Family Violence Death Review Committee

Family Violence Death Review Committee (FVDRC)

Submission on Strengthening the Family Justice System

To:

The Independent Panel
Family Court Review
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From:

Family Violence Death Review Committee
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Health Quality & Safety Commission

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1. Mortality Review Committees

The Family Violence Death Review Committee (FVDRC) is a statutory committee established under the New Zealand Public Health and Disability Act 2000 (the Act) by the Health Quality & Safety Commission (the Commission) mandated to:

> (1) review and report to the HQSC on family violence deaths, with a view to reducing the numbers of family violence deaths, and to continuous quality improvement through the promotion of ongoing quality assurance programmes, and
>
> (2) develop strategic plans and methodologies that are designed to reduce family violence morbidity and mortality.

FVDRC members are drawn from a wide range of sectors, primarily justice, health, and academic research and NGOs. They have expertise in family violence. The following recommendations are based on the collective view and professional experiences of the FVDRC members to contribute to strengthening the Family Justice system.

2. Background

FVDRC initially made a submission to the Independent Panel examining the 2014 Family Justice reforms in November 2018. FVDRC has now reviewed the consultation document released in January 2019 by the Independent Panel and wants to provide further commentary to assist the Panel as it prepares to finalise its proposals to move towards a more flexible and responsive family justice system. We agree that to strengthen Family Justice services in New Zealand the following need to be implemented;

- recognising Te Ao Māori
- amplifying children's voices
- reducing delays
- increasing the system's ability to respond to diversity, and
- improving accessibility to quality information

Victims (primarily women) of family violence also experience inequities in the Family Justice system, which the document does not consider. The FVDRC believes that this warrants specific consideration and strategies to address these. We also believe that there needs to be consideration of Pasifika cultural values.

FVDRC is responding to the questions posed in the consultation document, along with further commentary when warranted, using the headings provided.

3. Focus on Children

The checklist in the former section 61 of the Care of Children Act 2004 does need to be reviewed before being used as part of a safety assessment process. The FVDRC has identified the following concerns with that list:

1. The checklist is firmly focused on physical violence only. It needs to be expanded to include verbal, psychological, emotional, financial and sexual abuse.
2. Exposing children to intimate partner violence (IPV) in all its forms must be understood as violence against the child and as a parenting decision that has been made by the perpetrator of family violence.

3. We reiterate that protecting children means acting protectively towards adult victims of IPV, including giving sufficient weight to their views on their children's safety.
4. There is no reference to, or ability to apply a primary victim, predominant aggressor analysis by all workers in the Family Justice system. The application of such an analysis would mean that victims who act to resist violence and are themselves violent (at times to protect children) are differentiated from the predominant aggressor.
5. The checklist fails to recognise coercive and controlling behaviour by the predominant aggressor and the entrapment of the primary victim of IPV.

What should be included in a comprehensive safety checklist?

A parenting assessment of the violent party that also considers:

- coercive and controlling behaviours that impact on the adult victim, preventing them from parenting the children
- how the coercive controlling behaviours impact on family functioning
- all reference to children "witnessing" abuse should be removed as they do not merely witness abuse they experience abuse either directly or indirectly.
- evidence of the primary aggressor's acknowledgement of their behaviour and evidence of steps being taken to address this behaviour both in terms of their own parenting, as well as their (potential) co-parenting with primary victim of their aggression.
- primary victims and their children's views on the predominant aggressor's behaviour

What information should be available to the Court to assess children's safety and in what circumstances?

Perpetrator behaviour needs to be understood as a pattern of harm, rather than one off, discrete incidents, or located only in the context of a particular relationship. All known family and general violence histories of parties should be available to the Court when making parenting orders and assessing the safety of the child.

Wellchild, education and public health providers have information that is useful to understand the psychosocial profile, and children's safety needs. This information can lead to early intervention services that can better support children and young people's wellbeing. A full psycho-social health assessment such as the HEADSS assessment completed by an appropriately skilled professional may be useful.

What role should specialist family violence workers have in the Family Court? Should there be separate workers for adults and children?

- provide advice to professionals in the Family Justice system
- provide advice to service users about family violence issues and services
- facilitate referrals to services for service users
- provide advice to the judge about the suitability of restorative justice, mediation etc.
- ensure the safety of the primary victim when restorative justice, mediation or other court ordered action is undertaken which involves participation by both the predominant aggressor and primary victim
- have the power to veto any interaction between the two parties if they deem it to be unsafe, both physically and psychologically
- ensure the safety of child/ren if court ordered contact with the predominant aggressor is actioned.

The role should not be separated, because to do so would create a silo. Instead it should be contained within one role, to reflect that intimate partner violence and child abuse and neglect are entangled. However, workforce training and competency needs to be lifted to ensure the approach to children alleviates any reluctance to disclose abuse, due to feelings of shame, guilt and anxiety about the experiences and the consequences of disclosure.

Do you have any other suggestions for more child-responsive court processes or services?

The FVDRC recommend the creation of a child advocate position where children are supported throughout the process and their views are sensitively gathered and heard by those making decisions about their lives. Further independent research may be needed to evaluate the efficacy of the current lawyer for child (LFC) undertaking such activity. LFC are trained as lawyers, not specialist child interviewers, so their ability to get the 'child's voices' in the best way for the child may be compromised. Their role may still be to the legal advocate for the child's views/welfare but the information for the views may be best provided by a professional more specialised in the field. We need to ensure that children who have been subjected to domestic violence directly or indirectly are not further victimised by professionals in the system.

4. Te Ao Māori in the Family Court

The FVDRC supports the findings of the panel that there should be more done to provide culturally responsive services and supports to Māori. Achievement of mauri ora (Māori lives free of violence) requires a change in the way whānau violence/harm is understood and responded to. As outlined in the Ministry of Women's Affairs report on preventing violence against Māori women, this responsiveness should be strengths-based and cognisant of Māori cultural practices and values.

Māori experiences of IPV must be contextualised within the ongoing impacts of colonisation, including the stigma and structural racism experienced by Māori. Transformational changes in Family Justice practices are needed and should be undertaken in close collaboration with Māori to ensure that such changes are responsive to the needs and aspirations of Māori.

The FVDRC feels strongly that under Te Tiriti o Waitangi both the Ministry and the Government have an obligation to ensure improved outcomes for whānau in the Family Justice system. The FVDRC make the following recomendations;

- that processes are informed by Te Tiriti o Waitangi, demonstrating true partnership between the justice system, Government and Māori
- whānau need to be properly supported through the Family Justice system, prefereably by Māori staff or staff who are culturally responsive and sensitive to the multiple challenges and disadvantages that whānau may face
- provision of culturally responsive resources and services, to assist whānau to understand and be fully informed about the processes, including opportunities for participation, outcomes and implications of the family court's decisions

How could the Ministry of Justice or the Government partner with hapū, iwi or Māori organisations to deliver services?

Where family violence is an issue for parties, the FVDRC would like to see an increased range of interventions that are designed for tāne that recognise while tāne may perpetrate family violence today, many have their own stories as victims of child abuse and neglect (CAN) and family violence (including exposure to IPV). Whānau who may be fractured require all within that whānau to heal, including tāne who perpetrate violence. Wider access to kaupapa Māori based services, that understand the

association between family violence, substance abuse and issues of trauma and mental distress, and offer an integrated response, is essential. Culturally responsive services that can work with abusive Māori men who are fathers and Māori men with co-occurring problems, such as substance abuse or mental health issues, are required.

Residential programmes would offer the opportunity to remove the abusive partner from the physical vicinity of the victim while providing a range of interventions that address co-occurring issues. The resourcing of iwi and Māori organisations to provide Kaupapa Māori (by, for and with Māori) services would make a huge contribution towards supporting whānau to be violence-free.

How would you incorporate tikanga Māori into the Family Court?

The FVDRC support the proposed changes that would ensure cultural responsiveness training for family violence justice professionals, including court staff, LFC and the Family Court bench. This training should include training for all on the whakapapa of whānau violence and the ongoing impacts of colonisation and intergenerational trauma on whānau.

Increasing the appointments of Māori judges in the family court and Māori staff who have deep understandings of tikanga and Te Ao Māori, as well as improving the framework for cultural information to be heard in court, is essential. Decision-making processes could involve wider family/ whānau in care decisions when appropriate.

5. Quality, accessible information

What information do you think would help service providers, community organisations, lawyers and family justice professionals to achieve a joined-up approach to the Family Justice Service?

More coordination is required, along with increased sharing of information. Resources need to be easily understood and relatable and using consumer feedback through focus groups would help to create these. The Family Justice system could consider mapping of local service providers and community organisations, so that Judges and Family Justice professionals know what is available locally to support people through the process. The reforms could consider 'navigators' being assigned to cases, under the auspices of the newly proposed FJS Co-ordinators.

FVDRC believe that Family Court Judges and other professionals need to have the opportunity to review cases where there have been adverse outcomes. This information can act as a catalyst to change by promoting insights about systems improvement, referral processes and workforce upskilling.

6. Counselling and therapeutic intervention

Would the three proposed types of counselling meet parties' needs, or are there gaps in the counselling services that need to be filled? For example, should there be counselling available to children?

FVDRC support the proposed new focus of counselling and that it should be made available at any part of the process, free of charge, and extended to include children. The Committee believe that counselling should be age-appropriate and parties who are identified as violent, coercive or controlling in the relationship should not be able to veto children's access to counselling without providing rationale that stands up to scrutiny by the Court.

Where counselling is made available, there needs to be a range of service providers who can use a culturally-informed framework, as appropriate.

Counselling should not be compulsory, and family violence cases should automatically be considered complex cases and managed accordingly. The FVDRC is concerned that victims of family violence could feel pressured to attend counselling to demonstrate to the Family Justice system that they are committed to reaching outcomes. There is a risk that failure to attend could be wrongly interpreted as being obstructive or choosing not to engage in the process.

The FVDRC is also concerned that primary victims may feel the need participate in counselling to appease their abuser, to gain greater safety for their children. The Court will need to ensure that ongoing coercive and controlling tactics could not be allowed to continue by attending counselling. This is especially important because the dominant party in the dynamic can potentially benefit from any agreements made.

Are Parenting Through Separation/Family Dispute Resolution suppliers, Family Justice Service Coordinators and Judges best placed to refer people to counselling? Are there any other service providers who should be able to refer to counselling or should people able to refer themselves?

Referral pathways to counselling need to be both flexible and inclusive. Individuals should be able to self-refer for counselling, as well as NGOs working with victims and perpetrators.

Ensuring a specialist family violence worker is involved in the assessment of the suitability of both parties to attend will be critical. When assessing whether counselling is appropriate it is necessary to conduct a detailed assessment of the level of entrapment experienced by the victim. Counsellors working in the Family Justice system also need to be experienced in understanding dynamics of family violence and creating safety for victims. Any counselling should begin with an assessment that includes inquiry about family violence and safety issues.

It is important to establish that the victims consent to attend is given free from the power and control tactics of the abuser. This requires an assessment of the history of the predominant aggressor's coercive and controlling behaviours (including responses to any acts of resistance on the part of the victim), the history of institutional responses to victim's help-seeking behaviours and any structural inequities that have exacerbated entrapment in this case.

Should confidentiality be waived when parties are directed by the court to therapeutic intervention, in what circumstances and regarding what matters?

FVDRC is concerned that waiving confidentiality in family violence cases may create further risks, not least of which is that primary victims may not seek help from agencies such as health (including during the court process which will undoubtedly be stressful), if they fear their confidentiality is not assured. Care needs to be taken in advocating such a move because it may lead to more systematic abuse for victims by one party maintaining some psychological control or oversight of the other party.

Provisions under the Privacy Act currently exist for practitioners to disclose information if there are serious concerns about safety. FVDRC believes these provisions are enough, as there may well be unintended consequences if confidentiality were to be waived more broadly.

If confidentiality were to be waived, it should only be after judicial consideration of the nature of the information obtained and whether disclosure of the information outweighs the risks of non-disclosure. We would have concerns if disclosure was not confined to the reports on the court-ordered therapeutic intervention, and it could potentially include other information such as confidential medical/health information.

7. Parenting Through Separation

The FVDRC agree that the PTS programme needs to be more accessible to a diverse range of people. The content requires updating to reflect current research, with ongoing provision to review. It should include more detail about the long-lasting damage to children of family violence and promote an understanding that abusing another adult who is parenting a child, is abusing a child. The programme needs extending to be inclusive of diverse care situations, including grandparents.

Do you agree that there should be an expectation on parties to attend Parenting Through Separation, rather than having it as a compulsory step for everyone?

Given that there are issues of relevance and accessibility currently, compulsory attendance would seem too restrictive and problematic, so an expectation seems more appropriate. Compulsory attendance at programmes for women who are extricating themselves from violent relationships is particularly problematic. Parties who are victims of family violence are focused on creating safety for themselves and their children, and they have many pressing concerns like housing, income etc to attend to. They should not have additional burdens placed upon them unless it is their desire to attend. The timing of attendance should be determined by them, according to their priorities.

If PTS is not mandatory, how should this expectation of attendance be managed and achieved?

It could be dealt with as an opt out system, where parties can cite reasons for exemption to officials, outlining reasons why it is not appropriate in their circumstances. This could be an opportunity to identify family violence dynamics in operation, that may not be immediately apparent. Granting such exemptions could sit within the powers of the senior Family Court registrar.

8. Family Dispute Resolution

Family Disputes Resolution only works well if there is no power imbalance in the relationship. The concern is whether separated parents are sufficiently resourced to effectively and safely participate in the process. This includes being able to access legal advice before participating and being able to have an advocate raising issues of power and control, as often a victim of domestic violence may not be fully aware of the power imbalances in the relationship. FVDRC is opposed to victims of violence being compelled to undertake any mediation process where there is an assumption of a "level playing field". Where family violence has been a feature, no such playing field exists. FVDRC agree that costs should be removed as a barrier to attendance.

Do you agree with the idea of a rebuttable presumption? If so, how might it be worded to make sure that parties take part in Family Dispute Resolution unless there are compelling reasons not to?

A rebuttal presumption would seem appropriate in these circumstances and should include as a "compelling reason" that there has been coercive and controlling behaviour, or a reasonable expectation of that behaviour should the couple attend FDR. Examples of compelling reasons should be provided to people, and family violence should be specifically mentioned. Possible wording may be:

"If you fear for your own or your children's safety – please outline your concerns fully"

Do we need stronger obligations on family justice professionals to promote FDR and conciliatory processes generally?

Not where there is a history of family violence. FVDRC is concerned that FDR providers are not adequately skilled or supported to screen effectively for family violence, and some cases proceed to FDR where there are concerns about family violence and safety.

9. Legal advice and representation

FVDRC supports the reinstatement of legal representation at all stages of the COCA 2004 proceedings, with legal aid for those qualifying. They advocate that legal aid should be free where there are safety issues to a parent or child. Currently legal aid is a loan that must be repaid but we think it should be free when applications are made under the Care of Children Act to obtain parenting orders to protect children. The earlier the intervention the better chance of safety and cost should never be a barrier to safety.

Is there a place for more accessible provision of funded legal advice for resolution of parenting disputes outside of court proceedings? What would the key elements of this service be and how could it be achieved? For example:

- **Should it be part of a legal aid grant, or**
- **could there be an enhanced role of FLAS 1 (giving a person initial information and advice on the out-of-court processes), including the creation of a solicitor-client relationship?**

FVDRC believes there should be more accessible provision of funded legal advice for resolution of parenting disputes, by better targeting of legal aid. FLAS was introduced to simplify the process but has created another step in the process. Victims of family violence and those challenged by mental health conditions must engage with numerous professionals and navigate a complex system with little support. FVDRC believes it would be more effective and efficient to establish a relationship with their legal advocate from the outset, rather than creating additional steps for them to go through. Because of the limited scope of FLAS victims of family violence are less likely to disclose information about their situation. They need consistency of representation, rather than multiple, potentially disruptive and disjointed relationships.

10. Case tracks and conferences

FVDRC agree with the proposal to simplify the case track process to 2 tracks, reduction in conferences and increasing use of video and telephone conferences. The latter should be utilised where there has been family violence to reduce the potential for intimidation when a victim and abuser are required to be present. The provision of an advocate/support person for victims of abuse should be more proactive and advocates should have the ability to speak on behalf of parties if necessary, with leave of the Court.

11. Without notice applications

Will reinstating legal representation be enough to reduce the number of without notice applications? Or would other interventions be required? For example, are sanctions required for unnecessary without notice applications? If so, what sanctions would be appropriate?

FVDRC believes that reinstating legal representation will reduce the number of without notice applications. Those that still file unnecessarily should be sanctioned by the Judge if it is an ongoing pattern of counsel's behaviour.

13. Complex cases

What types of therapeutic intervention would be useful in complex cases? For example, should a judge have the power to direct a party for psychological or psychiatric assessment or alcohol and other drug assessment?

Family violence cases should be considered complex cases, and Judges should have the power to direct a party for psychological or psychiatric assessment or alcohol and other drug assessment with practitioners also skilled in family violence dynamics.

People challenged by mental health conditions need additional support and preparation to face initial family court hearings.

14. Cultural information in Court

What could be done to encourage lawyers and judges to make better use of s133 cultural reports? For example, should there be a different threshold for cultural reports? If yes, what would be an appropriate threshold?

To make better use of s133 cultural reports there needs to be a pool of cultural report writers available to write these, and they need to be given weight in Court proceedings.

15. A "new" role – Family Justice Service Coordinator

What do you think of our proposal to create a new role; the Family Justice Services Coordinator (FJSC)?

FVDRC supports this proposal.

16. A "new" role – Senior Family Court Registrar

What do you think of our proposal to establish a Senior Family Court Registrar position?

FVDRC supports this proposal.

17. Lawyer for child

Do you agree with our proposal to introduce new criteria for appointment of lawyer for the child to make sure of the best fit?

Yes, although the decision makers applying the criteria should themselves have expertise in child development and attachment, understanding the impact of trauma on development and attachment and in recognising and understanding the dynamics of family violence. We believe an accreditation process would be more robust than applying a set of criteria. LFC is asked to deal with the most vulnerable users of the Family Justice system and who have the least voice. They should therefore be subject to robust scrutiny of their work and skills to both be accountable and avoid further compounding unintentional harm to children.

What are the core skills for the role of lawyer for the child, and what training and ongoing professional development do you see as necessary to develop those skills?

Lawyers representing children must receive training in family violence, care and protection of children and child and youth development and be kept informed of current and relevant research. The Lietner Centre Report[1] recommended that "given the significant role they each play in addressing violence against women, the government should establish mechanisms for mandatory training on domestic violence for both judges and lawyers".

Do you see a role for an additional advocate with child development expertise to work together with the lawyer for the child, to support the child to express their views and make sure they're communicated to the judge?

Yes, FVDRC supports a role such as this to alleviate distress and mitigate negative outcomes.

18. Psychological reports

The issues raised about psychological reports also apply to psychiatric reports ordered under Section 178 of the CYPF Act, which are usually written on a parent/caregiver, but which can be written on a child who is the subject of care and protection proceedings.

[1] Lietner Center for International Law and Justice, It's Not OK: New Zealand's Efforts to Eliminate Violence Against Women, Fordham University, New York, at p 30 and see also p 24. 2008