



## **WOMEN'S DOMESTIC VIOLENCE COURT ADVOCACY SERVICES (WDVCAS) FORUM**

**Wednesday 1 June 2022  
Rydges World Square  
Sydney**

**DEPUTY CHIEF MAGISTRATE SHARON FREUND**

**'KEYNOTE ADDRESS: DOMESTIC AND FAMILY VIOLENCE AND THE COURT:  
NOW AND INTO THE FUTURE'**

### **INTRODUCTION**

- 1 I am honoured to have been asked to present a keynote address today at the 2022 Women's Domestic Violence Court Advocacy Services (WDVCAS) Forum.<sup>1</sup>
- 2 Before I begin my presentation, I would like to acknowledge the Traditional Custodians of the land upon which we meet today, the Gadigal people of the Eora Nation, and recognise their continuing connection to land, waters and culture. I pay my respects to their Elders past and present and pay my respects to any Aboriginal or Torres Strait Islander people who are present here today.
- 3 I would like to recognise the over-representation of Aboriginal and Torres Strait Islander people in the Local Court's jurisdiction. I acknowledge that this

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<sup>1</sup> I acknowledge the considerable help and valuable assistance in the preparation of this paper by the Associate to the Chief Magistrate, Astrid von Drehnen.

overrepresentation is intrinsically linked to historical and ongoing experiences of intergenerational trauma, dispossession, institutionalisation, and colonisation.<sup>2</sup>

- 4 The ongoing legacies of colonialism are starkly manifested in the domestic and family violence context and the Local Court is committed to making a positive contribution to the work being done in relation to the Closing the Gap targets and to addressing structural inequalities.
- 5 I would also like to take this opportunity to express my sincere thanks for the important work carried out by the Women's Domestic Violence Court Advocacy Services in helping women and children who are experiencing domestic and family violence to better navigate the legal system and connect with vital support services. The assistance that you provide to vulnerable women and children across the Local Court's locations is invaluable, and does not go unnoticed.
- 6 I was invited to speak to you today on the topic of 'Domestic and family violence and the Court: Now and into the future'. In order to address this subject, I will begin by outlining some recent developments and live issues relating to domestic and family violence from my perspective as a Deputy Chief Magistrate of the Local Court of NSW. I will then discuss my hopes and vision for the future.
- 7 I assume we all have the same dream, or utopia. A world without any violence, where everyone no matter what shape, size or cultural background is treated equally. A world which is caring and where everyone has equal access to health care and justice.

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<sup>2</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander People*, Report No 133 (2018) 11.45; Judge Peter Johnstone (2022) 'Opening Address' Paper delivered at the 2022 Local Court Southern Regional Conference, Kiama.

- 8      However, the reality is that we do not live in a perfect world. Consequently, we need to have a legal system which protects the vulnerable, which protects victim-survivors and one which empowers victim-survivors to come forward and which listens to their voices when they do. My hope is that we can work collaboratively to achieve these objectives and to develop strategies and processes to ensure that the legal system does not perpetuate the trauma already experienced by victim-survivors.

## **THE NOW**

- 9      I was appointed as a Magistrate of the Local Court of NSW in 2006 and was appointed to the role of Deputy Chief Magistrate on 17 December 2021. I am immensely honoured to hold this role. Since my appointment to the bench, I have presided over cases in the Local Court's criminal and civil jurisdictions, the Coronial jurisdiction and the Children's Court jurisdiction.
- 10     Following my appointment to the role of Deputy Chief Magistrate, I was allocated responsibility for the area of domestic and family violence within the Local Court. As a part of this role, I meet regularly with court stakeholders including DVNSW, NSW Police and Legal Aid NSW; am involved in policy and law reform; and Chair the newly established Local Court Family Violence Committee.
- 11     The Local Court Family Violence Committee meets bi-monthly to discuss legislative issues and law reform, issues relating to the Court's practices and procedures as they pertain to domestic and family violence, feedback that has been provided to the Court by members of the judiciary and our stakeholders and operational considerations relating to DFV. In my view, the establishment of the Family Violence Committee is significant as it highlights that the Local Court is committed to taking the issue of domestic and family violence seriously now and into the future.

## Current Issues

### Covid-19 Challenges

- 12 The Covid-19 Pandemic has posed considerable challenges to the Court's operations and has impacted the Court's ability to resolve matters in accordance with its published time standards.<sup>3</sup>
  
- 13 As a part of its plan to ameliorate the delays which have occurred as a result of the Pandemic and to increase timely access to justice, earlier in the year the Court identified six unused courtrooms and brought them back online for the purposes of working through the Court's hearing backlog. On 14 March 2022, the Court began using these courtrooms to conduct super call-overs where priority matters over 2 years old and those which are 1 – 2 years old are triaged and then allocated a hearing date. Of these priority matters, cases involving defendants in custody were given first priority followed by domestic and family violence (DFV) matters. From my experience on the bench over the past 16 years, I am keenly aware that time is of the essence in cases involving DFV, and I intend to develop and put in place further strategies to ensure that DFV matters are dealt with expeditiously.
  
- 14 In my view, this is incredibly important in light of a 2020 study conducted by the Australian Institute of Criminology which found that the Covid-19 Pandemic coincided with the onset or escalation of family violence and abuse experienced by women.<sup>4</sup> Devastatingly, the study also found that many of the

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<sup>3</sup> The Local Court of NSW, *2020 Annual Review* (Annual Review, 2020), 16  
< <https://www.localcourt.nsw.gov.au/publications/annual-reviews.html> >.

<sup>4</sup> Hayley Boxall, Anthony Morgan and Rick Brown, *The prevalence of domestic violence among women during the Covid-19 pandemic* (Statistical Bulletin 28, July 2020) Australian Institute of Criminology, 1  
< [https://www.aic.gov.au/sites/default/files/2020/07/sb28\\_prevalence\\_of\\_domestic\\_violence\\_among\\_women\\_during\\_covid-19\\_pandemic.pdf](https://www.aic.gov.au/sites/default/files/2020/07/sb28_prevalence_of_domestic_violence_among_women_during_covid-19_pandemic.pdf)>.

women surveyed reported that safety concerns presented a barrier to seeking help during this time.<sup>5</sup>

- 15 Additionally, I would like to highlight that I have observed an anecdotal increase in the incidence of systems abuse in DFV matters which come before me since the start of the Pandemic. In these cases, perpetrators attempt to manipulate the legal system and social services to their advantage with the intention of causing further harm to the victim-survivor by reasserting their control over them.<sup>6</sup> This is a concerning trend which I believe we all need to be attuned to in order to prevent inadvertent collusion with perpetrators of DFV.

### **Court Appointed Questioner Reforms**

- 16 Another live issue in the Local Court jurisdiction in the context of family and domestic violence proceedings is the implementation of s 289VA of the *Criminal Procedure Act 1986* (NSW) (the 'CPA'). This section was introduced into the CPA by the *Stronger Communities Legislation Amendment (Domestic Violence) Act 2020* (NSW) and commenced on the first of September 2021.
- 17 Section 289VA prevents an unrepresented accused from directly examining a complaint in proceedings for domestic violence offences and in associated ADVO proceedings. Instead, examination in chief, cross examination and re-examination is to be carried out by a person appointed by the court or via technology.

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<sup>5</sup> Ibid.

<sup>6</sup> Victorian Aboriginal Legal Service, *Addressing Coercive Control Without Criminalisation: Avoiding Blunt Tools that Fail Victim-Survivors* (VALS Policy Paper, January 2022), 28 <<https://www.vals.org.au/wp-content/uploads/2022/01/Addressing-Coercive-Control-Without-Criminalisation-Avoiding-Blunt-Tools-that-Fail-Victim-Survivors.pdf>>. ; The Australasian Institute of Judicial Administration Inc, *Systems Abuse*, (National Domestic and Family Violence Bench Book, June 2021) <<https://dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/systems-abuse/>>.

- 18 In theory, the introduction of this legislative amendment is positive as s 289VA intends to provide a necessary safeguard for complainants in domestic violence proceedings by addressing potential power imbalances and mitigating the risk of re-traumatisation. Unfortunately, however, the way in which this scheme has been implemented has been problematic in practice.
- 19 One major practical issue with this legislative amendment from the Court's perspective is the question of who is best placed to perform the role of the Court Appointed Questioner ('CAQ').
- 20 Currently, Local Court registry staff are being appointed to conduct the CAQ role in domestic violence proceedings. The Chief Magistrate's Office has determined that the Court will only appoint registry staff who have volunteered to carry out the CAQ role due to the distressing nature of many of these cases and because of the type of work which is required on behalf of the CAQ to effectively discharge this function.
- 21 This issue is further complicated by the fact that the technology referred to in the legislation has not been provided to the Court. Furthermore, the Court is not empowered with any discretion under the legislation to determine whether or not a CAQ should be appointed. Consequently, I am concerned that an absence of appropriate and willing CAQs may result in additional delays which, in turn, have the potential to cause further trauma to the person in need of protection contrary to the fundamental intention behind this legislation.
- 22 In my view, funding should be allocated for the purposes of setting up a dedicated team of appropriately qualified CAQs to carry out this role due to the real risk that CAQs may experience vicarious trauma as a result of the confronting nature of domestic violence proceedings and to prevent unnecessary delays.

### **Prospective Coercive Control Legislation**

- 23 The term ‘coercive control’ was coined by Professor Evan Stark, a forensic social worker, who enunciated that its four main elements are intimidation, isolation, control and violence.<sup>7</sup> Whilst there currently isn’t a generally agreed upon definition of coercive control, it ‘is often described as a pattern of behaviours within intimate relationships that results in the microregulation of the lives of victim–survivors’.<sup>8</sup>
- 24 Coercive control has also helpfully been conceptualised as: ‘not simply an action within a list of other actions that may constitute DFV, but is the context in which DFV occurs.’<sup>9</sup>
- 25 In 2021, the NSW State Government committed to criminalising coercive control in intimate partner relationships and to implementing a standalone offence of coercive control as a part of its response to the recommendations which were handed down by the Joint Select Committee on Coercive Control (Joint Select Committee).<sup>10</sup>
- 26 During its inquiry, the Joint Select Committee heard evidence from the NSW Domestic Violence Death Review Team who reported that ‘99 percent of domestic violence homicides between 2008 and 2016 (111 out of 112) were preceded by coercive control’.<sup>11</sup> This stark statistic highlights the grave

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<sup>7</sup> Dr Dina McMillan, ‘Criminalising coercive control: a complex discussion’ (2021) 33(6) *Judicial Officers’ Bulletin* <[https://jirs.judcom.nsw.gov.au/publish/job/vol33/jul/making\\_coercive\\_control\\_illegal.html#ftn.firqy66](https://jirs.judcom.nsw.gov.au/publish/job/vol33/jul/making_coercive_control_illegal.html#ftn.firqy66)>

<sup>8</sup> Hayley Boxall and Anthony Morgan, *Experiences of coercive control among Australian women* (Statistical Bulletin 30, March 2021) Australian Institute of Criminology, 2 <[https://www.aic.gov.au/sites/default/files/2021-03/sb30\\_experiences\\_of\\_coercive\\_control\\_among\\_australian\\_women\\_v2.pdf](https://www.aic.gov.au/sites/default/files/2021-03/sb30_experiences_of_coercive_control_among_australian_women_v2.pdf)>.

<sup>9</sup> Australia’s National Research Organisation for Women’s Safety, *Accurately identifying the ‘person most in need of protection’ in domestic and family violence law: Key findings and future directions* (Research to policy and practice paper, November 2020), 2 <<https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2020/11/ANROWS-RtPP-Nancarrow-PMINOP.pdf>>.

<sup>10</sup> Department of Communities and Justice, *Government to criminalise coercive control* (18 December 2021) <<https://www.dcj.nsw.gov.au/news-and-media/media-releases/2021/government-to-criminalise-coercive-control.html>>.

<sup>11</sup> Parliament of New South Wales Joint Select Committee on Coercive Control, *Coercive Control in domestic relationships* (Report, 1/57, 30 June 2021) 2, <<https://www.parliament.nsw.gov.au/ladocs/inquiries/2626/Report%20-%20coercive%20control%20in%20domestic%20relationships.pdf>>.

seriousness of this insidious form of abuse and demonstrates that coercive control is frequently an indicia of intimate partner homicide.<sup>12</sup>

- 27 The Local Court finalises approximately 38,000 domestic violence matters per year<sup>13</sup>, and whilst there is a gap in our knowledge around the prevalence of coercive control in these cases, there is research which suggests that ‘coercive control is a very common feature of women who experience any form of violence or abuse within their relationships’<sup>14</sup>. As such, the Local Court looks forward to being involved in any ongoing consultations that may occur in relation to this significant piece of law reform due to the inherent complexities involved in developing this prospective legislation.<sup>15</sup>
- 28 One such complexity, which you may have encountered in your work, and which must be considered as a part of the legislative reform process is the issue of the misidentification of the person in need of protection. Research conducted by Australia’s National Research Organisation for Women’s Safety Limited (ANROWS) has found that ‘women—especially Aboriginal and Torres Strait Islander women—are being misidentified as perpetrators’ of DFV and are being named as respondents on protection orders.<sup>16</sup>
- 29 In my view, accurately identifying the person most in need of protection is critical in the context of coercive control in light of the bidirectional links which have been identified between misidentification and systems abuse; whereby systems abuse contributes to misidentification and misidentification further enables the perpetration of systems abuse.<sup>17</sup> This is highly relevant in light of reported concerns that systems abuse involving image management and false accusations are being employed successfully against people who can’t

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<sup>12</sup> Victorian Aboriginal Legal Service (n 5) 9.

<sup>13</sup> The Local Court (n 2) 18.

<sup>14</sup> Australian Institute of Family Studies, *The power in understanding patterns of coercive control* (Audio Transcript, 19 January 2022) < <https://aifs.gov.au/cfca/webinars/power-understanding-patterns-coercive-control> >.

<sup>15</sup> Dr Dina McMillan (n 6).

<sup>16</sup> Australia’s National Research Organisation for Women’s Safety (n 8) 1.

<sup>17</sup> *Ibid*, 8



communicate fluently in English, in circumstances where interpreters are not being utilised.<sup>18</sup>

- 30 Another serious consequence of misidentification is the potential for victim-survivors to be retraumatised through criminalisation, which in turn, impacts upon their ability to access vital support services such as emergency housing.<sup>19</sup>
- 31 Concerns relating to the issue of misidentification in the context of criminalising coercive control have been discussed by the Victorian Aboriginal Legal Service (VALS), who have expressed that there is a 'substantial risk that victim-survivors, particularly Aboriginal women, will be misidentified as having engaged in domestic abuse, and that a new law would create tools for abuse to be perpetuated'<sup>20</sup>.
- 32 Additionally, VALS have articulated that the creation of a new standalone offence of coercive control may have unintended and disproportionate consequences for marginalised communities by increasing the ways in which people can become enmeshed in the criminal justice system.<sup>21</sup>
- 33 In light of these considerations, I am of the opinion that nuanced discussions around the criminalisation of coercive and controlling behaviours are required to ensure that any legislation which is introduced truly protects and meets the needs of victim-survivors and does not have the unintended consequence of compounding trauma, disadvantage or systemic bias.

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<sup>18</sup> Ibid.

<sup>19</sup> Victorian Aboriginal Legal Service (n 5) 29.

<sup>20</sup> Ibid, 6.

<sup>21</sup> Ibid, 23.

## THE FUTURE

- 34 I will now turn to outline my hopes for the future.
- 35 Since my appointment to the Bench of the Local Court in 2006, our collective understandings of domestic and family violence, coercive control and trauma have increased dramatically. One of my aspirations for the future is that the law which applies to domestic and family violence proceedings embodies these contemporary understandings.
- 36 The current civil and criminal legislative frameworks which operate in the sphere of domestic and family violence in NSW have their genesis in law reform which took place in the 1980's. In 1982, the need to address domestic violence was recognised as a distinct issue by legislation in NSW for the first time with the passing of the *Crimes (Domestic Violence) Amendment Act 1982* which introduced the ADVO scheme.<sup>22</sup>
- 37 In my view, the legislative reforms which have since taken place over the past decade can arguably be categorised as a retrofitting of this framework, whereby amendments are made on an ad hoc basis in order to align legislation with current knowledge. The CAQ reforms which I discussed previously in my presentation are a good example of what I have termed 'retrofitting'.
- 38 In light of these considerations, I would be supportive of the development of an innovative evidence-based legislative framework that is fit for purpose, is centred on meeting the needs of victim-survivors and which holds perpetrators of DFV to account.

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<sup>22</sup> Gareth Griffith, *Domestic Violence: An Overview of the Legislative Changes in NSW* (NSW Parliamentary Library Research Service Briefing Paper No 18/95, May 1995) <<https://www.parliament.nsw.gov.au/researchpapers/Documents/domestic-violence-an-overview-of-the-legislative/Domestic%20Violence%20An%20Overview%20of%20the%20Legislative%20Changes%20in%20NSW.pdf>>, 1.

- 39 The development of such an approach may also help to address the issue of duplication which currently occurs where members of the same family are involved in multiple proceedings across different courts such as the Local Court, Children's Court and the Federal Circuit and Family Court of Australia. As a result of this duplication, a victim-survivor may have to go through the parallel court processes. This issue is further compounded by the fact that there is very little communication which occurs between these different jurisdictions and as a result, conflicting court orders may be put in place. Unfortunately, duplication can also create additional avenues for the perpetration of systems abuse and can exacerbate power imbalances in circumstances where one party to the proceedings has greater access to financial resources than the other.
- 40 The subject of preventing duplication ties into my other key vision for the future – namely, the establishment of specialist family violence courts in NSW.
- 41 I believe that there would be merit in further exploring<sup>23</sup> the option of implementing specialist family violence courts in NSW for a number of reasons. Firstly, domestic and family violence is an incredibly complex subject and DFV cases are often imbued with trauma. Consequently, it would be of value for judicial officers, legal practitioners and court staff who work in this area to complete specialist training. This training should include education around working with people from culturally and linguistically diverse backgrounds to ensure the provision of respectful and culturally inclusive services. In my view, this is critical both now and into the future. Having Magistrates, legal practitioners and court staff with specialist expertise conduct DFV cases would be beneficial as it would assist to ensure that professionals working in this area have a nuanced understanding of the relevant law and up to date knowledge around trauma-informed practices.

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<sup>23</sup> For information on previous specialised family violence court pilot programs in NSW, see: Australian Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report 114, 11 November 2010) <<https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/32-specialisation-3/existing-specialised-family-violence-courts-in-australia/>>.

This would in turn, have the potential positive flow on effect of enhancing trust in the justice system.

- 42 Secondly, having a centralised forum where DFV Matters could be dealt with by those with specialised knowledge of the different areas of law where DFV intersects would also assist to prevent the re-traumatisation of victim-survivors by resolving the issue of duplication.
- 43 Thirdly, implementing specialist family violence courts may assist in ensuring that DFV matters are dealt with in a timely way, ideally within days, weeks or months depending on the type of matter.
- 44 Fourthly, having specialised family violence courts would provide numerous practical benefits that would assist the Court to enhance court user safety and its service delivery. For example, a key feature of the Specialist Family Violence Courts which have been implemented in Victoria include ‘targeted infrastructure upgrades to provide a purpose-built environment that maximises safety and choice. This can include a separate entrance/exit for victim survivors, safe waiting areas and interview rooms, remote witness facilities and child friendly spaces’.<sup>24</sup>
- 45 I would like to highlight that a number of the Specialist Family Violence Courts which have been implemented in Victoria include a dedicated Aboriginal and Torres Strait Islander family violence support program known as Umalek Balit, which means *give strength* in Woiwurrung.<sup>25</sup> In my view, providing culturally appropriate and inclusive services is an essential part of increasing equitable access to justice for victim-survivors of DFV.

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<sup>24</sup> Australian Government, Specialist Family Violence Courts and Family Violence Contact Centre (October 2021) <<https://plan4womenssafety.dss.gov.au/initiative/specialist-family-violence-courts-and-contact-centre/>>.

<sup>25</sup> Ibid.

## **CONCLUSION**

- 46 Once again, on behalf of the Local Court, I would like to thank you for the important work that you carry out in supporting some of the most vulnerable people in our State during what is an undoubtedly a very difficult time in their lives.
- 47 I look forward to working with the Women's Domestic Violence Court Advocacy Services, Legal Aid NSW and DVNSW collaboratively now and into the future to improve service delivery for those seeking protection from domestic and family violence.