the mention hearing, which added to Zoe's intimidation. The father attempted to use his FVIO Application as a negotiating tool at the hearing and the cross-application appeared to have been made solely for strategic purposes.

b) Electronic surveillance

PCLC's clients experience the use of technology by perpetrators to abuse, harass, threaten, monitor, control, humiliate, stalk, track, and locate victims, and to create a sense of omnipresence in the victim's life. The most common means by which this is done is by use of text, email, phone calls, instant messaging and social media platforms such as Facebook and Instagram. Facebook and Instagram, for example, are often used to humiliate and punish victims, while GPS or spyware is used to stalk, locate and monitor victims via media devices (including remotely). Perpetrators have also hidden listening devices in children's toys or school bags, and use children's Facebook accounts to find out information, often by creating an alias.

The definition of family violence in the *Family Law Act* could be expanded by adding the words 'physically or electronically' in S4AB(2)(c) to further qualify the word 'stalking'. This

⁶ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, above n , rec 8

could be expanded in S4AB(4) also, with the addition of a further subsection ‘spying on a family member or using electronic means to locate a family member’.

c) Psychological abuse

PCLC supports the inclusion of psychological and emotional abuse as an example of behaviour that may constitute family violence in section 4AB(2) of the *Family Law Act*. This would better align the *Family Law Act* definition with that contained in the *Family Violence Protection Act 2008 (Vic)*.

We also recommend that the requirement of coercive and controlling behaviour be removed so that the definition is consistent with comprehensive definitions such as those contained in state and territory family violence legislation, for example the Victorian *Family Violence Protection Act 2008 (Vic)* section 5.

Recommendations

16. Amend section 4AB(2) of the *Family Law Act* to include “misuse of process”, “physical or electronic stalking”, “spying on a family member or using electronic means to locate a family member”, and “psychological abuse” as types of behaviour that might constitute family violence.

17. Amend section 4AB of the *Family Law Act* to remove the requirement of coercive and controlling behaviour and make it consistent with state and territory family violence legislation.

Other provisions regarding family violence in the Family Law Act

Section 68R of the Family Law Act

i. Our experiences with the use of s68R of the Family Law Act

PCLC agrees with many other stakeholders that section 68R has been under-utilised for a variety of diverse reasons. Our view is that s68R, when read with section 90 of the *Family Violence Protection Act 2008 (Vic.)* which expressly refers to s68R and mandates the Magistrates’ Court to deal with any inconsistency between a parenting order and protection order, is critical in protecting victim/survivors from family violence, especially where family violence arises after the making of a parenting order.

We therefore agree with the Australian and NSW Law Reform Commissions that “increasing and fostering the use of section 68R in state and territory courts is necessary to fill a gap in the protection of victims of family violence caused by the interaction between family law and state and territory family violence legislation.” We support the Commissions’ recommendations 16-1, 16-2 and 16-3 to achieve this end.⁷

ii. Problems created by the 21 day period in section 68T

⁷ Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response*, ALRC Report No 114, NSWLRC Report 128 (2010), rec 16-1, rec 16-2, rec 16-3

Section 68T of the *Family Law Act* states that if a state or territory court revives, varies or suspends a parenting order in the making of an interim family violence order under section 68R, that revival, suspension or variation ceases to have effect when either the interim order ceases to be in force, or at the end of 21 days from the making of the interim intervention order.

Our experience has been that the 21 day period has presented many problems for our clients for a range of reasons, including that many clients and support workers do not know about its existence, the period is often too short, and that it creates a great deal of confusion among clients and their support workers. We therefore support the measures in the current draft *Family Law Amendment (Family Violence and Other Measures) Bill 2017* to remove the 21 day time limit on state or territory courts' power to vary, discharge or suspend an order contained in s 68T.

Recommendations

18. Increase the use of section 68R in state and territory courts to fill the current gap in the protection of victims of family violence caused by the interaction between family law and state and territory family violence legislation, as proposed in recommendations 16-1, 16-2 and 16-3 of the Australian and NSW Law Reform Commissions' Final Report A National Legal Response to Family Violence.

19. Remove the 21 day limit on a state or territory court's power to vary, discharge or suspend a family law order in interim domestic violence order proceedings as proposed in the draft *Family Law Amendment (Family Violence and Other Measures) Bill 2017*.

Question 20: What changes to court processes could be made to facilitate the timely and cost effective resolution of family law disputes?

PCLC shares the concerns about the delays associated with litigated proceedings in the family courts set out in the Issues paper, particularly in light of the fact that the majority of our cases involve concerns about family violence and clients with complex needs. Such cases tend to involve unacceptably lengthy timeframes for resolution, and as a result we often see unrepresented clients consenting to outcomes that fall way short of the safety and protection that should be provided.

Accordingly, we recommend:

- Triaging of matters so that urgent matters can be dealt with quickly and non urgent matters can be heard earlier. Clients experience significant anxiety when there are welfare concerns for children, especially when there are orders in place, or they are unable to spend time with children because the carer parent is preventing that. Delays in the FDR process and the hearing of matters potentially increase parental conflict. The risk of parties taking matters into their own hands is also increased, which can result in family violence intervention order proceedings.
- Ensure matters can be triaged into lists set up to deal with their nature and complexity.

- In cases where it becomes apparent that the matter might resolve by some kind of FDR after proceedings have been commenced, greater use of orders diverting the matter to FDR services such as Victoria Legal Aid's legally aided Litigation Intervention Family Dispute Resolution Service and for parties who are ineligible for aid, an extension of legally assisted FDR services.
- Establish a small claims property list for the resolution of small property matters with simplified procedures and short return times to facilitate early resolution.
- Greater scrutiny by judicial officers of pre-action procedures and whether s60I exemptions are sufficiently evidenced to enable applicants to take matters directly to court.
- Greater preparedness by the bench to penalise parties and their lawyers for failure to comply with court rules. Our clients regularly face the problem of having documents served late, leaving them with insufficient time to prepare a response. This often appears to be a deliberate strategy that is adopted to disadvantage the other party.

Recommendations

21. Establish a triaging process so that urgent matters can be heard earlier.
22. Encourage greater use of orders diverting matters to legally assisted family dispute resolution such as Victoria Legal Aid's Family Dispute Resolution Service in matters where resolution might be possible after proceedings have commenced.
23. Encourage greater scrutiny by judicial officers of whether exemptions to the requirement in section 601 of the *Family Law Act* to attempt family dispute resolution prior to lodging an application for parenting orders are sufficiently evidenced.
24. Encourage greater preparedness by the bench to penalise parties and their lawyers for failure to comply with court rules, particularly in the case of late service of documents which has disadvantaged the other party.

Question 22: How can current dispute resolution processes be modified to provide effective low cost options for resolving small property matters?

PCLC endorses the Victorian Women's Legal Services report, *Small Claims, Large Battles – Achieving economic equality in the family law system, March 2018* which accurately reflects the experience of many of our clients in relation to small property and financial matters.

We strongly support the Women's Legal Service report recommendations extracted below:

- Recommendation 1
The Australian government, in consultation with the Federal Circuit Court and Family Court of Australia, promote early resolution of small property disputes through a streamlined case management process available upon application to the court, with simplified procedural and evidentiary requirements.
- Recommendation 2
The Australian government, establish eligibility for the streamlined case management process with reference to the financial vulnerability of parties, the particular issues in dispute and the nature and value of assets.

- Recommendation 3
Any streamlined case management process adopted be available to eligible parties who may have concurrent unresolved parenting matters.
- Recommendation 11
The Australian government fund an expansion of existing models of legally-assisted Family Dispute Resolution, to give greater access to vulnerable parties seeking property settlements.
- Recommendation 12
The Australian government resource Legal Aid Commissions to broaden availability of funding for priority clients to pursue small property matters.

We also support two of the other suggestions listed in the issues paper, namely the Productivity Commission recommendation that the requirement in section 60I of the *Family Law Act* to attempt FDR be extended to financial matters⁸ and the recommendation to implement a small property claims list in the Federal Circuit Court.⁹

Recommendations

25. Promote early resolution of small property disputes through a streamlined case management process with simplified procedural and evidentiary requirements as proposed in recommendations 1, 2, 3, 11 and 12 of the Women's Legal Service report Small Claims Large Battles.
26. Extend the requirement in section 60I of the Family Law Act to attempt family dispute resolution prior to lodging an application for parenting orders to property matters.
27. Establish a dedicated Federal Circuit Court list for small property claims.

Question 23: How can parties who have experienced family violence or abuse be better supported at court?

Many of the measures we have recommended in relation to other questions, including Q 13 in relation to the physical design of the family law courts and Q 14 in relation to the establishment of a separate and dedicated management pathway for family law matters involving family violence, are relevant to this question.

We further recommend:

Recommendations:

28. Provide dedicated family violence support workers to assist victims on the day of the hearing.
29. Limit public access to the court rooms during family law proceedings.
30. Provide family violence training for court network workers.
31. Provide more judicial training on family violence as proposed in recommendations 12

⁸ Productivity Commission Access to Justice Arrangements Inquiry Report No. 72, VOL 2, 2014, 875

⁹ VLA Submission No 60 to SPLA Committee Inquiry into a Better Family Law System

and 15 of the Family Law Council Final Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems.

Question 24: Should legally assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?

PCLC has been providing legal assistance in family dispute resolution (FDR) processes for some time. In 2010, PCLC entered a partnership with the Frankston Family Relationship Centre to provide free legal information sessions to parties participating in the FDR process, which all FDR participants must attend. Through the partnership, PCLC also provides additional family law advice appointments for FDR participants.

Since October 2016, PCLC has also provided legal representation at Victoria Legal Aid's Family Dispute Resolution Service through its Family Violence to Family Law Continuity Pilot (described under Q31). Based on this experience, we believe that legally assisted FDR greatly improves the accessibility and fairness of the family law system and should be made more widely available.

PCLC receives regular referrals from FDR practitioners where parties have proceeded to mediation and are unaware of their legal rights and obligations. We have seen many instances of unworkable and unfair parenting agreements that have been reached by parties without legal advice prior to mediation. In one recent case, for example, an unrepresented client emerged from community FDR with a 25 page parenting plan which was unnecessarily detailed, unduly prescriptive and completely unworkable. Such arrangements result in further disputes, possible risks to safety where family violence is an issue, and increase the potential for large financial and emotional costs to the individual. Where family violence is in issue, we have seen undue pressure and influence upon unrepresented individuals that has resulted in unfair and unjust outcomes. This is because parties are not protected by the safeguards which exist in the court room or legally-assisted FDR.

Accordingly, PCLC's view is that trauma informed legally assisted mediation/conciliation services, such as those provided by Victoria Legal Aid's Family Dispute Resolution Service, can be enormously beneficial for those clients experiencing family violence or abuse because:

- Safety of victims, and hence their ability to participate in mediation is improved;
- The likelihood of reaching agreement on terms appropriate to the history of family violence and any present risk is improved;
- Early resolution means the cost and stress of further proceedings is avoided;
- Victims can participate to the extent they feel comfortable, with the lawyer's role varying to accommodate the client's capacities during the FDR session;
- The presence of legally trained personnel formalises proceedings and tends to limit power imbalances and entrenched methods of intimidation;
- Victims are comforted and empowered by being able to meet with a lawyer prior to the FDR to discuss issues and to strategise desired outcomes;

- Unrealistic expectations can be moderated with immediately available legal advice and hence legally represented FDR ‘educates’ participants;
- The workability and durability of parenting arrangements is enhanced because the parties are encouraged to participate in negotiations where appropriate, rather than being subject to externally imposed court orders;
- Interpreting where required can be made available;
- Legal issues can be immediately contained and explained;
- Agreed parenting arrangements are more likely to approximate the form and content of a judge made order, and are therefore more likely to be enforceable if reduced to consent orders.

The following case study illustrates many of these benefits.

Case study:

PCLC represented a mother with intellectual disabilities and two children under the age of two. The children were spending no time with the father due to ongoing conflict between the parties. The father had been abusive towards our client and she had serious concerns about his capacity to care for the children due to his drug and alcohol issues.

Prior to our involvement, our client attended non legally assisted FDR with the father.

During the mediation, the father was aggressive and our client felt pressured into agreeing to parenting arrangements which failed to address her concerns. A subsequent mediation was arranged, but agreement could not be reached because the father became angry at our client’s suggestions that his time be supervised.

The father then filed an initiating application for parenting orders which denigrated our client’s parenting capacity. Our lawyers assisted the mother with her response material. At the first mention, the Court ordered that the father’s time with the children be supervised and the matter was adjourned for one month. In the interim, the parties agreed to attend legally assisted FDR at Victoria Legal Aid’s Family Dispute Resolution Service (FDRS).

At the FDRS, the parties were able to sit in separate rooms and were legally represented, which reduced the previous power imbalance and made the father’s previous intimidation tactics impossible. PCLC prepared proposed orders which formed the basis of negotiations for the session. After lengthy negotiations, agreement was reached that the father’s time be supervised until completion of a toddler parenting program, with the father to spend overnight time upon the eldest child reaching the age of four. At the next return date, Minutes of Proposed Orders in those terms were tendered to the Court in chambers and final orders were made.

Our client was extremely relieved that workable and durable final orders were made in terms which addressed her concerns without the need for ongoing litigation.

Legally assisted family dispute resolution and legal aid eligibility requirements

In order to be eligible for assistance with Victoria Legal Aid’s family dispute resolution service through PCLC’s Family Violence to Family Law Continuity Pilot, clients must have experienced family violence in their family law matter and be eligible for a grant of legal aid.

PCLC has seen many clients who experience family violence but who are ineligible for legal aid under VLA's family law guidelines for FDRS, most commonly because they do not have the requisite vulnerability, usually because they do not receive treatment for a mental health issue and so cannot provide a letter of diagnosis. However, many of these clients remained vulnerable and disadvantaged because they were of limited means and unable to afford private lawyers and they could not have represented themselves in litigation.

Federal funding therefore needs to be expanded to provide legally-assisted FDR in circumstances where the client is ineligible for a grant of legal aid but nonetheless remains vulnerable and disadvantaged. This would enable the establishment of new collaborative arrangements between legal service providers and local community FDR organisations, and the extension of existing legally assisted FDR models. We note that appropriate funding allocations are also required to ensure that there is provision for interpreters in legally-assisted FDR processes.

Recommendation

32. Increase funding to make legally-assisted family dispute resolution that is appropriate for family violence cases more widely available, and ensure that this funding not be limited to legal aid eligibility requirements.

Question 25: How should the family law system address misuse of process as a form of abuse in family law matters?

There is an urgent need to address misuse of process as a form of abuse in family law matters. Our lawyers regularly witness the following range of behaviours outlined in the issues paper:

- The commencement and re-instigation of proceedings in multiple courts, such as family violence proceedings in the Magistrates' Courts during the currency of family law proceedings in the Federal Circuit Court;
- Making cross applications in proceedings for intervention orders;
- Self-representing in court to create opportunities to personally cross-examine victims about family violence;
- Refusal to participate in legally aided FDRS or community based FDR to delay resolution, or, to force the former partner to go to court unrepresented if the perpetrator knows that the former partner is unable to afford the cost of private legal representation and ineligible for legal aid;
- Deliberate efforts to "conflict out" the former partner from receiving legal assistance by consulting with locally available free legal services. This is easily done, especially at court registries where a range of legal aid and community legal centres provide duty lawyer services. This then conflicts out potential clients from receiving free legal assistance in circumstances where they are unable to afford the cost of private legal services, and are also ineligible for a grant of legal aid;
- Notifications to child protection agencies for trivial matters as a method of harassment; and

- Failure to comply with financial disclosure to frustrate attempts by the former partner to mediate small property matters.

The following example of one of our ongoing cases highlights the forms of abuse of process that many of our clients face. This case clearly demonstrates that there is an urgent need to strengthen penalties, including costs orders, to respond to instances of misuse of court processes.

Jodie's story

Jodie had two very young children when she separated from her partner a number of years ago. Jodie left as she had been subjected to physical, financial, psychological, verbal and emotional abuse. The physical violence included choking. The father controlled all the family finances and everything was in his name. Jodie obtained a Family Violence Intervention Order at the time to protect herself and the children from the father's violence.

Although the physical violence ceased when Jodie left, the other party has continued to perpetrate family violence against our client, particularly by abuse of process (also known as "litigation abuse" or "systems abuse"), with threats of legal action and multiple legal proceedings:

"The night we finally left was my get out of jail free card... it was the best day of my life, I was leaving the hostile environment and setting the three of us free. Well that's what I thought.

The last 6 years he has tormented me with constant threats to take me to court, multiple court cases, and he makes up his own rules when it comes to our court orders. Altogether, we have been to court over 25 times over the last few years. He can always afford private lawyers despite declaring a very low taxable income, so low he doesn't have to pay child support."

After protracted proceedings over two years after separation, parenting and property orders were made by consent. The father then breached the parenting orders on an ongoing basis (including withholding the children), allegedly due a dispute the father was having with the school. Jodie eventually commenced contravention proceedings as the father's behavior was having a devastating impact on one of the children. The father retaliated by applying for a Family Violence Intervention Order ("FVIO") against Jodie, alleging that she was physically and verbally abusive to the children. The father also contacted DHHS Child Protection and Jodie was investigated. DHHS concluded there was no evidence to suggest the children were at risk in their mother's care.

Jodie wanted to contest the FVIO application rather than "consent without admissions" to a limited FVIO as she was concerned that the children would be at risk of further emotional harm if they were pushed by the father to make statements against her. After many stressful months and a multi-day contested hearing, the father's FVIO application was dismissed. However, there was no penalty for the father. Jodie's relief was also short-lived. Shortly after the FVIO proceedings ended, the father commenced further family law proceedings seeking to change the parenting orders and again re-litigate the allegations that Jodie physically and verbally abuses the children. Additionally, the father still refuses to comply with orders relating to changeover, causing significant stress to Jodie and her children, and

interfering with Jodie's ability to work. Our client is financially and emotionally exhausted and cannot currently see an end to the cycle of legal proceedings.

"This is affecting my job, my emotional and mental health as it's affecting who I am as a person, and it's rubbing off on my poor kids."

In relation to cross-applications in Family Violence Intervention Order matters, these are now so commonplace that we usually advise our clients to expect one as a form of retaliation, especially considering that there is much publically available information which recommends that respondents make cross applications as a matter of course. We have recently seen a cross-application where the allegation was that our client was "committing family violence" by reporting the other party's family violence intervention order breaches to the police which was affecting his wellbeing.

In relation to the direct cross-examination of family violence victims by perpetrators, we welcome the draft legislative amendments to provide protection to victims contained in the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 (Cth)*. This protection to stop victims of family violence being directly cross-examined by perpetrators should be implemented as a matter of urgency.

Recommendations

33. Amend s.4AB (2) of the *Family Law Act* to include 'misuse of process' in the list of examples of behavior that might come within the definition of family violence.
34. Strengthen penalties, including costs orders, to respond to instances of misuse of court processes.
35. Provide protection to stop victims of family violence from being directly cross-examined by perpetrators in all family law proceedings, as proposed in the draft *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017*.

Question 31: How can integrated services approaches be better used to assist client families with complex needs? How can these approaches be better supported?

Due to the complex and multi-faceted nature of the legal and social issues faced by PCLC's family violence and family law clients, PCLC operates a number of integrated services programs which follow a variety of models. Some are court-located, others form part of health justice partnerships, and others are case managed internally by the Centre. The programs are conducted in collaboration with key family law system stakeholders such as Victoria Legal Aid, the Courts and community organisations, as well as large health service providers, and are promoted through PCLC's extensive family violence and family law community networks.

Specifically, the following services are offered:

1. Family Advocacy and Support Service (FASS);
2. Family Violence to Family Law Continuity Pilot (the Pilot);
3. Health Justice Partnerships with Peninsula Health and Maternal Health Service
4. PCLC's internal integrated non-legal services

Family Advocacy and Support Service (FASS)

Our FASS program is outlined in detail under Question 4, where on the basis of our experience we recommend the expansion of the FASS pilot to a greater number of locations. We further endorse the SPLA's recommendation to extend the FASS program to include a child safety service attached to the family courts.¹⁰

While we believe FASS is a valuable model, it also has some limitations. For example, due to the fact that it is court-based, the extent to which clients engage with FASS non-legal support services is often limited by the fact that those with listed matters regard their court attendance as the main priority for the day and may be less likely to engage with social support services. Many feel overwhelmed by their court appearance and emotionally unable to deal with other services that are on offer.

While FASS significantly enhances the provision of duty lawyer assistance in a multidisciplinary environment, in our view the program needs to be supplemented by, and to work in conjunction with, services such as PCLC's Family Violence to Family Law Continuity Pilot. FASS does not (nor was it intended to) provide ongoing or continuing legal assistance to navigate the complexities of the family law system. PCLC's Pilot, however, does just this, by providing ongoing casework and legal representation for clients from the start to finish of their matter with all the benefits that such continuity entails for ensuring that family violence issues are addressed throughout the fragmented jurisdictions. In addition, as the Pilot is not court-located, clients are more open to referrals to other non-legal support services to promote their safety and wider support.

The Family Violence to Family Law Continuity Pilot

In October 2016, PCLC commenced operation of the Family Violence to Family Law Continuity Pilot (the Pilot). This is a two year Pilot in which both PCLC and Hume Riverina Community Legal Service have been funded by Victoria Legal Aid to provide family law advice, casework and representation to clients who have experienced family violence. An innovative aspect of the Pilot is that it allows the partner community legal centres to conduct casework on a legally aided basis by making application for grants of professional costs. Historically, community legal centres have been limited to receiving disbursement only grants for counsel's fees and other disbursements. The Pilot, however, enables us to represent clients from start (negotiations/pre-action procedures) to finish (settlement/trial) in their family law matters, something which can be difficult to achieve with our usual funding arrangements.

¹⁰ SPLA, 144

In recognition of the fact that Magistrates Courts are often the first point of contact for many family law clients experiencing family violence, Pilot lawyers are stationed at two Magistrates Courts to provide family law advice at the hearing of the client's intervention orders matters and, if necessary, to help the client navigate their way through the family law system beyond their first court appearance. Providing start to finish legal representation in this way assists in building and maintaining trust between traumatized clients and the Pilot lawyer, thereby reducing the likelihood of client disengagement. It also allows the client better access to VLA's Family Dispute Resolution Service and litigation representation, and ensures that family safety issues are kept to the fore and not lost in the complicated process of navigating the family law system. By providing continuity of support the Pilot has proved to be a successful model of addressing the jurisdictional fragmentation referred to in the Issues Paper.

The Pilot has also proved to be valuable model of integrating support services. Siloing of support services is reduced by the Pilot's ability to provide regular and ongoing liaison between Pilot lawyers, Victoria Legal Aid lawyers, police, applicant support workers, family violence support workers, and by internal referral to PCLC's own social worker and financial counsellor. The Pilot will undergo an evaluation at the end of July 2018 to assist VLA to make future service delivery decisions.

Our experience of the Pilot has been that it offers tremendous potential, especially when combined with our FASS and other integrated service programs outlined in this section, to help families navigating a complicated system to get legal help earlier and at critical points, as well as to access social services and other support systems. As it is a pilot, the program is in its infancy and in our view requires a longer timeframe in order to realize its full potential. We therefore recommend that, subject to a positive evaluation, Victoria Legal Aid's Family Law to Family Violence Project be continued and expanded to other locations.

Recommendations

4. (same as recommendation 4 under Question 4) Subject to the pilot receiving a positive evaluation, expand the Family Advocacy and Support Service (FASS) program to a greater number of locations including all family law courts, as proposed in recommendation No 1 of the SPLA Committee Report.
36. Extend the FASS program to include a child safety service attached to the family courts.
37. Provide increased levels of recurrent funding for more programs like Victoria Legal Aid's Family Law to Family Violence Pilot to provide ongoing legal advice, representation and referral to non-legal support services in more locations.

Health Justice Partnerships – Peninsula Health and Maternal Health Service

Another model of integrated service delivery to address safety concerns is provided by two health justice partnerships that PCLC has also recently commenced with Peninsula Health and a local maternal health service.

Under the Peninsula Health partnership, a family law/family violence specialist lawyer attends Peninsula Health's Frankston hospital while under the maternal health service program a lawyer assists a local health centre and works closely with social workers, maternal health nurses and other health professionals to identify and refer patients with family violence issues.

As family violence is often first disclosed to or identified by a health professional, health justice partnerships provide the opportunity for early legal advice for clients who may not otherwise be in a position to seek such advice. Our lawyers refer clients who may need ongoing legal assistance and representation into our Pilot project or to other non-legal support services. Close collaboration between legal and health services better assist the client by empowering health professionals with practical options to address patient's family violence issues and legal professionals with a more holistic understanding of the clients' vulnerabilities. A key advantage of this model of integrated service delivery is that it targets women and children for early legal intervention prior to them entering the court system. In addition, by providing legal services in a "covert" location it offers an opportunity for parents and children to seek legal assistance for family violence and related family law issues that they might otherwise not have the opportunity to access.

Case study

'Cho', lived with her partner 'Dave' and their baby. Dave never physically hurt Cho, but made threats that he could kill her and make it look like an accident. He tracked her phone and knew where she was at every moment.

Cho attended the maternal health centre. She disclosed the above to the nurse. Over several months the nurse tried to make referrals for Cho, but Cho was scared that if she rang or visited a family violence service, Dave would find out and carry through his threats. She did not think she could ever leave him.

Shortly thereafter, PCLC's partnership with the maternal health centre began. The nurse was able to make an appointment for Cho to see our lawyer at a secret location. The lawyer recognised the risk, and went immediately with Cho to police. Police applied for a Family Violence Intervention Order (FVIO), and an interim exclusion FVIO was granted (but it was not served until the next day).

It was not safe for Cho to return home that night. We made a referral and she went to a refuge. When she did not come home, Dave was suspicious. He removed all the appliances and white goods from the home.

The court granted a final FVIO. Cho was still scared her home was unsafe. Our tenancy advocate negotiated early termination of the lease. She now has a new flat and Dave does not know the address. She received a family violence package which included funds for new appliances, and she has eradicated Dave's footprint from her phone. Cho has also been referred to a social worker and is receiving ongoing support.

To date Dave has not made attempts to see the baby. Should he do so, Cho knows our family lawyers will assist her. She says she would have left him ages ago, had she realised how much support is available. The nurse commented that the partnership is ‘life saving’.

We therefore believe that health justice partnerships such as our two programs with Peninsula Health and the maternal health service provide an extremely valuable model of integrated services to address safety concerns for children and parents in the family law system by providing early legal advice and non-legal support. Such models should receive further national and state funding to be continued and expanded to other locations.

PCLC’s internal integrated services

In recognizing that clients experience a range of needs arising from family violence, PCLC also provides its own, internal integrated services model by employing a social worker and a financial counsellor from the Family Mediation Centre to provide non-legal support services onsite at PCLC’s head office. As a result, clients requiring legal assistance can be referred by these non-legal social work and financial support services into Pilot services where family violence or family law is in issue, and from the Pilot to our own non-legal services. These integrated or holistic service models are being increasingly adopted by a number of CLCs in recognition of the complex needs of its client base and provide a valuable model of integrated services designed to support clients with multiple and complex needs.

Recommendation

38. Increase funding for health justice partnerships providing a link between family violence support services and family law assistance services. We recommend that health justice partnerships conducted by community legal centres and health service providers, including Peninsula Community Legal Centre’s partnership with Peninsula Health and the maternal health service, be considered as possible program models.

Question 41: What core competencies should be expected of professionals who work in the family law system? What measures are needed to ensure that family law system professionals have and maintain these competencies?

Numerous studies and inquiries have confirmed the importance of training and professional development in building the capacity of the family law system to respond to family violence. In particular, we endorse those the recommendations of the Victorian Royal Commission into Family Violence regarding the need for family violence, family law and child protection training for all court staff and judicial officers.¹¹

We further note that the Australian Government’s recent draft of legislative amendments in the *Family Law Amendment (Family Violence and Other Measures) Bill 2017* will require additional resourcing for training for court staff on the jurisdictional and other changes that will flow from the amendments.

¹¹ Royal Commission into Family Violence Report, Recommendations 215, 216

Recommendation

39. Make regular family violence training compulsory for all judges and court staff from the family courts and state and territory courts dealing with matters involving family violence.