

LEGAL } EAGLES CLE

Continuing Legal Education for Criminal Lawyers

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FAMILY VIOLENCE IN AUSTRALIA: KEY STATISTICS

Since the beginning of 2017, 28 women have died as a direct result of family violence¹ (2.8 women every month). In 2016, the total number of women who were killed as a direct result of family violence was over 73 (6 women every month).

A summary of the key statistics are as follows:

- Women are at least three times more likely than men to experience violence from an intimate partner.
- One in four Australian women has experienced physical or sexual violence by an intimate partner
- There is growing evidence that women with disabilities are more likely to experience violence.
- Aboriginal and Torres Strait Islander women experience both far higher rates and more severe forms of violence compared to other women.
- Intimate partner violence contributes to more death, disability and illness in women aged 15 to 44 than any other preventable risk factor.
- Domestic or family violence against women is the single largest driver of homelessness for women, a common factor in child protection notifications and results in a police call-out on average once every two minutes across the country.

¹ Destroy the Joint (Women's Advocacy Group) 2017.

- One in four Australian women has experienced emotional abuse by a current or former partner.
- Women are five times more likely than men to require medical attention or hospitalisation as a result of intimate partner violence, and five times more likely to report fearing for their lives.
- Of those women who experience violence, more than half have children in their care.

FAMILY VIOLENCE: WHAT IT IS AND HOW IT IS DEFINED

There has been a noticeable shift in the understanding of “Family Violence”, as well as the impact of family violence on the development of children and a parent’s parenting capacity. There is a widespread belief in the community that the justice system is awash with false claims of family violence in order to gain leverage in family law proceedings. Research confirms that this is incorrect and that there is reluctance on behalf of those who have experienced family violence to disclose their experiences to relevant agencies and even their own legal practitioners.

Clients may not be able to articulate the family violence that they have experienced, or even identify that the coercive and controlling behaviour displayed in their relationship does in fact, constitute family violence².

Family Law Act 1975 (CTH)

The Family Law Amendment (Family Law and Other Measures) Act 2011 commenced on 7 June 2012. The most significant amendment was the holistic definition of Family Violence.

Section 4AB(1) of the FLA states:

*“For the purposes of this Act, family violence **means violent, threatening or other behaviour** by a person **that coerces or controls a member of the person’s family** (the family member), **or causes the family member to be fearful**”.*

The FLA then provides examples of what constitutes Family Violence in section 4AB(2) and it is important to note that it is not an exhaustive list. It is imperative that any alleged conduct either coerces or controls the family member or causes them to

² There is a wonderful resource for legal practitioners that provides training in detecting family violence: DOORS (Detection of Overall Risk Screen). <http://www.familylawdoors.com.au>

be fearful. Many affidavits that are filed often do not address this issue. This is an important point to remember when drafting any affidavit.

With respect to coercive and controlling behaviour, it is helpful to consider the behaviour with reference to Duluth’s “Wheel of Power”:



As a result of the 2011 amendments, there is no longer any requirement of “reasonableness”.

The 2011 amendments also repealed section 117AB as to costs when a party made false allegations of family violence. There has also been a decreased in “shared care” arrangements³.

A helpful resource for practitioners is the **National Domestic and Family Violence Bench Book**. This resource is a concise database of case summaries of court decisions in domestic and family violence related proceedings in the High Court of Australia, Family Court of Australia, Federal Circuit Court of Australia and the courts of the states and territories.

The case database contains case summaries of

- Physical violence and harm
- Sexual and reproductive abuse

³ Kaspiew, Rae, et al, ‘Evaluation of the 2012 Family Violence Amendments’ (Synthesis Report, Australian Institute of Family Studies, 2015)

- Economic abuse
- Emotional and psychological abuse
- Cultural and spiritual abuse
- Following, harassing and monitoring
- Social abuse
- Exposing children to domestic and family violence
- Damaging property
- Animal abuse
- Systems abuse
- Forced marriage

IMPACT OF AN APPREHENDED VIOLENCE ORDER ON PARENTING PROCEEDINGS IN THE FCC OR FCA.

There is a rebuttable presumption that it is in the best interests of a child for a parent to have equal shared parental responsibility.

Section 61D of the FLA states:

(2) The primary considerations are:

(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in [paragraphs](#) 60B(1)(a) and (b).

(2A) In applying the considerations set out in [subsection \(2\)](#), the court is to give greater weight to the consideration set out in [paragraph \(2\)\(b\)](#).

This presumption is rebuttable in matters where family violence appears. Further, section 60cc(2A) expressly states that the paramount consideration is to protect a child from harm than the right of the child to have a meaningful relationship with the other parent.

Allegations that are accompanied by evidence of strong probative weight may influence the nature of court-based parenting outcomes, for example the court may

decide to order no contact, or that contact with the violent parent be supervised or restricted to daytime only. However, the FLA and FCA do not require independent verification or corroboration of allegations of domestic and family violence (such as police or medical reports) for the court to be satisfied that it has occurred.

As the Full Court of the Family Court of Australia said in *Amador & Amador* ([2009] FAMCAFC 196 per May, Coleman and Le Poer Trench JJ:

“Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage, and possibly their children. We cannot accept that a Court could never make a positive finding that such violence occurred without there being corroborative evidence from a third party or a document or an admission. (at [79])

The victims of domestic violence do not have to complain to the authorities or subject themselves to medical examinations, which may provide corroborative evidence of some fact, to have their evidence of assault accepted. (at [81])”

When corroboration evidence is available but is not called, adverse inferences might appropriately be drawn.

The court has an obligation to take prompt action pursuant to section 67ZBB of the FLA, however; there is the competing issue of a lack of court resources. There are also court obligations imposed pursuant to section 68P when the makes an order inconsistent with an existing family violence order.

PRACTICAL IMPLICATIONS:

- It will impact on the presumption of Equal Shared Parental Responsibility
- It will impact on the spend-time with arrangements
- It will impact on whether mediation is suitable and what arrangements need to be made if mediation proceeds (eg. Shuttle)

WHEN YOUR CLIENT IS THE PERSON IN NEED OF PROTECTION:


- Apprehended Violence Orders pursued by the police protects your client from any potential cost orders. There is also the issue of legal aid funding.
- If your client is from a CALD background, ensure that you have obtained instructions regarding the necessity of Airport Watch List Orders.
- Time the filing of any application to the FCA/FCC in conjunction with the AVO proceedings.
- Complete the details in the Notice of Risk form, which you are obligated to complete.
- It may be appropriate to seek an order that an ICL be appointed ASAP.

- Request that a copy of the AVO/Criminal file be provided to the FCA/FCC (it cannot be subpoenaed).
- Subpoena: NSW Police, FACS, Medical practitioners, etc.
- Apply to Victims Services for a compensation payment depending on the allegation of family violence.
- Legal Aid- production of transcript of local court proceedings.
- Be across any migration/visa issues.
- Refer your client on to a psychologist.
- Department of Family and Community Services.

WHEN YOUR CLIENT IS THE PERPETRATOR

- Mitigate the risk of harm to the child in the orders you are seeking: eg: shared care vs supervised time, sudden vs gradual.
- Take advantage of the Domestic Violence Units to have the parties enter into a parenting plan at the local court OR at least attempt to get these interim parenting arrangements into the AVO terms (Bankstown, Burwood, Fairfield and Liverpool).
- Build a relationship with the family lawyer who has carriage of the family proceedings.
- S. 501 Migration Act- visa cancellations on character grounds.
- Seek instructions on their understanding of family violence if you are required to prepare a Response to an Initiating Application.
- Timing of family court and avo proceedings.
- “Consent without admissions”- issue of breaches.
- Additional orders – AVO- legal representation.
- Impact on employment.
- Issue of affidavit material – proceedings on foot
- DV Perpetrator courses (family law & sentencing)
- Context of family law proceedings in AVO matters.

National Domestic and Family Violence Bench Book 2017:

“There may also be circumstances where, for example, in the absence of parenting orders, a victim obtains a protection order naming her children as protected people, and the perpetrator (the father of the children) subsequently applies to the Family Court for parenting orders so that he may have contact with his children otherwise disallowed under the protection order. Judicial officers should be aware when making protection orders naming children as protected people in these circumstances that there may be a considerable delay before parenting matters, including contact, can be dealt with by the Family Court, and that the new status quo established by the protection order may impact on the outcome of any subsequent parenting proceedings. Where the protection order is made with the consent of the parties (which is often the case ) judicial officers should ensure the parties are made aware of this potential impact, in particular where one or both parties are self-represented”.

RESOURCES

- [Domestic and family violence guidelines](#), Legal Aid NSW
Designed to assist lawyers provide a high quality and consistent service to Legal Aid NSW clients in domestic violence situations.
- [Best Practice Principles for Use in Parenting Disputes when Family Violence or Abuse is Alleged](#), Family Court of Australia, 2016
These best practice principles have been developed to provide decision makers with practical guidance in dealing with matters in which a notice has been filed alleging family violence or abuse.
- [Best Practice Guidelines in Family Law](#), Family Law Council and Family Law Section of the Law Council of Australia, 2010
Part 9 of these guidelines apply to family violence and include advice on screening, making needs assessments, carrying out safety planning, and proceedings to ensure personal protection.
- [Guidelines for contact with the complainant in apprehended domestic violence and criminal matters](#), Law Society of NSW, 2004
These guidelines outline some of the specific obligations and responsibilities of practitioners when dealing with complainants in apprehended domestic violence proceedings and in criminal matters.