

**WOMEN'S LEGAL SERVICES AUSTRALIA SUBMISSION
TO THE
NATIONAL CENTRE OF EXCELLENCE TO REDUCE VIOLENCE AGAINST
WOMEN AND CHILDREN**

Introduction

Thank you for the opportunity to provide a submission on the research agenda for the National Centre of Excellence (NCE).

Women's Legal Services Australia (WLSA) is a national network of community legal centres specialising in women's legal issues. WLSA regularly provides advice, information, casework and legal education to women on family law and family violence matters.

We have a particular interest in ensuring that women experiencing family violence are adequately protected in the family law system, and that disadvantaged women, such as those from culturally and linguistically diverse backgrounds, Aboriginal and Torres Strait Islander women, women with disabilities and rural women are not further disadvantaged by the system.

Through our casework services and the experiences of the women that we represent, it has come to our attention that there is no specific protection in the family law jurisdiction to prevent a victim of family violence from being directly cross-examined by an unrepresented ex-partner who is the perpetrator of that violence.

Our suggested research topics focus, in particular, on the intersection between domestic /family violence (dfv), child protection, family law and migration.

Key issues, areas or topics for research:

1. Research into the current socio-psychological assessments in family law decision-making and their approach to family and domestic violence

The extent of dfv in the family law system is extensive.

In the family law system legal decision-makers rely on socio-psychological reports to assist their decision-making in the best interests of children. There is a current trend in these assessments where there is a failure to identify dfv as violence and an increasing tendency to mutualise the violence through use of such terms as 'separation violence' or 'high conflict'.

Not identifying dfv correctly and mutualising the violence shifts the responsibility for the violence away from the perpetrator and makes the responsibility of stopping the violence a 'relationship issue' that both parties need to sort out by acting 'more appropriately' for the sake of the children.

The result is perpetrators are not held accountable for their violent actions. For example, women can be blamed for unreasonably allowing their 'fears and anxiety about violence' to get in the way of the father's relationship with the child. Indeed the legal system can in fact promote this lack of accountability. For example, see *Family Court Best Practice Guidelines* (Edition 3 April 2013) and the identification and promotion of the idea of categories of violence such as 'separation violence'. This has serious consequences for the types of parenting decisions that are made that may not take into account the seriousness of the violence.

It also has other ramifications. Lawyers are an essential element to women in family violence situations being able to make their arguments about safety to the family courts. However, the conclusions made by these socio-psychological assessments about violence can be a basis for withdrawing of legal aid funding. This exacerbates the issue of gender bias in legal aid

funding in Australia.

We believe there is a need for research into current assessment processes and whether they are delivering the evidentiary outcomes required. WLSA's position is that assessments of families where there has been family violence should be conducted by family violence experts who take a 'victim informed' approach.

WLSA believes for the court and other decision-makers to make the best decisions, they need the best evidence. WLSA therefore supports research being undertaken that specifically considers assessment practices in family law (including in family disputes resolution and other out of court environments) including a consideration of the following-:

- how matters of family violence and abuse are currently assessed in the family law system;
- whether the current approach is the best approach;
- whether additional issues such as culture and disability are being appropriately taken into account;
- whether evidentiary outcomes are being met by current approaches;
- what is the best approach regarding court assessment of families where there has been domestic and family violence?
- the experience and expertise that should be required to work in this area;
- whether the use of other or additional experts such as family violence experts would assist the court to make decisions in the best interests of children;
- the use of psychiatric evidence and whether it is being utilized appropriately and/or over-prescribed in family violence and abuse matters;
- consideration be given to "expertise" in child sexual abuse cases and whether current approaches give sufficient weight to all of the dynamics that are occurring in the family, including the inter-relationship between violence against women and violence against children;
- any recommendations for change that better take into account the features and implications of domestic violence and assist decision-makers to make safe and informed decisions that address the underlying dynamics of violence that persist.

Why are these issues of national relevance?

The *Family Law Act* is a federal act. WLSA has identified a persistent problem at a national level about how family violence is assessed in the family law system. At a national level we know that 1 in 3 women will experience violence and 1 in 4 children has witnessed violence in their home (ABS 2006). Allegations of violence and/or abuse can frequently accompany post-separation child-related disputes. "*More than half the parenting cases* that come to the (family) courts involve allegation by one or both parties that the other has been violent, and violence issues often go together with other problems, for example those associated with substance abuse and mental ill-health."(AIFS 2006). Issues of domestic violence and child abuse are so frequently raised in the family law system that child protection has been referred to as 'the core business' of family law.(Brown 1998) Bailey describes family violence as 'core business' of the Family Court and that allegations of family violence are not an aberration (Bailey 2007) The majority of clients presenting to Family Relationship Centres (family law mediation services) are identified as having some family violence issues. (AGD Family Law Services Background Paper 2013)

How would the results of the research contribute to:

a) knowledge and understanding

This would be important research as no research has been undertaken on the way that dfv is currently assessed in the family law legal system. Its findings and recommendations would be of relevance nationally and internationally.

(b) improved services, programs or practice

Improved assessments of dfv would have a major flow on affect throughout the entire family law legal system including, improving judicial decision-making to make parenting orders that better taken into account the dynamics and safety issues of dfv, through to family dispute resolution practices and processes and also post-separation programs. It would lead to better outcomes for women and children affected by violence in Australia.

(c) changes in policy?

Improved assessment processes for dfv in the family law legal system could lead to changes in intake and assessment processes for agencies throughout the system including the family law courts, family dispute resolution agencies, contact centres, legal aid.

2. Spousal or dependent visas and domestic violence

What are the key issues, areas or topics, you would like to see as a focus for research?

Whilst there has been research into the barriers experienced by women of culturally and linguistically diverse backgrounds in accessing services in response to domestic and family violence,¹ there is a lack of research as to the unique dynamics of violent relationships in which one person is dependent on the other for visa sponsorship, and of the characteristics of those sponsoring in respect of past histories of domestic violence or other violent crimes. Such research is needed to inform interventions, both at the visa application phase and migration transit phase. Applications for spousal and prospective marriage visas focus on the legitimacy of the relationship and character of the applicant, with comparatively little attention paid to the character of the sponsor, for example by way of a criminal history check.

This research should also seek to identify the frequency of violence experienced by women who are not on spousal visas, but possess only temporary visas and cannot access the family violence exception, such as those on prospective marriage, student, bridging and some skilled worker visas, together with the impact of not being able to access Centrelink benefits on their decision-making vis-à-vis whether to stay or leave a violent relationship.

Finally, the research should examine the impact of systematic and financial barriers to accessing free migration legal assistance on women in these situations, bearing in mind that many have limited access to money, including social security benefits. Many community legal centres and some legal aid commissions cannot assist with immigration matters because of restrictions on funding and provisions of the *Migration Act* that have the effect of severely limiting those who can provide migration advice. In WLSA's experience, this has a detrimental impact on women who rely on community legal centres and legal aid commissions for legal assistance on matters related to their visa, such as applications for protection orders and family law proceedings.

Some of WLSA's members have seen cases in which men were able to sponsor women and their children from overseas on spousal visas despite having prior convictions for child sexual assault and having had a domestic violence order issued against to protect a woman previously sponsored, usually on a spousal visa. Unfortunately, such cases have resulted in the subsequent perpetration of domestic violence and sexual assault, and in extreme cases, conditions akin to servitude. There is a lack of evidence as to the frequency of violence in these relationships. Department of Immigration and Citizenship (DIAC) records can indicate the number of women who transfer from the spousal visa pathway to domestic or family violence visa pathway, however many women remain in violent relationships until after they receive their permanent visa.

¹ See eg Annabelle Allimant and Beata Ostapiej-Piatkowski, 'Supporting women from CALD backgrounds who are victims/survivors of sexual violence: Challenges and opportunities for practitioners', *ACSSA Wrap*, Australian Centre for the Study of Sexual Assault, No. 9 (2011).

Why are these areas, topics or issues important and of national relevance?

This matter is clearly one of national relevance, particularly in the context of an ever-changing and tightening *Migration Act*. Women who experience dvf perpetrated by their visa sponsor may enter at any international airport in Australia and live in both urban and rural contexts.

What sort of research methodology would you propose for the research areas, topics or issues you have identified?

Women on temporary visas that are linked to a violent spouse can often be hard to locate and will be fearful of seeking help due to concerns of being deported. In WLSA's experience, sponsors will exploit such fears through threats to deport. We acknowledge the difficulty of finding participants for this research, especially among those who remained in a violent relationship until a permanent visa was granted, however so far as is possible, identifying the experiences of women now on permanent visa/citizens who experienced violence whilst on a temporary spousal or other dependent visas is essential to identifying sites for intervention.

How would the results of the research contribute (a) to knowledge and understanding (b) improved services, programs or practice and/or (c) changes in policy?

The results of the research would assist in understanding:

- the circumstances of women who are dependent on violent spouses for sponsorship of different types of visas, including access to Centrelink benefits;
- factors that impact on their decision-making in respect of whether to remain or leave a relationship, including access to money and accessibility of legal assistance, and cultural factors, including the fear of stigma or persecution if returned to their home country;
- the unique dynamics of domestic violence in such relationships, which must be distinguished from domestic violence that occurs in the absence of any relationship of visa dependence; and
- The characteristics of visa sponsors who go on to perpetrate domestic violence.

The above knowledge would help to inform interventions, both at the visa application phase and migration transit. This might include interventions in both Australia and overseas in partnership with Governments of countries from which Australia receives the majority of family violence exception visa applicants.

The research outcomes would also contribute to improved services, programs and practices by potentially highlighting new sites for intervention during the process of migration. It would also provide an evidence base to clarify the effectiveness of different methods of information delivery on family violence delivered before and after arrival in Australia. More obviously, it would provide a better understanding of the particular dynamics of visa dependent domestic violence relationships and the decision-making practices of women in those relationships, which should improve decision-making and service delivery by DIAC officers, migration agents and community support services.

In terms of law and policy, the research would provide an evidence to determine whether the imposition of criminal and intervention/protection order history checks on sponsors and disclosure to applicants is justified, bearing in mind the need to balance the non-interference in the privacy of families and the safety of applicants and their children.² Currently, applications for temporary spousal visas for example, focus on the legitimacy of the relationship and character of the applicant, however little attention is paid to the character of the sponsor.

² For discussion on these tensions, see Australian Law Reform Commission, *Family Violence and Commonwealth Laws - Improving Legal Frameworks* (2011), 507.

Finally, the research may provide an important evidence base on the risks to the integrity of the migration system in extending the family violence exception to other visa categories, including secondary applicants; creating a temporary family violence visa (with access to special Centrelink benefits) for secondary visa holders of temporary visas who experience family violence, but are not able to access the family violence exception; and a new permanent visa for temporary visa holders who experience family violence based on exceptional humanitarian or compassionate grounds.³

3. Child protection and early intervention:

An important research area is the social and economic cost effectiveness of intensive early intervention support, particularly where mothers have experienced dfv; or where trauma, social exclusion and poverty are the causes of child protection concerns. There are holistic community based models in international jurisdictions, such as the Cornerstone Advocacy approach in New York City in the United States, but further research and studies in the Australian context which explore such models, as outlined below, are required.

The following factors should be included in the research: addressing intergenerational trauma; holistic community based models that include social work/support services, parent advocates (peer mentoring of parents) and early intervention legal services to support parents and children; 'strengths based' framework; ways to support parents to be protective parents (including services supporting victims of dfv by providing evidence to support an application for protective family law orders); addressing barriers to engaging with support services; adequate training and support of case workers.

We note the 2008 Special Commission of Inquiry into Child Protection Services in NSW ('Wood Inquiry') found that the key to reducing risk to children is 'sufficiently resourcing flexible prevention and early intervention services so as to reduce the numbers of children and young people who require the state to step in to keep them safe.'⁴

Why are these issues of national relevance?

There are over 37,000 children in out of home care (OOHC) within Australia.⁵ We are greatly concerned by the large numbers of Aboriginal children and young people in OOHC.⁶ There is a correlation between OOHC, the criminal justice system and homelessness.⁷ Studies have highlighted the importance of family preservations where it is in the child's best interest. This is consistent with Australia's human rights obligations.⁸

Recently in Queensland, the Carmody inquiry into Child Protection has been completed. While noting the 2008 Special Commission of Inquiry into Child Protection Services in NSW ('Wood Inquiry'), we believe a more extensive inquiry on this issue, like the Carmody Inquiry, is required within NSW and indeed, nationally.

³ Australian Law Reform Commission, *Family Violence and Commonwealth Laws - Improving Legal Frameworks (2011)*, 493.

⁴ The Hon James Wood, *Report of the Special Commission of Inquiry into Child Protection*, November 2008, Executive Summary at i.

⁵ Cited in Joseph J McDowall, 'Experiencing Out-of-Home Care in Australia: The Views of Children and Young People', *Create Report Card 2013* at 2 (28) accessed on 25 September 2013 at:

[http://www.create.org.au/files/file/report%20cards/CREATE_ReportCard2013\(LR\).pdf](http://www.create.org.au/files/file/report%20cards/CREATE_ReportCard2013(LR).pdf)

⁶ Australian Government, *Child Protection Australia 2011-12, Child Welfare Series No 55*, Australian Institute of Health and Welfare, Canberra, 2012, Table 2.4

⁷ Australian Institute of Health and Wellbeing, *Children and young people at risk of social exclusion: Links between homelessness, child protection and juvenile justice*, Canberra 2012.

⁸ *Convention on the Rights of the Child*, ratified by Australia on 17 December 1990, Articles 3 (1), 3(2), 3(3), 8, 9(2), 9(3), 12, 18(2) 19, 20(3), 26 29(1)(c), 30, 31. The state also has a responsibility to protect victims, namely children and their mothers, and bring perpetrators to account – Due diligence obligations outlined in: Human Rights Committee, *General Comment No. 31*, CCPR/C/74/CRP.4/Rev.6, para. 8; Committee on the Rights of the Child, *General Comment No. 5*, CRC/GC/2003/5, 27 November 2003, para. 1; Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, E/C.12/2000/4 (2000), para. 33. Also see: *General Assembly Resolution - Guidelines for the Alternative Care of Children*, A/RES/64/142, 24 February 2010, Article 3, 6, 9, 11, 15, 24, 32, 33, 34, 35, 36, 39-41, 51

How would the results of the research contribute to:

a) knowledge and understanding

By:

- identifying and addressing barriers to parents engaging with support services.
- focussing on holding the perpetrator (often the father) to account rather than on punishing and blaming the mother for not acting in a protective manner.
- greater recognition that by supporting mothers to be protective parents in turn supports their children.
- a greater understanding that substance dependency may arise from past trauma and violence and that if there was a cultural shift towards support rather than surveillance and punishment, parents are more likely to feel more able to engage with treatment services.
- improved understanding of the need to and how to address intergenerational trauma.

(b) improved services, programs or practice

By:

- increasing the understanding that substance dependency may arise from past trauma and violence and that if there was a cultural shift towards support rather than surveillance and punishment, parents are more likely to feel more able to engage with treatment services.
- increased investment in what has been proven to work.
- development of solutions that are focused more on long lasting benefits for all, that is parents and children.

(c) changes in policy?

Better understanding about and investment in early intervention could see an emphasis on family preservation when it is in the best interests of the child.