

Submission: The role of victims of crime in the criminal trial process

12 November 2015

Introduction

safe steps Family Violence Response Centre (**safe steps**) is pleased to make this contribution to the Victorian Law Reform Commission's review of the role of victims of crime in the criminal trial process. We provide the commentary below with a view to enhancing access to justice for the women and children we support.

About safe steps Family Violence Response Centre

safe steps Family Violence Response Centre is Victoria's 24 hour, 7 day per week service for women and children experiencing family violence. **safe steps** provides a critical service intervention, including support, accommodation, advocacy and referral throughout Victoria and nationally. **safe steps** ensures that women and children experiencing family violence, including those at the highest risk of harm, receive an immediate response to keep them safe.

What is family violence?

Family violence involves an ongoing pattern of threatening, coercive and violent behaviour in a current or former domestic, intimate or family relationship. This not only includes physical assault, but also threats, verbal abuse, emotional and psychological abuse, abuse of institutional and administrative systems, economic abuse and control, social abuse and isolation, cultural or spiritual abuse, all of which cause a person to live in fear. Family violence includes criminal offences, but not all family violence is a criminal offence.

Family violence is most likely to be perpetrated by men towards women and children¹ – this makes family violence a gendered form of violence. Therefore, this submission will focus on women and children as the victims of family violence, and men as perpetrators of violence.

A note on terminology

References to *specialist family violence services* in this submission refer to services that work from a gendered understanding of family violence, in accordance with Codes of Practice for Victoria. These services include **safe steps** as the state-wide immediate response service, women's refuges, outreach services, legal and counselling services, as well as men's behaviour change programs. The 'specialist family violence system' also includes specialist police and court services, as well as provisions within the *Family Violence Protection Act 2008*.

Who is a victim?

Family violence is under-identified by most statutory and social service systems. Women and children who experience family violence often do not have a voice within many systems, including the justice system. Family violence includes many acts that are not criminal offences. Many perpetrators of family violence are never charged with family violence offences, and many charges are dismissed without prosecution. A restrictive definition of victim is therefore often a barrier for women and children who have experienced family violence.

Experiences of children

Family violence has profound effects on children, even when they do not directly observe physical or verbal abuse. Children depend on their parents to meet their needs, but when one parent is being abused this inevitably affects the child, whether or not the child observes the abuse. Abuse towards mothers affects all aspects of children's development, including the neurophysiology of the brain. This can have long-term consequences for children who live with family violence, such as mental illness, poor educational attainment and difficulties with social interaction. These effects of family violence on children are not well recognised in legislation, policy or service system design.

In 2014-15, 70,906 Victoria Police attendances at family incidents resulted in 27,058 charges. 24,436 children were identified among all family incidents attended², although it is estimated that 61% of women experiencing violence at the hands of their partner or ex-partner had children in their care.³

This indicates that the victimisation of children affected by family violence is not being recognised to the full extent. **safe steps** recommends that specific recognition is given to the impact of crime on children within the criminal justice system, including legislation.

The voice of the victim

1. *Should the role of victims in the criminal trial process be that of protected witnesses, participating witnesses or prosecuting witnesses?*

Women who have experienced family violence are experts in their lives. In **safe steps'** experience women who have experienced family violence require a range of options to ensure their safety and wellbeing – no two clients are the same. **safe steps** has supported clients who have sought remedies through the criminal justice system as well as clients who were too fearful to be involved in any criminal process. Furthermore, women's and children's needs for justice are not always sought within the criminal justice system.

Women who have experienced family violence are often concerned about participating in a criminal prosecution out of fear for their safety. As a result many women withdraw their testimony and charges are dropped.

In other jurisdictions where mandatory prosecution laws apply to domestic and family violence offences, women have paradoxically been charged with providing false testimony when they have withdrawn charges.⁴ Rigid definitions of the role of a victim in criminal prosecution may, similarly, have the unintended consequence of penalising women who make choices other than full participation according to a prescribed role. **safe steps** opposes any measures that would penalise women for prioritising their safety or exercising agency, and therefore supports a flexible approach.

safe steps recommends that the Victorian justice system adopts a flexible approach that seeks to maximise victims' capacity to make informed choices about their participation in criminal trials. This will ensure that victims of family violence participate to the extent that they are safe doing so, and with clear expectations about the process.

Victim advocacy

60. Are there gaps in the provision of victim support services?

61. How should victim support services be prioritised?

62. How might the delivery of victim support services in Victoria be improved?

63. Do victims need personalised legal advice and assistance? If so, how should such support be delivered?

safe steps supports the proposed measures to ensure that victims of crime can access information, legal advice and advocacy during the criminal trial process, independent of the Office of Public Prosecutions. These roles would not only be able to inform victims about their rights and the criminal trial process, but also to provide informed comment to the court on behalf of victims.

safe steps proposes that, for victims of family violence, these roles should be integrated into the family violence system, rather than a role within the criminal justice system.

Women need to be empowered well before and after a criminal prosecution in order to participate effectively and obtain a just outcome. Women require continuous support from whatever point they disclose violence including the process of initial police contact, as well as when police file charges, with bail proceedings, trial processes, sentencing, and parole. It would be beneficial for advocates for women and children experiencing family violence to have an official status or role within the criminal justice system, although the role would work best sitting outside the criminal justice system. Independent Domestic Violence Advisors already perform this role in the United Kingdom.⁵

Protecting witnesses

Risk identification and assessment

Family violence thrives through secrecy. Perpetrators of family violence usually go to great lengths to conceal the abuse they are perpetrating, and undermine the credibility of their victims with public authorities. The full extent of abuse is often unknown by anyone except the victim and the perpetrator. For this reason it is crucial that victims of family violence are believed when they disclose that they are being abused.

Comprehensive risk assessment by a trained practitioner is an important part of risk management, as it enables practitioners to make recommendations for appropriate support. The Victorian Family Violence Risk Assessment and Risk Management Framework (also known as the Common Risk Assessment Framework or CRAF) can be used by professionals in a range of settings to identify family violence risk factors.

There need to be opportunities for risk assessment built into the justice system. The extent of risk to women and children needs to be taken into consideration in sentencing processes. A formal role for Family Violence Support Advocates within criminal trials would allow this to occur, providing evidence from risk assessment to inform judicial processes and outcomes.

Complex risk factors

Many women who have experienced family violence are at ongoing risk of harm from family members of the perpetrator, even where an Intervention Order has been finalised or a criminal charge has been filed. It is therefore not clear whether many of the protective measures for victims of crime are always available to women in these circumstances.

32% of perpetrators of family violence against **safe steps** clients had a prior history of violence not perpetrated against family members. Some of these perpetrators had a prior criminal history, or have faced charges for these non-family violence related incidents. In these contexts, the involvement of the perpetrator with the criminal justice system can promote increased risk for women and children.

Where perpetrators of family violence are also involved with organised crime, women and children face elevated risk of harm, including homicide, from the perpetrator's associates and family members. A number of **safe steps** clients have therefore declined to participate in criminal prosecution because of this risk.

While **safe steps** acknowledges that this review is not concerned with protection of witnesses in general, the secrecy surrounding family violence can mean that risk to women and children is escalated through the justice system. **safe steps** emphasises that protective measures should be available to a range of witnesses, not only individuals

identified as the victim of crime. Furthermore, it is important for sentencing outcomes to be communicated clearly to any family members at risk when a family violence perpetrator is being sentenced.

Cross examination

safe steps supports the proposals in the Consultation Paper for the court to prevent cross-examination of victims of family violence. **safe steps** supports the extension of remote witnessing and video statement facilities that enable victims to participate safely in criminal prosecutions. However, these processes should ensure that victims have support through the process, and the decision to participate should remain with the victim.

Evidence from specialist family violence services

safe steps has had some experience of client records being subpoenaed for criminal prosecution, and staff members have appeared as witnesses in criminal trials. **safe steps** supports the practice of using evidence from specialist family violence services to inform judicial decisions. This has the potential to ensure women and children's choices and decisions are supported. **safe steps** believes there is particular value in evidence from specialist family violence services, as we are often the only agency with comprehensive information about the extent of harm to victims.

safe steps would support extending some provisions regarding *confidential communications* in sexual assault cases to evidence from specialist family violence services. Specialist family violence services may hold a range of information about clients, some of which would not be relevant to a criminal case. Sharing certain information may be detrimental to the client and violate their privacy. Furthermore, in certain cases there may be security concerns with regard to sharing certain information, e.g. addresses of emergency accommodation services or the victim's location. As a minimum measure, **safe steps** recommends that victims are informed beforehand and given the option to lodge an objection if any evidence from a specialist family violence services is to be subpoenaed in a criminal case.

There are some practical challenges for services if the number of subpoenas were to increase. The lack of formal recognition of this activity has meant that **safe steps** does not currently have the capacity to plan or budget for staff time preparing evidence or appearing at court. Resourcing support services such as **safe steps** to provide this role would enhance the support available to victims of family violence.

Conclusion

safe steps appreciates the opportunity to provide feedback on the review and looks forward to the release of the final report.

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Reference

- ¹ ANROWS (2014) *Violence Against Women: Key statistics*, available at: <http://www.anrows.org.au/publications/fast-facts/key-statistics-violence-against-women> (last accessed: 10/11/2015).
- ² Crime Statistics Agency (2015) *Family Incidents – Year Ending June 2015*, available at: <http://www.crimestatistics.vic.gov.au/home/crime+statistics/year+ending+30+june+2015/family+incidents> (last accessed: 10/11/2015), Data Tables, Table 1.
- ³ ANROWS (2014), Op. Cit.
- ⁴ Goodmark, L. (2009) 'Autonomy feminism: An anti-essentialist critique of mandatory interventions in domestic violence cases' in *Florida State University Law Review*, Vol. 37, No. 1, pp. 1-48.
- ⁵ Howarth, E. et. al. (2009) *Safety in Numbers: A Multi-site Evaluation of Independent Domestic Violence Advisor Services*, The Hestia Fund, The Sigrid Rausing Trust & The Henry Smith Charity, London, Table E3.