BROADMEADOWS COMMUNITY LEGAL SERVICE (INC)

Reg No: A0009451J

29 May 2015

Royal Commission into Family Violence
PO Box 535
Flinders Lane VIC 8009

Our Ref:

Your Ref:

By Email: enquiries@rcfv.com.au

Dear Royal Commission into Family Violence

Re: Family Violence and Cross Applications

The Broadmeadows Community Legal Service ("BCLS") welcomes the Royal Commission into Family Violence and views this as an opportunity to generate discussion regarding our experience of working in the field of family violence.

This submission to the Royal Commission focuses on:

1. The experiences of women through the Magistrates' Court and in particularly cross applications of intervention orders by perpetrators of family violence.
2. Perpetrator accountability
3. Primary Prevention Programs
4. Barriers to accessing Family Violence Services by culturally diverse communities

BCLS has been providing free legal advice and casework in the Hume area for over 40 years. BCLS is a generalist legal centre that provides free legal advice and a referral service to people who live or work in the Hume area. In particular BCLS specialises in family violence matters.

Broadmeadows Intervention Order Court Support Service ("BIOCSS") has operated at the Broadmeadows Magistrates' Court since 1992 as a duty service with rostered volunteer solicitors. This was established as a result of the difficulties women faced dealing with the court process when applying for intervention orders.

In July 2007, the Victorian Government and Victoria Legal Aid provided funding to 10 community legal centres across Victoria to establish 6 full-time and 4 half-time specialist Family Violence Lawyer positions. The *Family Violence Protection Act 2008* (Vic) was introduced following the Victorian Law Reform Commission's report and years of advocacy by community legal centres and family violence services. In October 2007 BCLS received funding from the State Government to employ a full time Family Violence Lawyer. The Family Violence Applicant Service aims are to provide support, legal advice and representation at the Broadmeadows Magistrates' Court and other assistance such as family law matters to victims of family violence. Our experiences at the Broadmeadows Magistrates' Court are linked to and assists us in developing our community legal education initiatives.

The volume of intervention order matters listed at the Broadmeadows Magistrates' Court has increased significantly. Initially the Family Violence Lawyer was funded to attend court once a week which has increased to twice a week and commencing on 3rd June 2015 the Family Violence Lawyer will be attending Court three days 3 days per week.

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BCLS recently received a thank you card from a client which stated the following:

> *"Dearest Anita,*
> *Thank you for representing me and helping me obtain my Intervention Order against me ex.*
> *I know you may not remember me as you help 100's of people each year, but I will ALWAYS remember you*
> *I can open my blinds without being watched. I can breathe again*
> *Deepest thanks,*
> *A D"*

In the last twelve months 75% of BCLS casework related to family law matters with family violence being a factor in a large percentage of these clients. Last year the family violence lawyer saw approximately 800 clients, predominantly women applicants. Our casework has highlighted many of the issues faced by women who try to access the legal arena to seek protection from a violent family member.

We seek to address question 8 of the Issues Paper released 31 March 2015 which refers to the identification of any gaps or deficiencies in current responses to family violence including legal responses.

1. CROSS APPLICATIONS

The ability of perpetrators to make cross applications against Intervention Order applicants (the *real* victims of family violence) provides perpetrators with the means to avoid accountability for their actions. It allows the perpetrators to deny their behaviour and to further control their victims.

Cross applications may be used as a procedural tactic, a further way to abuse and control the applicant or may be legitimately used in cases where the respondent needs protection from the applicant. These uses (or abuses) of cross applications are further explored below. There is no specific data regarding the number of cross applications however it has been our experience that it is common practice.

In general terms, a cross application for an intervention order refers to a situation where normally the victim of family violence has applied for an interim intervention order and subsequently the perpetrator applies for an intervention order against the victim. Often the basis of the cross application is vexatious, the allegation are fabricated and is not based on legitimate safety concerns.

During the Royal Commission into Family Violence Laws in 2001 regarding the *Crimes (Family Violence) Act* 1987 the issue of cross applications was raised by the Law Reform Commission as a major concern back then and this continues to be a major concern at present.

1.1 Procedural tactic

The existence of a cross application does not necessarily mean there has been mutual family violence, although in some situations this may be the case. There is potential for cross applications to be misused and respondents may use them as a procedural tactic/bargaining mechanism to get a desired result , such as mutual withdrawals of intervention orders.

For victims of domestic violence seeking legal protection can be an empowering process, where the violence against them is acknowledged and validated. This potential empowerment is undermined by a cross application:

*" ...when a victim goes to the police and gets an order the power shifts... to the victim...and I think **when the other party takes out an order they try and gain some power back**. That's what they do, and if you have an order you know then he might have a bit of the power back because he then has the ability to say 'okay, well you drop your order, I'll drop mine'."*[1]

The reasons a victim often capitulates and consents to mutual intervention orders is to placate the perpetrator, or she might feel pressured by busy lawyers and Magistrates to expedite matters or just to conclude the legal process to relieve the associated stress.

The following is an example of a purely tactical approach by Counsel acting for a Respondent:

*"In situations where the matter cannot settle either by way an undertaking or by consent without admissions and where both sides have engaged in what might be described as "argy bargy", I am inclined to propose to the client that he or she consider making a cross application. From a tactical point of view it makes sense. Figuratively speaking, an applicant is armed with both **a shield as well as a sword**. That is, the allegations constitute an attack on the character of the respondent. They also are the basis for seeking the protection of the court against the respondent. Without a cross application, the respondent has only a shield with which he or she endeavours to defend him or herself against the allegations. If the allegations are blatantly false it should not be difficult for the respondent to defend him or herself particularly as the onus of proof rests with the applicant. However, where there are contextual issues and other significant matters not raised by the applicant but are relevant to the overall picture of the relationship of the parties then a cross application may be warranted. Otherwise, the respondent is at a tactical disadvantage: having to defend him or herself against the allegations without being able to raise other relevant factual matters because they do not form part of the case. An experienced advocate would readily object to matters that were not at hand and thus endeavour to confine the case just to the allegations. In is not uncommon in my experience that when a cross application is made the matter readily settles by way of mutual undertakings, mutual orders or both parties withdrawing their applications."*[2]

1.2 Extension of abuse and violence

Cross applications may be used by perpetrators to further intimidate the victim.

Case Study
Jill was subjected to family violence over many years by her partner Jack. Police were notified by neighbours of an incident when Jack physically assaulted Jill and threatened to kill her at the front of their house. The children were present and witnessed the incident. Jill sustained a cut under her eye, cuts on her nose and bruising to her face and body. The attending police officers issued a family violence safety notice ('FVSN') against Jack as they were concerned for Jill's safety. Jack was also charged with the crime of assault and threats to kill.

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[1] Jane Wangmann,'She Said ...' 'He Said ...': Cross Applications in NSW Apprehended Domestic Violence Order Proceedings (March 2009) Sydney eScholarship Repository, 233.
http://ses.library.usyd.edu.au//bitstream/2123/5819/1/01%20J%20Wangmann%202009%20Thesis.pdf
[2] Nicholas Kanarev, Victorian Bar 'Intervention orders in Victoria: Their use and potential for misuse?'
http://www.gordonandjackson.com.au/uploads//documents/seminar-papers/Kanarev_Intervention_orders_15th_March_2013_(2).pdf

Jack is contesting the intervention order and subsequently applied for an intervention order against Jill. His application was based on financial abuse perpetrated against him by Jill. He alleged that Jill was withholding money from him. Jack also alleged that Jill assaulted him in the past and sometimes in front of the children, that she was psychologically abusive by making derogatory taunts about his career and personal appearance. Jack was granted an interim intervention order against Jill.

To date, Jack continues to abuse Jill during changeover of the children. Jack threatened to go overseas to another country and post offensive material about Jill online so everybody would know how horrible she is that she was to blame for everything. Jack also told Jill that his defence to the assault charge is based on self defence.

In this scenario Jill is not a threat in any way to Jack however he has been able to manipulate the situation for his benefit and to her detriment. His actions and persistence to continue with the cross application has increased her level of fear and anxiety. This has caused Jill to question whether to consent to the intervention order for the sole purpose of ending the ongoing stress that the legal process is causing her.

Had a procedure been in place which required Jack to firstly seek leave from the Court to apply for an intervention order against Jill together with a proper risk assessment, Jack may not have even been able to apply for an intervention order against Jill.

This abuse of process further impacts victims of family violence. Not only researchers but support workers, lawyers, court registrars and police have recognised the manipulation of cross applications by perpetrators in Victoria and other states;

"While some cross applications may be genuine, in that each party faces a threat of continued violence and both parties are equally in need of protection from each other, concerns have been raised that this may not be the case in a significant proportion of incidents. Wangmann has suggested that respondents to a DVPO application might make their own application (a cross-application) ***as a form of intimidation and as an extension of their abusive behaviour.*** *Support workers in the domestic violence field have argued that reactive cross-applications may disproportionately affect female DV victims whose earlier claims for protection can be trivialised or even silenced. Cross-orders have also been criticised by others who suggest that they do not promote responsibility and accountability among offenders. Moreover, cross-orders can be difficult for police to enforce, which ultimately stands in the way of the aim of maintaining safety within families."*[3]

"Cross applications therefore cannot simply be investigated as potential examples of gender equivalency, or cases of mutual violence, but ***must also be seen as a possible extension of the violence and abuse itself.*** *Many of the women interviewed saw the cross application lodged by their former partner as harassment, a breach of their ADVO, or another way to hurt them. This was also recognised by some of the professionals interviewed."*[4]

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[3] Heather Douglas & Robin Fitzgerald, 'Legal Processes And Gendered Violence: Cross-Applications For Domestic Violence Protection Orders'56 UNSW Law Journal 36(1), 61.

[4] Jane Wangmann, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33 University of New South Wales Law Journal 945, 967. http://www.unswlawjournal.unsw.edu.au/sites/default/files/42_wangmann_2010.pdf

"Generally the women interviewed identified the cross complaint as another form of abuse, 'harassment', 'a breach of his AVO', 'another way of trying to ... get at me ... and upset me', or 'hurt me'. ***Thus the cross complaint was seen as a continuation of the abuse that the woman had already experienced.*** *Kate indicated that her former husband 'threatened' to apply for a cross application after he was served with her ADVO if she did not withdraw. As Janet noted there was 'nothing' in her former partner's complaint about being 'fearful' of her. This provides another example of an act that does not fit within conventional definitions or lists of 'what is an act of violence and abuse?'"*[5]

1.3 Legitimate need of protection

As stated in the above extract, some cross applications may be genuine and both parties may need equal protection from each other. Furthermore, it is our experience that occasionally the perpetrator may be the first to initiate an application for an intervention order against a genuine victim and then the victim applies for a cross application.

The Code of Practice defines the Primary Aggressor as "the party to the family violence incident who, by his or her actions in the incident and through known history and actions, has caused the most physical harm, fear and intimidation against the other".

When there are competing allegations it is paramount that police and Magistrates have at the forefront of their mind the definition of primary aggressor to determine who actually requires protection when considering family violence matters.

The Victoria Common Risk Assessment and Risk Management Framework ("CRAF") is a framework used to identify risk factors associated with family violence and guide professionals to respond consistently and appropriately to victims of family violence. This framework could be applied to all requests for cross application. Firstly a respondent must seek leave from the Court. If granted then a detailed risk assessment be conducted where present and past history of family violence and immediate safety concerns could be addressed.

The appointment of Applicant and Respondent workers that is currently being implemented in Magistrates' Court is a welcomed initiative. This role can include conducting a detailed risk assessment thus assisting Magistrates to make a more informed decision.

Cross applications are not necessarily indicative of mutual violence, thus consenting to mutual orders gives rise to a misconception that there has been mutual family violence in the relationship. Furthermore, consenting to an unwarranted intervention order exposes victims to potential and or false breaches and consequently criminal liability.

By applying for an intervention order applicants are empowered by their attempt to escape the perpetrator's control. On the other hand, by consenting to a baseless cross application, the applicant is re-entering the controlling cycle the individual is trying to escape.

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[5] Jane Wangmann,'She Said ...' 'He Said ...': Cross Applications in NSW Apprehended Domestic Violence Order Proceedings (March 2009) Sydney eScholarship Repository, 138.
http://ses.library.usyd.edu.au//bitstream/2123/5819/1/01%20J%20Wangmann%202009%20Thesis.pdf

2. PERPETRATOR ACCOUNTABILITY

If we are to take family violence matters seriously with a view to changing community attitudes then we must ensure that intervention orders are not used to further impact on victims of family violence. If this process is to be an effective means of providing safety to victims then lawyers should not encourage applicants to consent to cross applications in an attempt just to settle a case.

"Consenting to mutual orders fails to provide a public forum in which the woman's story is affirmed and the man's actions are clearly denounced."[6]

"USA research documents a range of potential negative outcomes for women as a result of mutual orders, including that they: add fuel to the suggestion that men and women are equally violent, ***fail to place responsibility on the perpetrator,*** *negatively impact on the woman's credibility, and may create problems for subsequent enforcement of orders (police may be confused about who to arrest, if anyone, or whether to arrest both parties) ... mutual orders 'mark...[a woman] as a perpetrator', and place her at risk of being alleged to have breached the ADVO ... mutual orders provide women with 'less protection'."*[7]

In March 2006, Victorian Law Reform Commission delivered the final report recommending a family violence Act and it identified:

"... concerns about cross- applications and recommended that cross-orders should not be made by consent and that magistrates should be satisfied there are sufficient grounds for making cross-orders on the basis that both parties have committed domestic violence."[8]

Both parties are normally encouraged by lawyers and Magistrates to resolve matters in the interests of saving court time, avoid having to return to court, take time off work, make child care arrangements, limit legal costs, and avoid the anxiety leading up to and during the contested hearing.

"Woman's ex-partner, represented at the AVO hearing by barrister, took out a cross application. She received legal advice from the duty solicitor to accept the AVO to 'get it over with', and that she should: 'Just accept it – it shows you don't want to see him'. Community Services also gave that same advice. Against her better judgement, she reluctantly agreed. This is now being used against her in Family Law proceedings."[9]

Police should be responsive to complaints about breaches of intervention orders regardless of how "minor" they believe the breach is. Failure to do so does not hold the perpetrator's accountability for their actions and demonstrates contempt of the court. All reported breaches of intervention orders recorded on the police database LEAP should be included on the intervention order Court file for a Magistrate's consideration.

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[6] Jane Wangmann, 'Incidents v Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?' 34 Sydney Law Review 696, 715.
http://sydney.edu.au/law/slr/slr_34/slr34_4/05_Wangmann_ProtectionOrderSystem.pdf.

[7] Jane Wangmann,'She Said ...' 'He Said ...': Cross Applications in NSW Apprehended Domestic Violence Order Proceedings (March 2009) Sydney eScholarship Repository, 240.
http://ses.library.usyd.edu.au//bitstream/2123/5819/1/01%20J%20Wangmann%202009%20Thesis.pdf

[8] Heather Douglas & Robin Fitzgerald, 'Legal Processes And Gendered Violence: Cross-Applications For Domestic Violence Protection Orders' 56 UNSW Law Journal 36(1), 62.

[9] Lesley Laing, 'It's Like this maze you have to make your way through'
http://ses.library.usyd.edu.au/bitstream/2123/9267/2/It's%20like%20this%20maze.pdf

Case Study

Judy was granted an intervention order against Bob which included the children. There was a Parenting Plan regarding the children which specified time spent with the children and for changeover to take place at the local McDonalds. Bob was always late and withheld the children for up to many hours at a time. Judy reported this to police however police informed her that this was not a breach of the intervention order.

This was clearly a breach of the intervention order on two grounds because Bob's time with the children had ended in accordance with the Parenting Plan and as a result he was now in breach of the intervention order by being within 5 metres of the children and communicating with them which is prohibited by the intervention order.

Family violence and breaches of intervention orders often occurs at changeovers of children. Public locations such as McDonald's, petrol stations, shopping centres and police stations are not adequate venues.

Parents seek to have changeover in the presence of witnesses and CCTV, but these venues are not adequate. Children as young as 3 are made to walk in the dusk across carparks and concourses, particularly where Intervention Orders prevent parents from approaching each other within 5 metres. Violent exchanges commonly take place during or immediately after emotion-charged changeovers. Properly supervised venues with each parent using a separate entrance are needed throughout Victoria to prevent such incidents.

It is more appropriate for changeovers to occur in a friendly environment such as a school or kindergarten. Parents would be less inclined to commit violence during or after the changeover. Different levels of supervision could be provided by trained staff ranging from teachers and social workers up to Protective Safety Officers.

2.1 Mutual Undertakings

An undertaking is a promise to the Court with identical clauses as the intervention order except that it can't be enforced by police. However, where there is a breach of the undertaking the applicant can apply to the Court to reinstate the intervention order proceedings.

Undertakings assist perpetrators to avoid accountability and can be used as a bargaining tool to settle matters. Where there are cross applications the victim is forced to accept the lesser protection of an undertaking rather than to consent to an unwarranted intervention order.

It is perceived as an easy way of finalising the matter on the day at Court and not taken seriously by perpetrators. It is our experience that often applicant's need to return to Court to reinstate their intervention order applications as a result of breaches of the undertaking. This highlights the perpetrator's disregard for the consequences of his actions.

"Agreeing to an undertaking instead of pursuing an application for a protection order may, therefore, compromise the protection and safety of a victim of family violence ...victims of family violence who have accepted an undertaking often return to court to seek a protection order because the undertaking has been breached."[10]

[10] https://www.alrc.gov.au/publications/18.%20Evidence%20of%20Family%20Violence/outcomes-protection-order-proceedings

3. PRIMARY PREVENTION PROGRAMS

The Broadmeadows Community Legal Service and the Broadmeadows Magistrates' Court have been conducting a family violence primary prevention program since 2010 at Roxburgh College for year 9 students. Our program aims to challenge young people's perception of family violence through exploring the legal system, family violence myths and examining healthy relationships.

Our involvement with the students has shown that a fundamental shift in their attitude to family violence can occur if young people are given the opportunity to have information and open discussion on these issues. In each year that the program has been conducted the pre and post surveys of the students has shown an increased understanding of family violence:

"It helped me and I realised I was treating my girlfriend wrong. Perfect, amazing, helpful and meaningful presentation". (2014 Evaluation Survey, comment by year 9 student).

This is a long term investment and it will be generational change that will ultimately make the difference in reducing family violence in the future.

Despite family violence laws, men's behaviour change programs and a number of programs supporting victims of family violence we still see that this issue continues to grow. The education system can play an integral role in societal change. This can be achieved through the adoption of curriculum based programs that promote respectful and healthy relationships through the entire educational life of a student. An example of such a program that has been introduced into Victoria is the school-based 'Love Bites' training manual which evolved in NSW and looks at both family violence and sexual assault.

We seek to address questions 18 and 19 of the Issues Paper which states:

What barriers prevent people in particular groups and communities in Victoria from engaging with or benefiting from family violence services?

How can responses to family violence in these groups and communities be improved?

4. BARRIERS TO ACCESSING FAMILY VIOLENCE SERVICES BY CULTURALLY DIVERSE COMMUNITIES

The 2011 Census shows that the City of Hume is a culturally diverse area with one third of residents born overseas are from 160 different countries. The Indian population is the 3rd largest group in the area and is increasing.

It has been our experience at Court and at the Legal Service that women in the Indian community in Australia are particularly vulnerable and reluctant to access existing Family Violence Services.

It is accepted that the strict gender roles where men are superior and women are subservient are upheld in the Indian community. The breakdown of a marriage, either arranged and voluntary 'love marriages' is not tolerated in the community.

The topic of family violence is generally taboo and a woman is likely to face severe isolation from her family and the Indian community if she leaves a marriage. Family violence is understood as an acceptable part of marriage, where women must tolerate the family violence and 'adjust'.

Marriage breakdown causes great shame for the family of both the husband and wife. Generally the wife lives with the husband and his family, all of whom may perpetrate violence towards her. The role of the 'mother-in-law' is pivotal in Indian culture and it is not uncommon for extended family members to perpetuate family violence even if they are located in India.

The language barriers further isolates women who are totally dependent on their husbands not only financially but also on what the services are available in the area. Their lack of knowledge in relation to their Visa status further impacts on a woman's reliance on her husband and impedes her ability to live freely in the community.

The Indian community itself will be the most effective driver of change. To an extent, change cannot be imposed on them, but must develop and be effected by, the Indian community itself. To that end, funding should be allocated to existing Indian community groups who have taken up the responsibility to act on this issue. This should be geographically focused. In the City of Hume, Craigieburn has the highest Indian population. The Oorja Foundation, which consists of members of the Indian community working with the broader Indian community to overcome family violence and intergenerational conflict, is an appropriate organisation to support.

The Department of Immigration and Border Protection is an important avenue for the provision of information to all new arrivals in Australia which should include attitudes to family violence including:

1. Outline of what is considered Family Violence in Australia.
2. Family violence is not acceptable in Australia.
3. In Australia men and women are considered equal in marriage, in the workplace, in the community and society generally.
4. Differences between the law in other countries and Australia in relation to Family Violence need to be made very clear to both men and women. In particular:

    i. Rape within marriage is illegal in Australia.
    ii. Family violence is not an acceptable part of marriage.
    iii. Perpetrators of Family Violence could find themselves in court, subject to an intervention order and criminal proceedings.

Where there is spousal visa the Department of Immigration and Border Protection ("DIBP") must be made aware of any incidents of family violence so that these matters can be dealt with in an integrated way. Police should seek consent from the woman to provide such information to the DIBP and the DIBP provide women with the appropriate information relating to the DIBP family violence policy and support services.

Local Government can also play an integral role in assisting communities to settle into their new community. Programs which engage local members of the identified cultural community to assist with the settlement and the welcoming of new immigrants in the area would be a positive way to ensure that families have an understanding of services in the area and feel connected to the wider community.

Local organisations to take a pro-active role in providing cultural awareness training for all staff that reflects the cultural profile of their area and assist in making the organisation more accessible to established and newly emerging communities.

RECOMMENDATIONS

- Increase funding to Community Legal Centres to address the increase volume of matters being seen by the Family Violence Lawyers at the Magistrates' Court through the Family Violence Applicant Programs.
- The Family Violence Protection Act 2008 be amended so that all Respondents who apply to make a cross application must seek leave from the court.
- An integrated and consistent approach to risk assessment (CRAF) be used by Police, Magistrates and Lawyers.
- Risk assessment to be included as part of professional development for Magistrates and judicial officers.
- Courts to develop risk assessment checklists to differentiate between short term situational family violence and long term family violence to determine the primary aggressor.
- Compulsory for Respondent and Applicant workers at court to undertake a CRAF assessment where a cross application is being sought.
- The police brief or LEAP incident reports should be placed on the intervention order court file for Magistrates to view.
- A software link between courts and police to allow sharing of information to increase safety of victims.
- Primary and secondary schools to include in the mainstream curriculum programs regarding healthy relationships.
- Funding to provide properly supervised venues including school, kindergartens and child care centres throughout Victoria for children to be handed over to the other parent at agreed changeover times.
- That the Police should seek the consent of women who report family violence to inform the DIBP of such incidents so that the intersecting migration and family violence issues can be dealt with in an integrated way.
- Information regarding existing Family Violence services needs to be delivered to the Indian Community in a culturally appropriate way.
- Local government take a role in establishing a "Community Engagement Program" to engage local members of the identified cultural community to assist with the settlement and the welcoming of new immigrants in the area.
- Appropriate Family Violence organisations (for example those in the same geographic area as concentrations of the Indian population) should have Professional Development on barriers specific to the Indian community. These organisations can then in turn adjust their practice to make it accessible and appropriate to the Indian community.

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