Aboriginal Family Violence Prevention
& Legal Service Victoria

FVPLS Victoria

Submission to Family Law Council reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems

May 2015

Introduction

The Aboriginal Family Violence Prevention and Legal Service Victoria (FVPLS Victoria) welcomes the opportunity to provide a submission to the Family Law Council reference on families with complex needs and the intersection of the family law and child protection systems.

FVPLS Victoria endorses the submission made by the National Family Violence Prevention Legal Services Forum (NFVPLS). This submission is to be read in conjunction with the NFVPLS submission and seeks to explore in further detail certain matters of particular importance in Victoria.

FVPLS Victoria also refers to its Policy Paper Series June 2010[1] which includes:

- Paper 1: Strengthening law and justice outcomes for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault and women and children;

- Paper 2: Strengthening on-the-ground service provision for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault in Victoria;

- Paper 3: Improving accessibility of the legal system for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault.

In addition, we refer the Family Law Council to our recent submissions to the Senate Inquiry into Out of Home Care[2] and the Senate Inquiry into Domestic Violence.[3]

About FVPLS Victoria

Established over 12 years ago, FVPLS Victoria is an Aboriginal Community Controlled Organisation who provide culturally safe and trauma-informed, holistic legal assistance to Aboriginal and Torres Strait Islander[4] victims/survivors of family violence and sexual assault. FVPLS Victoria also provides early intervention/prevention and community legal education to the Aboriginal community, the legal, Aboriginal and domestic violence sector. In addition, with support from philanthropic sources, FVPLS Victoria undertakes policy and law reform work to identify systemic issues in need of reform and advocate for strengthened law and justice outcomes for Aboriginal victims/survivors.

FVPLS Victoria is open to Aboriginal men, women and children who have experienced or are at risk of family violence or sexual assault, as well as non-

[1] Available at www.fvpls.org/Policy-and-Law-Reform.php#PolicyPapersSubmissions
[2] Available at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Out_of_home_care/Submissions
[3] Available at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Domestic_Violence/Submissions
[4] Hereafter referred to as 'Aboriginal'.

Aboriginal carers of Aboriginal children who are victims/survivors of family violence. FVPLS Victoria is not gender specific, however at last count 93% of our clients were women.

FVPLS Victoria has a holistic, intensive client service model where each client is assisted by a lawyer and paralegal support worker to ensure the client is linked into culturally safe counselling and support services to address the underlying social issues giving rise to the client's legal problem. As an Aboriginal Community Controlled Organisation, FVPLS Victoria is directed by an Aboriginal Board and has a range of systems and policies in place to ensure we provide culturally safe services in direct response to community need.

FVPLS Victoria's legal services include advice, casework and court representation in the areas of:

- family law;
- child protection;
- family violence intervention orders;
- victims of crime assistance; and
- other civil law matters connected with a client's experience of family violence such as: police complaints, housing, centrelink, child support and infringement matters.

Family law and child protection are two of FVPLS Victoria's core legal service areas.

FVPLS Victoria is funded by the Commonwealth and State government, with supplementary funding provided by Victoria Legal Aid ('VLA')and philanthropic sources.

FVPLS Victoria is grateful to receive VLA funding to enable us to employ a family lawyer and paralegal support worker. These positions are dedicated family law positions which service clients in the Melbourne metropolitan area. This supplements and supports the work undertaken by FVPLS Victoria's regionally based lawyers who all undertake family law casework as well as child protection and family violence legal cases. At the time of writing, this VLA funding is uncertain. Our current funding comes to an end on 30 June 2015 and the prospect of renewal will not be known until after the Federal Budget is released in May 2015. Without renewal or replacement of this funding, our capacity to provide crucial family law services will be severely impacted.

In addition, FVPLS Victoria receives vital and recurrent funding from the Koori Justice Unit within the Victorian Department of Justice which enables us to employ a full time child protection solicitor with a dedicated focus in that area of significant growth and importance.

Response to the terms of reference

As FVPLS Victoria fully endorses the submission of the NFVPLS, we do not propose to respond to each of the terms of reference. Instead we wish to outline the following matters for the Family Law Council's attention:

Child Protection in Victorian Aboriginal Communities

Aboriginal and Torres Strait Islander families experience child protection intervention at disproportionately high rates. According to 2013 AIHW data, Victorian Aboriginal children are 16 times more likely to be on care and protection orders than their non-Aboriginal counterparts.[5] Aboriginal children in Victoria are also 16 times more likely to be in out-of-home care[6] and that rate is increasing. The rate of removal of Aboriginal children increased by 42% in the last twelve months[7]. In Victoria, out-of-home care rates for Aboriginal children are some of the highest in the country and they are now higher than at any time since white settlement.[8]

These escalating rates of child protection intervention and removal are inextricably inked with high rates of family violence against Aboriginal people – especially Aboriginal women. Family violence is the single greatest driver of Aboriginal child removal.[9] The Victorian Commissioner for Aboriginal Children and Young People commenced *Taskforce 1000* in 2014 to investigate the cases of approximately 1000 Aboriginal children in out-of-home care across Victoria. Preliminary findings from his review of the first 250 cases indicate that men's violence against women was the primary driver of up to 95% of Aboriginal children entering out-of-home care.[10]

Along with family violence, another key catalyst for the over-representation of Aboriginal families within the child protection system Courts is Aboriginal people's lack of access to and awareness of culturally safe and specialised legal assistance services. Without culturally safe legal representation, Aboriginal victim-survivors of family violence face enormous barriers to accessing their rights to participate in critical decision-making related to their children and holding the Department of Health and Human Services ('the Department') to its statutory obligations towards Aboriginal children.

Through our engagement with Victorian Aboriginal communities, FVPLS Victoria has received the following anecdotal reports concerning Departmental practices towards unrepresented Aboriginal families:

- Families feeling pressured to consent to the removal of their children due to the power imbalance between the Department and Aboriginal and Torres

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[5] Australian Institute of Health and Welfare, *Child Protection Australia 2012–13*, Table 5.4, page 52 available at http://www.aihw.gov.au/publication-detail/?id=60129547965

[6] Australian Institute of Health and Welfare, *Child Protection Australia 2012–13*, Table 5.4, page 52 available at http://www.aihw.gov.au/publication-detail/?id=60129547965

[7] Commissioner for Aboriginal Children and Young People, Open Letter in response to *2015 Report on Government Services*, 3 February 2015.

[8] Australian Institute of Health and Welfare, *Child Protection in Australia 2012–13*, Table 4.4 p 41.

[9] October 2014 Update to *Koorie Kids: Growing Strong in their Culture: Five year Plan for Aboriginal Children in Out of Home Care*, a joint submission from Victorian Aboriginal Community Controlled Organisations and Community Service Organisations; See also Commission for Children and Young People, *Annual Report 2013-14*, Victorian Government, Sept 2014, p.36

[10] Personal correspondence. See also *Koorie Kids: Growing Strong in their Culture: Five year Plan for Aboriginal Children in Out of Home Care* – October 2014 Update, a joint submission from the Commissioner for Aboriginal Children and Young People and Victorian Aboriginal Community Controlled Organisations and Community Service Organisations, p 3; and Commission for Aboriginal Children and Young People - Papers submitted to Aboriginal Justice Forum October 2014.

Strait Islander parents and a lack of faith that the justice system will give Aboriginal parents a fair go;

- Children being removed after their parent seeks assistance with respite care;
- Families being 'set up to fail' by the imposition of unrealistic timelines and unnecessarily onerous conditions;
- Grandparents taking on primary responsibility for caring for children and not receiving any supports, financial or otherwise;
- Siblings being put in separate placements and access between siblings not being prioritised;
- Failure to comply with existing law and procedure designed for Aboriginal and Torres Strait Islander children – for example, delays and failures to -
    - apply the Aboriginal Child Placement principle;
    - convene Aboriginal Family-led Decision Making meetings;
    - prepare and implement cultural plans; and/or
    - respect Aboriginal and Torres Strait Islander cultures;
- High staff turnover within the Department resulting in no connection between the child and allocated DHHS caseworker and families being required to 'start over' every time the caseworker changes;
- The Department assessing proposed kinship carers as "unsuitable" but not providing reasons for its decisions or allowing families any right of reply;
- The Department making negative and prejudicial judgments about parents' capacity to care for their children on the basis that their extended family members are known to the Department;
- The fact that a new parent was themselves removed by the Department as a child being considered a 'protective concern' justifying Departmental scrutiny and intervention;
- The Department using legal jargon which Aboriginal and Torres Strait Islander families do not understand;
- Department workers responding to Aboriginal women as though they are to blame for being victims of family violence and making decisions about their capacity to care for their children on the basis of this misinformed view. This re-victimisation contributes to victims' reluctance to seek help which can put them and their children at greater risk of family violence and Departmental intervention.

FVPLS Victoria strongly endorses the recommendation of NFVPLS that there should be a mandated and enforceable process for ensuring that FVPLSs are notified where an Aboriginal client comes into contact with child protection authorities and that client is also immediately advised of the need to obtain independent legal advice at the earliest opportunity. We recommend such a process be implemented in Victoria. This would mirror the Custody Notification System which exists in the criminal law jurisdiction in Victoria and forms part of the response to the issue of Aboriginal deaths in custody and over-incarceration. Given the high and escalating rates of child removal among Victorian Aboriginal families, we believe such a response is justified. We note that while family law legislation imposes a range of pre-litigation procedures including a requirement that parties be encouraged to seek independent legal advice prior to consenting to court orders, there is no such provision within Victorian child protection legislation. Such a requirement, along with appropriate resourcing of FVPLSs to respond to demand, would be an important step in reducing the devastatingly high rates of child protection and child removal in Aboriginal families.

Family Law in Victorian Aboriginal Communities

For many Aboriginal people in Victoria, the law is viewed as a weapon of coercion inflicted upon Aboriginal people rather than an open system which Aboriginal people can actively engage with as rights-bearers. Many Aboriginal people associate courts and the legal system with criminal charges or child removal and are therefore hesitant to proactively seek access to the court system. Within Victorian Aboriginal communities there is significant lack of awareness about family law rights and legal processes which adversely impacts on the accessibility of family law courts for Aboriginal people.

Accordingly, use, understanding and trust of the family law system is limited within Aboriginal communities. This is to the disadvantage of Aboriginal victims/survivors of family violence – most commonly mothers – who may not avail themselves of opportunities to obtain protective orders or enforceable parenting orders which promote their children's best interests and reduce parental conflict. Sadly, this can mean that the negotiation of time spent with children becomes a site of intimidation, conflict, control or outright violence between parents and this in turn can bring families to the attention of child protection agencies.

Culturally safe and specialist community legal education and legal assistance services are crucial for improving Aboriginal people's knowledge of their legal rights. Appropriate investment in education will assist to encourage Aboriginal victims/survivors to engage proactively with the family law system in a way that allows them to put clear, safe and appropriate arrangements in place that support their children's best interests, their own safety and reduce the risk of further violence, victimisation and child protection intervention.

Unfortunately, the importance of community legal education and early intervention prevention has not been reflected in recent funding decisions. Similarly funding for legal assistance services has not been in step with increasing and demonstrated need. In this regard, we refer the Commission to the comments concerning the

Indigenous Advancement Strategy, as outlined in the NFVPLS submission to this inquiry.

Pursuant to announcements in March 2015 concerning funding outcomes under the Commonwealth Indigenous Advancement Strategy ('IAS'), FVPLS Victoria has received three years of funding at 2013-14 levels. While recurrent funding is a welcome and much-needed result, the IAS leaves significant gaps:

- Of greatest concern, FVPLS Victoria will see no increase in funding levels from 2013 through to 2018.

  That is despite increasing rates of reported family violence. In Victoria, police reports of family violence against Aboriginal people have almost tripled in less than a decade. Between 2008 and 2013 the percentage of Aboriginal victims/survivors of reported family violence incidents increased by as much as 360% in some of the regions we service (specifically Geelong).[11] We expect reporting rates and legal need associated with family violence will continue to increase in response to significant public attention on the issue including through the current Victorian Royal Commission into Family Violence.

- Our IAS grant provides funding for regional and remote locations only and does not allow for expansion to additional geographic areas of unmet need.

  For example, FVPLS Victoria has never been resourced to have an office in Shepparton or to service Echuca, Bendigo or Swan Hill, despite significant Aboriginal populations and family violence rates in those regions.[12]

- Nor does IAS funding not extend to:
  - the vast majority of, or staffing for, our highly successful early intervention prevention and community legal education programs; or
  - staffing for our policy and law reform activities (despite the significant benefits this function provides in delivering advice to government, participating in research and consultation and identifying opportunities to strengthen and improve law and justice outcomes for Aboriginal victims/survivors of family violence and Aboriginal women within the family law and child protection system).

The newly initiated Victorian Royal Commission into Family Violence is also expected to create significant spikes in demand for family law and child protection-related legal assistance – including demand on services such as FVPLS Victoria. As discussed above, family violence is a key catalyst of child protection intervention, family breakdown and family law need. In terms of Aboriginal communities, the demand created by the Royal Commission will be two-fold: firstly, demand for awareness-raising, educating and facilitating Aboriginal victims/survivors' input

[11] Calculated on the basis of 2008/9 and 2013/14 police data supplied by Department of Premier and Cabinet and the Koori Justice Unit, Victorian Department of Justice. Please note that family violence incident data is based on reports to police, which means that multiple incidents may be caused by an individual perpetrator. Given the prevalence of under-reporting of family violence, the true prevalence of violent incidents is likely higher.

[12] See Annual Victoria Police data and regional profiles compiled by the Koori Justice Unit, Victorian Department of Justice. FVPLS Victoria can provide further detail on request.

into the Commission; and, secondly, addressing the increased demand in frontline services requested by Aboriginal victims/survivors who feel motivated by the Royal Commission to report violence and seek assistance. While the Victorian government has allocated increased funds to family violence services in its most recent budget, a significantly greater, long-term investment will be required in future to appropriately respond to and implement the Royal Commission's recommendations.

The Experiences of Aboriginal Victims/Survivors of Family Violence Involved In Both Family Law and Child Protection Matters

Due to the significant prevalence of family violence and allegations of child abuse against Aboriginal people, particularly women and children, many FVPLS Victoria clients become involved in both family law and child protection matters.

Families involved in both jurisdictions can face significant difficulty distinguishing between the two jurisdictions, confusion about the significance and distinct consequences within each jurisdiction and understandable difficulties trying to comply with different and often complex court orders and processes. It can be extremely burdensome for clients to keep track of and remain engaged with many ongoing court proceedings. As noted in the Victorian Indigenous Legal Needs Report, Aboriginal clients experience multiple and complex legal issues at a greater rate than the mainstream population. One person may be engaged in criminal proceedings (as either a victim, witness or accused), a victims of crime compensation case, a civil matter involving a fine or infringements alongside child protection and/or family law matters. They may also be experiencing a range of underlying social pressures which may detract from their capacity to engage with legal processes such as housing instability, financial hardship, cultural and family obligations, mental or physical health issues and perhaps drug and alcohol issues. Keeping track of multiple court dates and obligations can be particularly onerous in this context.
In addition, the burden of multiple court dates can be even more excessive on Aboriginal clients living in regional or remote areas where court circuits are infrequent and significant travel is required to attend Court.

This complexity demonstrates the importance of well-resourced and culturally safe legal assistance services with capacity to provide long-term and holistic engagement with clients.

Case Studies

In some instances, FVPLS Victoria lawyers have observed clients refuse to cooperate with the Department or, conversely, unnecessarily accept services from the Department to their detriment because they mistakenly believe interim family law orders will protect them from having their children being taken from their care.

In one particular case, family law proceedings were issued in the Federal Circuit Court but both the mother and father failed to attend so the matter was adjourned. In the meantime the Department issued proceedings. At the first return date in Children's Court, no orders were made because – unusually – the Department did not seek any orders at that stage. When the family law matter returned to the Federal Circuit Court, the judge also declined to make orders because she felt her hands were tied as the matter was before Children's Court– despite no Children's Court orders having been made. Consequently, the client was left in a state of limbo. She and her child were at significant risk of family violence by the client's ex-partner, however she was unable to obtain any order for her child's care despite there being proceedings going on in both courts.

This sort of 'limbo' situation is not uncommon amongst our clients. FVPLS Victoria lawyers have assisted clients in matters where our clients wanted Departmental assistance to impose restrictions on their violent ex-partners' contact with their children due to concerns for their children's safety and wellbeing but the Department declined to investigate the matter instead choosing to 'wait and see' what might happen in a family law matter.

The Department is significantly under-resourced and at times encourages families to utilise the Family Law courts so that the Department can relinquish responsibility for the matter. However, this can become complicated in instances where the Department seeks to evade responsibility for managing the matter and providing services, but still seeks to influence family law proceedings and outcomes. In one recent example, child protection litigation was avoided on the basis of the parties making an undertaking which was intended to cease upon the making of interim family law orders. On the day the matter was listed in the family law courts however, the Department caseworker attended court and made demands as to the final content of the outcome between the parties. The worker was seeking to impose her view that the client should not have the child in her full time care, notwithstanding that the Department had withdrawn from the matter.

Children, Youth and Families (Permanent Care and Other Matters) Amendment Act 2014 (Vic)

While there may be benefits achieved in amalgamating jurisdiction so as to reduce complexity and duplication for clients, there are also some significant dangers if this results in increased child protection intervention in Aboriginal families and an even further increase in Aboriginal child removal rates.

This is of particular concern currently due to recent legislative reforms in Victoria which we believe are likely to have a disproportionate and devastating impact on Aboriginal families.

The Children, Youth and Families Amendment (Permanent Care and Other Matters) Act was passed in September 2014 and is due to commence by March 2016. FVPLS Victoria is deeply concerned that these reforms will fast-track the increased removal of Aboriginal children into permanent out-of-home care in a number of ways:

- Firstly, by imposing a strict cumulative 12 month window in which parents must resolve protective concerns and regain care of their children before children are placed on permanent care orders;

- Secondly, removing the Court's discretion to extend this timeframe by any more than a further 12 months in 'exceptional circumstances' – it is unclear whether recovering from family violence victimisation and complex, potentially intergenerational trauma, would constitute 'exceptional circumstances' for the purposes of this provision;

- Thirdly, prioritising adoption over permanent care orders, thus removing Departmental responsibility and oversight including the capacity to require ongoing contact between children and their Aboriginal relatives; and

- Finally, removing court scrutiny of children on permanent care orders leaving parents without the ability to enforce the cultural rights of Aboriginal children in care, Departmental compliance or family contact.

We are deeply concerned that these changes will disproportionately impact Aboriginal children and families who are statistically more likely to experience complex trauma – such as family violence - that cannot be quickly resolved according to an abbreviated timeline.

In addition, we are concerned these legislative changes will damage the care, cultural connection and wellbeing of Aboriginal children by significantly reducing Departmental accountability towards Aboriginal children in care. For example, currently if the Department seeks to change a child's care placement, reduce parental or sibling access or permit a carer to relocate with a child, the Department must obtain a Court order and all parties to the matter must be notified and given the opportunity to appear at Court and make submissions. Under the new legislative reforms, the Department will be under no such obligation and can carry on its duties unchecked by court scrutiny or any external confirmation of the child's best interests.

Given significant existing failings by the Department to meet its statutory obligations towards Aboriginal children, we are concerned that a removal of court scrutiny will exacerbate the cultural dislocation of Aboriginal children in out-of-home care. By way of example of current Departmental failings, a 2013 audit of 194 cases found that only 8% of Aboriginal children required by law to have a cultural plan in place had one.13 This indicates the Department was breaching the rights of Aboriginal children in 92% of cases.

[13] Department of Human Service, Information about cultural support plans for child protection clients, 2013, page 2, available at

Another example is the failure to convene Aboriginal Family Led Decision Making meetings or AFDMs. Under s 12 of the Victorian Children, Youth and Families Act the Department is required to implement a set of decision-making principles that involve Aboriginal family in decisions related to the care and placement of Aboriginal children. The Department has elected through its internal policy to do this through convening AFDMs. If convened early, AFDMs can be highly effective in identifying appropriate kinship carers and ensuring extended Aboriginal family can participate in important decisions about the care, placement and wellbeing of Aboriginal children. However we have seen cases where children unnecessarily languish in out-of-home care placements with un-related, non-Aboriginal carers – in some cases for years – because the Department failed to organise an AFDM to prevent this.

FVPLS Victoria along with a number of legal practitioners, academics and legal institutions are strongly advocating for the repeal of this legislation to ensure the best interests of Aboriginal children are appropriately supported.

In the absence of a repeal of this litigation, FVPLS Victoria will have a responsibility to support Aboriginal victims/survivors of family violence to proactively access the family law system to endeavour to put in place safe and culturally appropriate parenting arrangements with a view to avoiding child protection intervention. This may involve for example negotiating for children to spend time in the care of grandparents or other family member while the victim/survivor (most often the mother) receives the support she needs to safely exit a violent relationship and heal before resuming care of her children.

http://www.dhs.vic.gov.au/__data/assets/word_doc/0012/898878/Information-about-cultural-support-plans-for-child-protection-clients.doc.