

FOLEY'S | LIST

WHAT'S HAPPENING AT THE FAMILY VIOLENCE ROYAL COMMISSION

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What's happening at the Family Violence Royal Commission?

Foley's List Family Law Breakfast 10 September 2015

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This paper is intended as a little window for busy family lawyers into the large project which is the Victorian 2015 Royal Commission into Family Violence. Firstly I want to provide an overview of the Royal Commission process and then finish with some things I think we as family lawyers could be doing now to improve our own practice whilst we wait for the final report of the Commission.

The Family Violence Royal Commission was given the task in February 2015 of enquiring into and making practical recommendations on how Victoria's response to family violence can be improved. The Commission is due to provide its report and recommendations to the government by 29 February 2016.

It is the first Royal Commission to be established under the new Victorian *Inquiries Act* 2014 which established a legislative framework for a 3 tiered inquiries system, with Royal Commissions at the top of the tree. The Royal Commission has the power to inform itself in any manner it considers appropriate, subject only to procedural fairness. It was noted in the course of the hearings that the *Inquiries Act*¹ does not give power to the Royal Commission to enquire into the operations of a Victorian Court (but the State Magistrates' and Children's Courts did and could choose to provide information).

The Royal Commissioners are the Honourable Marcia Neave AO (former Professor and Victorian Court of Appeal Judge) as Chairperson, Patricia Faulkner AO (Chair of Jesuit Social Services and a former Secretary of the Department of Human Services) and Tony Nicholson (Executive Director of the Brotherhood of St Laurence). The budget is \$36 million. Mark Moshinsky QC is Counsel Assisting with Rachel Ellyard and Joanna Davidson.

¹ S123 *Inquiries Act* 2014 (Vic)

The Terms of Reference² of the Royal Commission are interesting compared to other past Royal Commissions. The task is not to investigate a scandal such as the Home Insulation Scheme or a disaster such as in the Bushfires Royal Commission, but to look at a problem and investigate the community and legal system's response to it to make recommendations on how to improve that response.

Family Violence is defined in section 5 of the *Family Violence Protection Act 2008*³ and it is this definition the Royal Commission uses.

The Royal Commission summarised its Terms of Reference into goals as follows –

“ to make recommendations which:

- foster a violence-free society
- reduce and aim to eliminate family violence
- prevent the occurrence and escalation of family violence
- build respectful family relationships
- increase awareness of the extent and effects of family violence
- reinforce community rejection of the use of family violence
- ensure the safety of people who are or may be affected by family violence, by:
 - facilitating early intervention before violence occurs
 - providing fast, effective responses to those who report family violence
 - providing effective protections to adults and children who have been affected by family violence in the past, and remain at risk of family violence
 - support adults and children who have been affected by family violence
 - hold those who have been violent accountable for their actions
 - help people who use or may use family violence to change their behaviour
 - develop and improve the means by which solutions to family violence are implemented and assessed.”

² See Appendix A

³ See Appendix B

The Royal Commission released an Issues Paper on 13 March 2015 and called for written submissions by the end of May 2015. It received nearly 1,000 submissions and is still working its way through the process of uploading them to the website⁴. I assisted the Law Institute of Victoria with writing its submission, a task that involved drawing together the views of its various practice groups to develop some recommendations from solicitors' perspectives. I was also involved in consultations for the joint Victorian Bar and Family Law Bar Association submission and the submission from the Magistrates' Court Family Violence Taskforce.

Some issues of interest for family lawyers are –

- An emerging awareness that the Family Violence intervention order system has become a defacto triage system for the family courts in dealing with family violence and there may be opportunities to use this more effectively in a formal way by encouraging the use of the Family Law Act powers by the State Courts by way of early intervention;
- Communication and lack of it between the different court systems is a significant problem and the final report is likely to recommend formal and fast access by each court to the orders of other courts (and probably reports as well);
- There is a common theme that family lawyers and the family courts are out of step and not taking allegations of family violence seriously when balancing risk and children's right to spend time with the other parent on family breakdown;

The Royal Commission conducted 43 community consultations across Victoria and met with over 820 people, from individuals who have personal experience of family violence to agencies working in the field.

⁴ <http://www.rcfv.com.au>

Some of the key themes raised at the consultations include:

- the impact of family violence on children and young people and on older victims;
- the importance of developing a range of age-appropriate primary prevention strategies;
- the importance of culturally appropriate responses and services in Aboriginal communities;
- challenges faced by victims who have recently migrated to Australia and who do not use English as their primary language;
- challenges faced by men who have experienced family violence;
- challenges faced by people with disabilities whose carers are also their abusers;
- the availability of services for victims who live in regional and remote areas;
- the adequacy of justice system responses and the need for people who use violence to be held accountable;
- the value of educating people who come into contact with victims of family violence about the nature and causes of family violence and appropriate ways to respond;
- the importance of coordination and information sharing between different agencies;
- the important role government, agencies and communities can play in fostering family violence prevention and cultural change;
- the legal and practical issues people affected by family violence face when living and working close to an interstate border;
- difficulties accessing crisis services including housing;
- the physical environment of court buildings and associated security issues;
- how to break the cycle of intergenerational family violence.⁵

Public Hearings commenced on 13 July 2015 and concluded on 14 August 2015. Days were directed around themes. The opening day's theme was

⁵ Media Release Friday 22 May 2015
<http://www.rcfv.com.au/MediaLibraries/RCFamilyViolence/UploadedDocs/Royal-Commission-concludes-community-consultations-2.pdf>

“What is family violence and who experiences it including causes and contributing factors” which saw concurrent evidence from Rhonda Cumberland, CEO of Good Shepherd Australia New Zealand and Wendy Steendam, Assistant Commissioner, Victoria Police providing a background to the professional services response to Domestic Violence over the past 25 years. Evidence was then called from a lay witness, anonymously, giving a personal experience of surviving violence and trying to get help from the system. There were such lay witnesses and 160 other witnesses.

Some Judicial officers gave evidence about Intervention Orders and Criminal law matters in the Magistrates’ Court - the deputy Chief Magistrate Felicity Broughton, Magistrate Noreen Toohey from Sunshine and Magistrate Kate Hawkins, the Supervising Family Violence Magistrate. Children’s Court President Judge Amanda Chambers and Magistrate Peter Dotchin from Moorabbin gave evidence about child protection and intervention orders in the Children’s Court.

No Family Court or Federal Circuit Court Judges gave evidence (although both courts lodged submissions and have been consulted by the Commissioners). The family lawyers’ perspective was presented by evidence from Caroline Counsel and Lee Formica, both Accredited Family Law Specialists when the theme of the day was “Overlapping jurisdictions - the role of family law and child protection law.”

Public Hearings were live streamed on the Internet and transcripts uploaded online. There were an estimated 13,000 unique visitors to the live streaming from around the globe.⁶

In concluding the final day of the hearings thus far, Commissioner Neave said⁷ (numbering added) –

⁶ Media Release 14 August 2015
<http://www.rcfv.com.au/MediaLibraries/RCFamilyViolence/UploadedDocs/RCFV-hearings-conclude.pdf>

⁷ Transcript 14 August 2015, pages 3188 - 3190

"I just want to refer briefly to some of the key issues covered in the evidence and these are not intended to be comprehensive:

1. The history of family violence reform and the heroic work that women have done to help women and children escape violence and to highlight the role which gender inequality has played in family violence;
2. the fact that family violence has lasting effects on children which may result in the transmission of violence from generation to generation;
3. the inadequacy of accommodation for women and children leaving violent relationships and the lack of accommodation options for men excluded from the home, which may result in them trying to return;
4. the lack of resources to deal with financial abuse, elder abuse and abuse of family members by teenage children;
5. the need to acknowledge and provide more support to all groups that face barriers in reporting family violence, including members of the LGBTIQ communities, older people, disabled people and people from culturally and linguistically diverse communities;
6. the particular difficulties faced by people affected by family violence and service providers in rural areas;
7. the challenges of holding perpetrators accountable for their violence, helping them to change their behaviour and responding to perpetrators who have complex needs;
8. the importance of universal service providers such as maternal and child health nurses, GPs and teachers, as well as work colleagues, in identifying signs of family violence and providing soft entry points for victims;
9. the need to support women at times that they are at the greatest risk of violence: during pregnancy, after giving birth and when taking steps to leave a relationship;
10. the need to make a range of services available to victims to keep them safe, to equip them to make choices about the options that are right for them and to empower and support them beyond the

- crisis stage - for some women this may involve wanting to remain in the relationship;
11. the importance of therapeutic interventions, especially for children; the innovations which have been made by police and service providers from the health, legal and specialist family violence sectors to improve responses, including those that make use of technology;
 12. the high rate of violence against women and children in Aboriginal and Torres Strait Islander communities and the important work these communities are doing to reduce violence and provide support to members of their communities who are affected by it;
 13. the roles which schools and other community organisations could play in preventing family violence;
 14. the importance of consistency and reliability in responses from the police and courts;
 15. the stress placed on workers in specialist family violence services, police and courts as a result of the huge increase in reporting of family violence incidents;
 16. the impacts of fragmented and siloed services on people who are seeking support and assistance;
 17. the multitude of initiatives to address family violence which unfortunately remain unevaluated and uncoordinated; and,
 18. finally, the need to collect data on the extent of family violence across all affected groups.”

Apart from the daunting task of considering all the submissions (about 1,000) and the evidence (150 or so Witness statements plus 3,192 pages of transcript), the Royal Commission is now moving on to Round Table discussions where particular issues can be debated and then a brief further set of public hearings from the week starting 12 October 2015.

While waiting for the report to be delivered in February next year, there are some things we as family lawyers can all do now -

1. When clients come to you pre-separation (or especially when separated under the one roof), take the time to explain the new wider definition of family violence to try and guide your client away from behaviour which would fall into the definition. In particular think about “economically abusive” behaviour when considering access to funds and housing on separation and what instructions you are prepared to accept about financial orders.
2. When a client alleges family violence, be precise in documenting the allegations. Give examples in your affidavits of incidents rather than simply stating that “there was family violence in the relationship”. Be aware of the risk assessment criteria used by the police (and others) and document incidents of violence during pregnancy, at separation and violence to animals in particular. If you see a client before they make an application for a family violence intervention order, give them a copy of your statement so they don't have to repeat (and remember to repeat) all the allegations.
3. Encourage clients to run their Intervention Order cases when assisted by the Police in particular so there are findings about family violence which can be taken into account when matters are in the family courts.
4. Subpoena the necessary material so that information is available to the family courts from the police file, the child protection file, the hospital records, doctors records and school records. Ask for permission to copy necessary documents and get them to the family report writer to ensure that they are considered properly.
5. Document incidents of family violence in your chronology documents for trial, looking out for the more nuanced incidents such as examples of economic abuse.
6. Attend any training you can. It is getting more sophisticated every day.

7. Talk to your colleagues and support each other. We all know family law isn't easy but it might just get a bit harder after the Royal Commission's Final report is released next year.

Appendix A

Royal Commission into Family Violence

TERMS OF REFERENCE

You are appointed to inquire into and report on how Victoria's response to family violence can be improved by providing practical recommendations to stop family violence.

You are required to:

1. examine and evaluate strategies, frameworks, policies, programs and services across government and local government, media, business and community organisations and establish best practice for:
 - a. the prevention of family violence;
 - b. early intervention to identify and protect those at risk of family violence and prevent the escalation of violence;
 - c. support for victims of family violence and measures to address the impacts on victims, particularly on women and children; and
 - d. perpetrator accountability;
2. investigate the means of having systemic responses to family violence, particularly in the legal system and by police, corrections, child protection, legal and family violence support services, including reducing re-offending and changing violent and controlling behaviours;
3. investigate how government agencies and community organisations can better integrate and coordinate their efforts; and
4. provide recommendations on how best to evaluate and measure the success of strategies, frameworks, policies, programs and services put in place to stop family violence;

and inquire into and report on any other matters reasonably incidental to those set out in paragraphs 1-4 above.

You may make such recommendations arising out of your inquiry as you consider appropriate, having regard to any matters you consider relevant including:

5. the need to establish a culture of non-violence and gender equality, and to shape appropriate attitudes towards women and children;
6. the needs and experiences of people affected by family violence with particular regard to children, seniors, Aboriginal and Torres Strait Islander communities, culturally and linguistically diverse communities,

gay, lesbian, bisexual, transgender and intersex communities, regional and rural communities and people with a disability and complex needs;

7. the need to identify and focus on practical short, medium and long term systemic improvements to Victoria's current response to family violence and the need for this response to be sustainable into the future;
8. the need for coordination across jurisdictions to provide the most effective response to family violence;
9. the systems and mechanisms to identify and appropriately prevent and respond to family violence, including information sharing and data systems; and
10. the expertise of professionals and academics working in the field of family violence, including any relevant international and Australian family violence research, past inquiries, reports and evaluations that may inform your inquiry and avoid unnecessary duplication.

Appendix B**FAMILY VIOLENCE PROTECTION ACT 2008 - SECT 5****Meaning of family violence**

- (1) For the purposes of this Act, *family violence* is—
- (a) behaviour by a person towards a family member of that person if that behaviour—
- (i) is physically or sexually abusive; or
 - (ii) is emotionally or psychologically abusive; or
 - (iii) is economically abusive; or
 - (iv) is threatening; or
 - (v) is coercive; or
 - (vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or
- (b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

Examples

The following behaviour may constitute a child hearing, witnessing or otherwise being exposed to the effects of behaviour referred to in paragraph (a)—

- overhearing threats of physical abuse by one family member towards another family member;
- seeing or hearing an assault of a family member by another family member;
- comforting or providing assistance to a family member who has been physically abused by another family member;
- cleaning up a site after a family member has intentionally damaged another family member's property;

- being present when police officers attend an incident involving physical abuse of a family member by another family member.
- (2) Without limiting subsection (1), "family violence" includes the following behaviour—
- (a) assaulting or causing personal injury to a family member or threatening to do so;
 - (b) sexually assaulting a family member or engaging in another form of sexually coercive behaviour or threatening to engage in such behaviour;
 - (c) intentionally damaging a family member's property, or threatening to do so;
 - (d) unlawfully depriving a family member of the family member's liberty, or threatening to do so;
 - (e) causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed so as to control, dominate or coerce the family member.
- (3) To remove doubt, it is declared that behaviour may constitute family violence even if the behaviour would not constitute a criminal offence.

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