

DOMESTIC
VIOLENCE
VICTORIA

Submission to the Royal Commission
into Violence, Abuse, Neglect and
Exploitation of People with Disability

Criminal Justice System Issues Paper

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About Domestic Violence Victoria (DV Vic)

Domestic Violence Victoria (DV Vic) is the peak body for specialist family violence response services for victim-survivors in Victoria. As such, DV Vic is recognised as the state-wide voice of Specialist Family Violence Services (SFVS) responding to victim-survivors. DV Vic is a membership-based organisation and is accountable to its members, who also comprise its Board of Governance. DV Vic's core membership comprises state-wide and regional specialist agencies working with victim-survivors of family violence across Victoria. We are an independent, non-government organisation that leads, organises, advocates for, and acts on behalf of its members utilising an intersectional feminist approach. However, the organisation is ultimately accountable to victim-survivors of family violence and works in their best interests.

DV Vic's work is focused on advocating for, supporting, and building the capacity of specialist family violence practice and service delivery for victim-survivors; system reform; and research, policy development and law reform. DV Vic analyses the views and experiences of member organisations, the evidence on family violence, and the lived experience of victim-survivors, and translates this into innovative and contemporary policy, practice, and advocacy.

DV Vic holds a central position in the Victorian family violence system and its strategic governance and is one of the key agencies with responsibility for providing family violence subject matter expertise, technical assistance, capacity building, and policy and practice advice to the SFVS sector, broader sectors, government, and other partners and stakeholders.

Language and Terminology Used

Family Violence

DV Vic recognises family violence as any behaviour that occurs in family, domestic or intimate relationships that is physically or sexually abusive; emotionally or psychologically abusive; economically abusive; threatening or coercive; or is in any other way controlling that causes a person to live in fear for their safety or wellbeing or that of another person. This definition includes violence within a broader family context, such as extended families, kinship networks and **'family-like' relationships which can include a paid or unpaid carer for people with disabilities**; families of choice for LGBTIQ people; and cultural kinship networks.¹ In relation to children, family violence is defined as behaviour by any person that causes a child to **hear or witness or otherwise be exposed** to the effects of the above behaviour.²

The scope of this submission will include **violence, abuse, neglect and exploitation of victim-survivors with disabilities that occurs within the context of family, domestic, intimate and 'family-like' relationships, including violence perpetrated by a carer (paid or unpaid).**

¹ See *Family Violence Protection Act 2008* (Vic) s.5; the Royal Commission into Family Violence noted that, "the dynamics between a person with a disability and paid carers may give rise to 'family-like' relationship very quickly [and] where elements of a 'family like' relationship do exist in relation to non-related carers or co-residents, then the FVPA definition should be applied", pp193-194

² *ibid*

Family Violence and the Use of Language

Family violence is predominantly driven by gender-based oppression and inequality. Research to date demonstrates that the majority of perpetrators are men and the majority of victim-survivors are women and children. As such, gender-binary language and terminology is often used in specialist family violence services (SFVS) to acknowledge and communicate about this deeply entrenched social problem. At the same time, family violence impacts people across a diversity of gender identities, social and cultural contexts, and within various intimate, family and family-like relationships.

This submission will primarily use gender-binary terms (i.e. women and men) to reflect the current evidence base which predominantly pertains to the experience of women with disabilities who experience family violence perpetrated by men. By using gender-binary language DV Vic acknowledges that people will identify and express themselves across the masculine-feminine spectrum and that family violence can be experienced by all people. Where the term ‘**victim-survivor**’ is used it refers to people with disabilities who experience family violence, and the term ‘**perpetrator**’ is applied to adult men who use family violence.

Social Model of Disability

Historically, disability has been viewed within the context of the *medical model*, where disability is considered a tragic health condition that should be ‘fixed’ or ‘cured’ or the *charity model* where people with disability are viewed as in need of ‘help’, unable to do things for themselves³. For decades disability advocates have been working tirelessly to shift thinking about models of disability to a Social Model which views ‘disability’ as:

“the result of the interaction between people living with impairments and an environment filled with physical, attitudinal, communication and social barriers. It therefore carries the implication that the physical, attitudinal, communication and social environment must change to enable people living with impairments to participate in society on an equal basis with others.”⁴

The Social Model recognises that disability is socially constructed and does not seek to change or deny the reality of living with a disability or impairment; rather, it is the social and physical environment that must change to enable the full and equal participation of people with disabilities.⁵ Throughout this submission, we use the term disability within the context of a Social Model of disability to examine the systemic, structural and attitudinal barriers that exist within the criminal justice system that restrict equal access to and participation in that system for victim-survivors with disabilities.

³ ‘Shifting models of thinking’ (n.d). In Disability Advocacy Resource Unit. Retrieved from <<https://www.daru.org.au/what-is-advocacy/shifting-models-of-thinking/>>.

⁴ Domestic Violence Victoria (2020). *Code of Practice: Principles and Standards for Specialist Family Violence Services for Victim-Survivors*. 2nd Edition. Melbourne: DV Vic. p80 <<https://dvvic.org.au/members/member-resources/>>

⁵ ‘Social model of disability’ (n.d). In People with Disability Australia. Retrieved from <<https://pwd.org.au/resources/disability-info/social-model-of-disability/>>

Introduction

Given DV Vic's central position in the Victorian family violence system, we are well placed to provide insights into how victim-survivors of family violence with a disability, interact with the criminal justice system. Current research shows that people with disabilities are more likely to experience family violence than people without disabilities⁶. Further, women and girls with disabilities experience higher rates of violence and abuse than men with disabilities and "the intersection of gender and disability increases the risk of violence against women and girls with disabilities"⁷.

Due to the increased risk and prevalence of family violence for women with disabilities, the existing evidence-base, including the report of the Royal Commission into Family Violence (RCFV), primarily document the experience of women with disabilities. Consequently, drawing on this evidence-base, this submission will primarily focus on family violence against women with disabilities that results from the intersection of systemic gender-based discrimination against women and disability-based discrimination against people with a disability⁸.

This submission seeks to draw the Commission's attention to the structural and systemic elements of the criminal justice system that result in:

- family violence experienced by victim-survivors with disabilities not being systematically identified,
- women with disabilities experiencing multiple and complex barriers to disclosing and reporting family violence,
- victim-survivors with disabilities not being able to access protection and justice from the police and courts,
- women with disabilities being more likely to be named as a 'predominant aggressor'⁹ or perpetrator of violence when she is actually the victim of a crime and of family violence; or
- failure to consider the impact family violence has had on a woman's criminal offending.

Whilst limiting our comments in this submission to the criminal justice system, it is important to note that for victim-survivors of family violence, it is difficult to look at the criminal justice system in isolation as "cases involving family violence are heard in many different legal jurisdictions"¹⁰. Victim-survivors are often required to simultaneously navigate multiple jurisdictions which can be extremely confusing

⁶ Australian Institute of Health and Welfare (2019). *Family, domestic and sexual violence in Australia: continuing the national story-In brief*. Cat. No. FDV 4. Canberra: AIHW <<https://www.aihw.gov.au/reports/domestic-violence/family-domestic-and-sexual-violence-in-australia-c/contents/table-of-contents>>, p8. Compared to people without a disability, people with a disability are: 1.8 times as likely to have experienced physical and/or sexual violence from a partner in the previous year (2.5% women | 1.1% men); 1.7 times as likely to have experienced sexual violence (including assault and threats) since the age of 15 (1 in 4 women | 1 in 20 men); 1.5 times as likely to have experienced emotional abuse from a partner and more likely to report having experienced emotional abuse from multiple previous partners (1 in 3 women | 1 in 5 men); State of Victoria(2014-16). *Royal Commission into Family Violence: Summary and recommendations*, Parl Paper No 132. Melbourne, VIC. p36.

⁷ Family Safety Victoria (2019). *MARAM Practice Guides: Foundation Knowledge Guide*. Melbourne, VIC: State of Victoria. p51; Family Safety Victoria (2018). *Family Violence Multi-Agency Risk Assessment and Management Framework: A Shared Responsibility for Assessing and Managing Family Violence Risk*. Melbourne, VIC: State of Victoria. p35; Australian Bureau of Statistics (2017). *Personal Safety, Australia 2016*. ABS Cat. No. 4906.0. Canberra: in 2016, an estimated 5.9% (172,800) of women with a disability or long-term health condition experienced violence in the 12 months prior to the survey, compared to 4.3% (274,400) of those with no disability or long-term health condition.

⁸ Women with Disabilities Victoria (2015). *Royal Commission into Family Violence: Submission by Women with Disabilities Victoria*. p4 <https://www.wdv.org.au/documents/FV_RC_submission_Women_with_Disabilities_Victoria_2015.pdf>

⁹ No to Violence (2019). Discussion Paper: *Predominant Aggressor Identification and Victim Misidentification*. The term 'predominant aggressor' is "used to refer to the person who is exerting the greatest amount of harm and control over their partner or family member through any number of abusive behaviours including physical and sexual violence, threats, intimidation, emotional abuse, stalking and isolation". p3 <<https://www.ntv.org.au/policy-development/policy-briefs-and-position-papers/>>

¹⁰ State of Victoria (2014-16). *Royal Commission into Family Violence: Report and recommendations, Vol III*. Parl Paper No 132. p118.

and complicated and for people with disabilities can create additional barriers to accessing the justice system¹¹. Gaps that currently exist between jurisdictions also provide opportunities for perpetrators to manipulate the legal system to maintain and ‘reassert their power and control over the victim’¹² (referred to as systems abuse).

Whilst limiting the scope of this submission to victim-survivors of family violence with disabilities and their interaction with the criminal justice system, DV Vic’s broader submission to the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* will address cross-jurisdiction issues such as systems abuse, and the additional barriers this creates to accessing justice for people with disabilities who experience family violence.

How do victim-survivors of family violence with disabilities come into contact with the criminal justice system in Victoria?

In Victoria, family violence related matters are primarily heard in the Magistrates’ Court¹³. Matters are predominantly heard in the civil jurisdiction and relate to Family Violence Intervention Order (FVIO) or Family Violence Safety Notice (FVSN) proceedings. Criminal family violence proceedings may also be heard in the Magistrates’ Court if police have charged a perpetrator with a criminal offence (i.e. assault, property damage), or the victim-survivor with a disability has been charged as a result of being misidentified as the perpetrator (see below discussion). Specifically, victim-survivors with disabilities who experience family violence may come into contact with the criminal justice system:

- as victims and/or witnesses of a family violence crime that has been committed against them and resulted in police charging the perpetrator with a criminal offence,
- if a perpetrator (known as the *Respondent*) breaches a FVIO or FVSN and police decide to lay criminal charges. In this case, a victim-survivor (known as the *protected person*) may be required to provide a statement to police and may be called as a witness if the matter proceeds to court, or
- if the victim-survivor is charged with a criminal offence (this may be in relation to a family violence incident or unrelated alleged criminal offending).

Unfortunately, it is difficult to determine the number of women with disabilities who experience family violence and have contact with the criminal justice system due to the unreliability of available data, lack of systematic data collection and complex and multiple barriers to reporting and disclosing (see below discussion)¹⁴. The findings in the Personal Safety Survey (PSS) which is currently the best source of prevalence data primarily relate to cis-gendered women and men, resulting in it being difficult to analyse the prevalence of violence against people with intersecting forms of oppression and discrimination (i.e. family violence against LGBTIQ people with disability or culturally and linguistically

¹¹ For example in Victoria a woman who has experienced family violence may have both civil and criminal matters in the Victorian Magistrates’ Court as a result of a family violence intervention order and charges laid by police, the family law courts if children are involved and there are parenting/property matters and the children’s court if child protection are involved.

¹² The Australian Institute of Judicial Administration. (2019). *National Domestic and Family Violence Benchbook*. <<https://dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/systems-abuse/>>

¹³ State of Victoria (2014-16). Vol III. p117.

¹⁴ Australian Institute of Health and Welfare (2019). *People with disability in Australia 2019-In brief*. Cat. No. DIS 74. Canberra: Identified critical data gaps and a lack of information on “how much contact people with disability have with the justice and child protection systems, both as victims and as offenders”. p23.

diverse people with disabilities, older people with disability etc).¹⁵ Until the second half of 2019, Victoria Police did not systematically collect data in relation to disability, and it is difficult to obtain disaggregated data for family violence criminal matters in the Magistrates Court¹⁶.

The limited data that is currently available about women in the criminal justice system primarily relates to women who are on remand and/or incarcerated and speaks to whether a woman has a disability **or** has experienced family violence but does not analyse the co-occurrence of the two. For example, Department of Justice and Community Safety data on women in the Victorian prison system as of 30 June 2017 found that 65% of the women in prison had experienced family violence but is silent on how many of those women had a disability¹⁷, and research conducted by ARBIAS on women entering Victorian prisons found that 73% had at least one ABI risk factor but the report is silent on family violence¹⁸.

Although it is difficult to quantify how many women who interact with the various parts of the criminal justice system have a disability and have experienced family violence, what is well established in the available research and reports is that victim-survivors with disabilities experience significant barriers in accessing protection from the justice system.

Barriers to accessing justice and protection from police and courts

A number of recent inquiries, including the RCFV have noted that there are critical barriers for women with disabilities in accessing justice after sexual or family violence¹⁹. For victim-survivors of family violence with disabilities, there are systemic, structural and attitudinal barriers that make it extremely difficult for them to report and disclose family violence and to equally participate in and access the justice system. This can render them invisible to the system and impact on their ability to live safely and free from violence.

Whilst improvements and changes have occurred in the justice system in Victoria as a result of recommendations from the RCFV (i.e. the introduction of Specialist Family Violence Courts, technological improvements in courts, establishment of the Victoria Police Family Violence Centre of Learning and some improvements in data collection by police), more needs to be done to reduce barriers, ensure fair and equitable access, prevent misidentification of women as perpetrators of violence and to ensure that if women with disabilities do enter the criminal justice system they receive a trauma and violence informed response. This section of the submission will outline barriers which can result in family violence not being systematically identified and victim-survivors not reporting or

¹⁵ AIHW (2019). *Family, domestic and sexual violence in Australia: continuing the national story*. Cat. No. FDV 3. Canberra: these limitations in the PSS led the AIHW to recommend that the findings “relating to people with disability should be interpreted with caution”. p91.

¹⁶ Healey, L. (2014). *Voices Against Violence: Paper 2—Current Issues in Understanding and Responding to Violence Against Women with Disabilities* (Women with Disabilities Victoria, Office of the Public Advocate and Domestic Violence Resource Centre Victoria). p36: “neither the Victorian Magistrates’ and Children’s Courts nor Victoria’s public hospital emergency departments (VEMD) routinely collect data in relation to the co-occurrence of disability and family violence”.

¹⁷ Department of Justice and Community Safety. (2019). *Women in the Victorian Prison System*. Victorian State Government. Melbourne.

¹⁸ ARBIAS Ltd and La Trobe University. (2010). *Acquired Brain Injury: Screening, Identification and Validation in Victorian Correctional System*. This study found that out of 86 female prisoners – 73% had at least one ABI risk factor (this report does not look at the co-presentation of family violence and ABI or whether the ABI was a result of family violence).

¹⁹ Maher, J. M., Spivakovsky, C., McCulloch, J., McGowan, J., Beavis, K., Leas, M., Cadwallader, J., Sands, T. (2018). *Women, disability and violence: Barriers to accessing justice: Final report*. Sydney: ANROWS. <<https://apo.org.au/sites/default/files/resource-files/2018/04/apo-nid173826-1188211.pdf>>

disclosing violence they are experiencing which can lead to poor, inappropriate, inadequate and retraumatising responses from the criminal justice system.

Identifying Family Violence

The impact of attitudes, biases and knowledge of professionals working in the criminal justice system

Attitudes, biases and stereotypes held by professionals working in the criminal justice system and a lack of training and knowledge, can result in family violence not being identified and disability support needs not being identified or adequately assessed. For example, a person may be assessed as having a hearing impairment or a cognitive impairment, however, the impact of this in relation to equal access to the criminal justice system is not adequately assessed. The cumulative impact of not identifying family violence or disability can result in adverse outcomes for victim-survivors.

In Victoria, the RCFV noted that there was a lack of understanding of what constitutes a ‘family-like relationship’ amongst Victoria police and courts and a lack of knowledge about the nature of family violence perpetrated against women with disabilities which is “different in comparison to women in the broader population”²⁰. Professionals may also lack the skills and knowledge to identify if a victim-survivor has a disability and to understand how a disability is likely to impact on her engagement with the system and what additional supports she may require.

While women with disabilities can experience the same types of family violence as those experienced by women without disabilities, they also experience different and additional types of violence (referred to as ‘disability-based’ violence). While intimate partner violence is the most common form of violence perpetrated against women with disabilities it is also perpetrated within a broader range of relationships (i.e. other family members, paid carers etc), in a broader range of settings (e.g. institutional/residential setting) and may be inflicted for longer periods of time by a greater number of perpetrators than for women without disabilities²¹. For a comprehensive summary of the nature of violence against women with disabilities, we refer the Commission to the *Voices Against Violence* report²².

If the perpetrator has a dual role as partner and carer, a lack of understanding about the unique types and dynamics of family violence against women with disabilities can result in police or others in the criminal justice system assessing the situation as ‘carer fatigue...or a response to challenging behaviour by the person with disabilities, rather than [identifying it as] family violence’²³. Further, the perpetrator may be viewed as a ‘support’, and police may interview the woman with him present and even defer to him rather than speaking directly to the victim-survivor.

For people living in residential accommodation, professionals may not identify family violence if they do not have a thorough understanding of what constitutes a *family-like relationship* and what behaviour falls within the definition of family violence. Further, there can be a culture of acceptance of abuse and an atmosphere of fear that can be an additional barrier to victim-survivors reporting violence²⁴.

²⁰ Maher et al. p26

²¹ Family Safety Victoria (2019). p51-53; State of Victoria (2014-16), Vol V; Healey, L. (2014). Paper 1 and 2.

²² Healey, L (2014). *Voices Against Violence: Paper 2*. pp38-41.

²³ Judicial College of Victoria (2011). *Family Violence Bench Book*. Melbourne. Section 5.8.5-Barriers to reporting family violence <<https://www.judicialcollege.vic.edu.au/eManuals/FVBBWeb/index.htm#34143.htm>>.

²⁴ Victorian Ombudsman (2015). *Reporting and Investigation of Allegations of Abuse in the Disability Sector: Phase 1—The Effectiveness of Statutory Oversight*. Victorian Government; State of Victoria (2014-16), Vol V, p182.

As noted by the RCFV, women with disabilities are often viewed with suspicion, can face a culture of disbelief and are not perceived as credible or reliable witnesses. Further, victim-survivors with disabilities may be stereotyped as “incompetent, voiceless, hypersexualised and inherently vulnerable”²⁵. Holding attitudes and biases such as these can result in “family, friends, carers and police not [believing] them when they report violence”²⁶, police not taking reports and potentially not investigating physical abuse or other family violence criminal offenses due to perceiving the victim-survivor with a disability as not being ‘reliable’ or ‘credible’²⁷ and family violence not being identified.

It is therefore important that professionals working in the criminal justice system have a contemporary understanding of family violence and particularly, the nature and dynamics of family violence perpetrated against victim-survivors with disabilities so they can provide a family violence informed response. Further, professionals need to be able to identify whether a victim-survivor has a disability and understand how a disability may impact on a person’s behaviour and what supports that person may need to access the justice system.

If people within the criminal justice system hold biases and stereotypes about people with disabilities it can result in them not identifying family violence, not believing victim-survivors when they disclose and report violence which can negatively impact on the victim-survivors willingness to report and their ability to access protection and safety. It can also result in women with disabilities who experience family violence being ‘misidentified’ as the perpetrator of violence.

Misidentification of the ‘predominant aggressor’

A lack of understanding of the nature and dynamics of family violence can lead to police and others in the criminal justice system misidentifying women as the ‘predominant aggressor’ rather than as a victim, which can have significant and long-term adverse outcomes for victim-survivors. While this is more likely to occur in the civil jurisdiction resulting in women being named as Respondents²⁸ in FVIO/FVSNs, it can also result in police charging a woman with a criminal offence. If a woman is not correctly identified as a victim-survivor it is unlikely that her risk will be assessed, safety planning²⁹ may not be undertaken and it can impact on her access to support services as she is unlikely to be referred to services that specialise in responding to victim-survivors of family violence.

Research conducted by Women’s Legal Service Victoria (WLSV) and Monash University found that women with a disability or mental health issue/s are more likely to be misidentified³⁰. This was also noted by the RCFV in their final report³¹. Women with disabilities are more likely to be misidentified if police and/or court staff hold the biases, stereotypes or attitudes discussed above or if adequate supports are not provided when the woman comes into contact with the justice system, preventing her from communicating effectively about what has happened (i.e. police fail to get an independent third

²⁵ State of Victoria (2014-16), Vol V, p184

²⁶ *ibid*, p184

²⁷ *ibid*, p188; Victorian Equal Opportunity and Human Rights Commission (2014). *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime: Research Findings*. p188. <<https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/reports/item/894-beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime>>

²⁸ Magistrates Court of Victoria (2020). *Family violence intervention orders (FVIO)*. <<https://www.mcv.vic.gov.au/family-matters/family-violence-intervention-orders-fvio>>. “Respondent: A person who has an application for an intervention order made against them”.

²⁹ Family Safety Victoria (2018). p57: “Safety planning: process of implementing a strategy or identifying steps to be taken, subject to timelines agreed with relevant parties, to reduce the likelihood of further family violence occurring and ensure safety for the victim/s”.

³⁰ Women’s Legal Service Victoria & Monash University (2018). *Policy Paper 1. “Officer she’s psychotic and I need protection”: Police misidentification of the ‘primary aggressor’ in family violence incidents in Victoria*.

<<https://www.womenslegal.org.au/files/file/WLSV%20Policy%20Brief%201%20MisID%20July%202018.pdf>>

³¹ State of Victoria (2014-16), Vol III, p19

party³², do not get an interpreter, assess disability-related behaviour as problematic behaviour, view the partner as more credible than her, do not ask questions in plain English or do not speak to her at all etc).

Misidentification is more likely to happen in a system that does not have a contemporary understanding of the nature and dynamics of family violence, a rights based approach to disability and one that lacks the capacity and flexibility to deal with the complex and diverse needs of those who use the system (see below discussion on ‘one-size fits all’ approach and ‘incident-based approach’).

Disclosing and reporting family violence

Victim-survivors with disabilities encounter significant barriers to disclosing and reporting family violence³³. These barriers result in family violence being underreported, leading to the true extent of family violence experienced by women and children remaining hidden³⁴. For women with disabilities, underreporting and a lack of systemic data collection, result in the true extent of family violence they experience not being visible. Choosing to disclose family violence is an extremely difficult and personal decision for each victim-survivor and is known as a time of increased risk of harm for victim-survivors and a time of great uncertainty³⁵. When a woman chooses to disclose family violence, she needs to be believed, her courage acknowledged and a response provided that ensures her safety and the safety of any children in her care. This is particularly important given that research shows that the response received by a victim-survivor when they seek help will impact on future help-seeking behaviour³⁶.

For victim-survivors with disabilities who have experienced a lifetime of discrimination, they may not recognise that what is happening to them is family violence or they may be reluctant to divulge that they have a disability and associated support needs³⁷. If their life has been characterised by demeaning experiences and discrimination, they may see what is happening to them as ‘normal’ as it is an almost ‘everyday occurrence’ and they may blame themselves for what is occurring³⁸. If the victim-survivor is isolated as a result of the family violence being perpetrated against them, they may not have access to information or support which may further limit their ability to recognise what is happening to them as not ‘normal’ and as family violence. If, when a victim survivor does take the courageous step of reporting, she is met by a system that does not believe and acknowledge what has happened to her, it can reinforce the messaging that she is to blame and will discourage any future reporting or help-seeking behaviour. It will also result in her staying in an unsafe situation.

³² State of Victoria (2014-16), Vol V, p196.

³³ Judicial College of Victoria (2011). Section 5.8.5; Healey, L. (2014). *Voices Against violence: Paper 2*; State of Victoria (2014-16), Vol V.

³⁴ AIHW (2018). *Family, domestic and sexual violence in Australia 2018*. Cat. No. FDV 2. Canberra. p5; RACGP White Book: <https://www.racgp.org.au/clinical-resources/clinical-guidelines/key-racgp-guidelines/view-all-racgp-guidelines/white-book/partner-abuse;> Laing, L (2010). *No way to live: Women’s experiences of negotiating the family law system in the context of domestic violence*. University of Sydney <<https://ses.library.usyd.edu.au/handle/2123/6255>>

³⁵ Family Safety Victoria .2018; Toivonen, C., & Backhouse, C (2018). *National Risk Assessment Principles for domestic and family violence: ANROWS Insights 07/2018*. Sydney, NSW.

³⁶ State of Victoria (2014-16), *Summary and Recommendations*.

³⁷ State of Victoria (2014-16), Vol V, p183

³⁸ Healey, L (2014). *Voices Against Violence: Paper 1—Summary Report and Recommendations*. (Women with Disabilities Victoria, Office of the Public Advocate and Domestic Violence Resource Centre Victoria).

Impacts of family violence can delay disclosure

Family violence has broad and long-lasting impacts on victim-survivors' "emotional, psychological, spiritual, financial, physical, sexual and reproductive health and well-being"³⁹. Women can acquire a disability as a result of family violence perpetrated against them and research shows that intimate partner violence contributes to more death, disability and illness in adult women than any other preventable risk factor⁴⁰.

In 2016-2017, an increasing number of women were hospitalised due to family violence (23% increase), head and neck injuries were the most common injuries inflicted, and a spouse or domestic partner were most common perpetrators of assault-related brain injury⁴¹. Victorian research conducted in 2018 found that the association between family violence and ABI in Victoria is significant with 40% of women victim-survivors of domestic violence presenting at Victorian hospitals over a 10-year period sustained a brain injury as a result of the violence perpetrated against them⁴².

Research shows that women with disabilities stay in violent relationships for longer⁴³ which results in them experiencing the harmful impacts and trauma of family violence for a prolonged period as it delays reporting or disclosing family violence and seeking help. This can be particularly the case if the person who is perpetrating violence has the dual role of partner and carer⁴⁴. A victim-survivor may be extremely reluctant to report family violence they are experiencing as the person perpetrating violence against them may be providing care to them and they may fear that if they report that person, they will not be able to care for themselves. Further, they may have heard how others have tried to access safety only to find that the system has not been able to support them. A victim-survivor may also be fearful of retribution from the perpetrator and for her safety and that of any children in her care⁴⁵. Women with disabilities fear losing custody of their children if Child Protection is notified of the violence and this fear is well-founded with removal of children from parents with disabilities happening at a much higher rate than for parents without disabilities⁴⁶.

Given how difficult and traumatic it can be for a victim-survivor to disclose and report family violence, it is crucial that the justice system does not put additional structural and systemic barriers in the way that make accessing safety, protection and support even more challenging.

Structural and Systemic Barriers to Accessing Justice

As discussed earlier, if victim-survivors do report to police or disclose the family violence they are experiencing, they can be met with a system that does not believe them and is ill-equipped to support their needs. Reporting can lead to multiple court matters in different jurisdictions which result in a victim-survivor potentially having to see the perpetrator at each of the hearings and being required to retell their story.

³⁹ Domestic Violence Victoria (2020). p18.

⁴⁰ VicHealth (2004). *The health costs of violence. Measuring the burden of disease caused by intimate partner violence. A summary of findings*. State Government Victoria.

⁴¹ AIHW (2018). op cit.

⁴² Family Safety Victoria (2019); Brain Injury Australia (2018). *The prevalence of acquired brain injury among victims and perpetrators of family violence*. New South Wales. <<https://www.braininjuryaustralia.org.au/wp-content/uploads/BRAININJURYAUSTRALIAfamilyviolencebraininjuryFINAL.pdf>>

⁴³ State of Victoria (2014-16), Vol V; Voices Against Violence (2014). Paper 1 & 2.

⁴⁴ State of Victoria (2014-16), Vol V, p191

⁴⁵ *ibid.* p183

⁴⁶ *Ibid.* p183; Healey, L. (2014). *Paper Two*. P52

When victim-survivors come into contact with the justice system, it is often at a point of crisis when they are concerned for their immediate physical or psychological safety. If this involves intervention by the police, they may remove the perpetrator from the home, but if the perpetrator has been providing care, this leaves the victim-survivor without support and in a vulnerable situation. Alternatively, a victim-survivor may have to move out of their home and relocate to an entirely new geographic area. For women with disabilities, this potentially separates them from all their supports.

At these points of crisis, the systems that are set up to support and protect victim-survivors need to be able to respond quickly. The inflexibility of the criminal justice system and the current transition to the NDIS result in significant barriers to victim-survivors with disabilities accessing support and safety in times of crisis⁴⁷. For example, if a woman has an NDIS plan and relocates to a refuge in another area, it will take time for her plan to be reviewed and new supports put into place. Alternatively, if a woman is on remand she may not be released on bail until an NDIS plan is in place. As noted in the submission by the Magistrates Court of Victoria to the Mental Health Royal Commission, “people with complex disabilities and disadvantage (including those in the justice system) are finding it difficult – sometimes impossible – to access support under the NDIS”⁴⁸.

The inflexibility of the current criminal justice system which is characterised by a “one-size fits all” approach, fails to meet the diverse and complex needs of those who engage with the system and cannot provide the tailored and nuanced response and support they require⁴⁹.

“One-size fit all” approach

The ‘one-size fits all’ approach stems from a justice system that focusses on efficiency rather than outcomes and that struggles to deal with the complexity of family violence matters partly due to the justice system being established to respond to male offending (i.e. single incident crimes)⁵⁰. For women with disabilities, the lack of a nuanced and individualised response can also stem from a tendency for people with disabilities to be viewed as a homogeneous group rather than as unique individuals. As noted by Maher et al⁵¹, the justice system must recognise and identify the “diverse types of violence that impact on the everyday safety and security of women with disability [and this] requires attention to individual, environmental and institutional factors because they influence, impact on, and in many instances, constrain those women’s autonomy and agency”.

For victim-survivors with disabilities the lack of a tailored and nuanced response can create major barriers to them accessing and understanding the justice system. Court terminology, language and information is extremely confusing and the focus on efficiency and the speed at which hearings take place, can result in people not having the time or opportunity to access support and legal services at court and result in victim-survivors not understanding the court process and orders that are made.

This lack of understanding and ability to participate fully in the process can lead to a woman feeling as though she has no control over the process or the outcome. For a victim-survivor of family violence

⁴⁷ Office of the Public Advocate (2018). *The illusion of ‘Choice and Control’*. Victoria.

⁴⁸ Magistrates Court of Victoria (2019). *Submission to the Royal Commission into Victoria’s Mental Health System*. p29 <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-rcvmhs.files/3815/7059/3215/Magistrates_Court_of_Victoria.pdf>

⁴⁹ Women’s Legal Service Victoria (2015). *Submission to the Royal Commission into Family Violence*, p20

<<https://womenslegal.org.au/files/file/AMENDED%20AMENDED%20FINAL%20MAIN%20SUBMISSION.05.08.2015.pdf>.

⁵⁰ Day, A., Casey, S., Gerace, A., Oster, C., & O’Kane, D (2018). *The forgotten victims: Prisoner experience of victimisation and engagement with the criminal justice system (Research report, 01/2018)*. Sydney, NSW: ANROWS.

⁵¹ Maher, J. M., Spivakovsky, C., McCulloch, J., McGowan, J., Beavis, K., Leas, M., Cadwallader, J., Sands, T. (2018). *Women, disability and violence: Barriers to accessing justice: Key Findings and future directions*. Sydney: ANROWS. p8

this loss of agency and control is highly problematic as it replicates what they experienced in their abusive relationship.

Most court related information is in English and not provided in alternative and accessible formats (i.e. Easy English, audio, plain English so that it is more accessible for victim-survivors with cognitive disabilities). Forms can be complex and contain legal jargon and there can be limited support available at court to complete them. Victim-survivors may not have timely access to an AUSLAN interpreter, there may be no hearing loop in court or there may be physical barriers in the court building which make certain parts inaccessible⁵².

As a result of recommendations by the RCFV, many Magistrate Court venues in Victoria received infrastructure upgrades. Despite this, DV Vic hear from our partners that some courts are still not fully accessible to people with disabilities. This is particularly true where court buildings have been added to, retrofitted or refurbished rather than being purpose built which would allow for accessibility to be considered from the original concept and design stage.

The current structure and operation of the criminal justice system leads to an 'incident-based' approach which is highly problematic in family violence related matters. This approach can result in women being misidentified as predominant aggressors as the pattern of abuse that has occurred throughout the relationship is not assessed as intervention becomes focussed on a single 'crime' or incident. Further, an 'incident-based' approach can lead to a failure to consider the impact family violence has on a woman's criminal offending.

Incident-based approach and failure to assess impact family violence has on criminal offending

The number of women in Victoria's prisons has risen dramatically in recent years and particularly concerning is the increase in the number of women on remand⁵³. As noted above, 65% of women in Victoria's prisons have experienced family violence and this number is thought to be even higher if you consider historical and childhood abuse and the underreporting of family violence. For women who have been charged with a criminal offence, it is important to identify if she has, or is currently experiencing family violence, and consideration given to how this has impacted on the criminal offending. An incident-based approach does not facilitate this approach.

Some women may have been coerced into criminal activity by their partner, as part of the cycle of power and control, resulting in them committing an offence because they are fearful of repercussions from the perpetrator. Further, a woman may have acquired a cognitive disability as a result of violence perpetrated against her which may impact on her ability to manage her behaviour or to understand 'in the moment' consequences⁵⁴.

By identifying family violence and assessing the impact it has had on a victim-survivor it does not excuse behaviour but it can inform the response provided by the criminal justice system so that it is supportive and does not replicate the abusive and unsafe situation a victim-survivor has come out of. A family violence informed response is likely to be less traumatic and potentially rehabilitative if a woman's underlying trauma is recognised and she is not treated like a perpetrator but a victim-survivor of abuse.

⁵² Women with disabilities Victoria (2015).

⁵³ McMahon, M. (2019). *No bail, more jail? Breaking the nexus between community protection and escalating pre-trial detention*. Research Paper No. 3. Parliamentary Library and Information Services: Victoria.

⁵⁴ Humphreys, C. (23 Feb 2019). *Vulnerable women trapped by changes to bail laws*. The Age. Retrieved from <<https://www.theage.com.au/national/victoria/vulnerable-women-trapped-by-changes-to-bail-laws-20190212-p50x8v.html>>

Equal access to justice

Supports needed to assist victims-survivors of family violence with disabilities to participate in the criminal justice system on an equal footing

Throughout this submission, we have highlighted barriers that victim-survivors with disabilities who experience family violence face in accessing the justice system. These barriers stem from systemic, structural and attitudinal elements of the criminal justice system that result in family violence not being systematically identified, disability support needs to facilitate equal access not being assessed and underreporting due to the barriers women with disabilities face to disclosing and reporting violence they have experienced.

To ensure victim-survivors of family violence with disabilities can participate equally, it is the responsibility of the criminal justice system and not the individual to make changes and adjustments to ensure that victim-survivors can participate safely and fully in the legal process. Further, any change that is undertaken within the criminal justice system must have safety and accessibility for all as key underlying principles. We detail below some of the changes and supports that would facilitate better access to the criminal justice system for victim-survivors with disabilities who have experienced family violence.

Assessment of safety, family violence risk and disability support needs

Given the prevalence of family violence as a risk factor for women engaging with the criminal justice system, and that women with disabilities are at increased risk of experiencing family violence, it is essential that the response provided within the justice system assesses risk and safety at every opportunity and that this assessment informs the response provided.

Women who have experienced trauma as a result of family violence, “often live in fear of, and or experience ongoing, threats or acts of violence which severely compromise their physical and emotional safety”⁵⁵. If victim-survivors do not feel a sense of safety, they will not be able to engage in the legal process and this is likely to result in poor outcomes. The ‘system’ must assess and manage risk and safety so that this does not become the responsibility of an individual victim-survivor.

All professionals in the justice system must have a contemporary understanding of family violence risk, including the nature and dynamics of family violence experienced by victim-survivors with disabilities, and a comprehensive and wholistic assessment undertaken as early as possible to ensure that legal and support needs are identified as soon as a victim-survivor engages with the justice system.

As noted in the Magistrates’ Court of Victoria submission to the Royal Commission into Victoria’s Mental Health System, embedding early intervention and prevention into the justice system would “provide the client with timely engagement with appropriate services to address the range of complex psychosocial issues, including family violence, that could otherwise be overlooked or identified at a later stage in court proceedings”⁵⁶. This assessment of needs, risk and safety would in turn inform a nuanced and tailored response.

⁵⁵ Blue knot foundation. (n.d.) *Trauma-informed care and practice when working with domestic and family violence* <<https://www.blueknot.org.au/Training-Services/Calendar-of-Events/Public-TICP-Domestic-Family-Violence-Services>>

⁵⁶ Magistrates Court of Victoria. (2019). p45.

A nuanced and tailored response

Every victim-survivors experience of family violence and disability support needs are unique. As noted above, people with disabilities are often seen as one homogeneous group which can lead to a 'one-size fits all' approach that does not address the specific needs of individuals. Consequently, a targeted and tailored response is required to ensure that a victim-survivors' needs are assessed and that the response by the justice system does not retraumatise them. Further, for women who come into contact with the criminal justice system as offenders, interventions need to address the traumatic impacts of family violence and acknowledge that she is a victim-survivor so that it can respond to the trauma she has experienced.

As noted in the Department of Justice and Community Safety report on *Women in the Victorian Prison System*, "women offenders' experience of family violence has a range of implications for service provision"⁵⁷. Without a tailored response, the individual impacts of family violence will not be accessed and consequently, the response from the justice system may not be safe and appropriate. Such a response would need to be underpinned by trauma informed holistic case management services to ensure psychosocial and legal needs are identified and supported throughout the legal process.

A nuanced and tailored response is reliant on accurate and sophisticated data about who is using the system and what their needs are. As noted earlier in this submission, there are current critical gaps in data collection that need to be addressed to ensure that we have a true and accurate picture of who is engaging with the justice system and what their needs are.

Access to support in crisis situations

As noted above, for women with disabilities who experience family violence, they often become known to the justice and service system at a point of crisis. If this is the case, women cannot afford to wait for support to be put in place and need an immediate and timely response. In Victoria, the Disability Family Violence Crisis Response Initiative provides support to women with disabilities at times of crisis in recognition that the NDIS is not agile or flexible enough to immediately meet their support and safety needs. This Initiative is however only funded until 30 June 2020 and it is critical that this funding is maintained.

Victim-survivors also require access to safe, stable and accessible housing when escaping family violence but also if they are on remand, as access to safe housing can impact on their ability to be released on bail. As noted in the *Women in Victorian Prison System* report⁵⁸, a lack of access to safe and appropriate housing can result in women being held in remand which can have many adverse consequences for women (i.e. removal of children, loss of employment, loss of housing etc). Access to affordable, accessible long-term housing options continues to be extremely challenging in the current housing environment but without this, many victim-survivors with disabilities and their children are forced to stay in violent relationships or may be held in remand for extended periods.

Assessible information and fully accessible court processes

Information about the legal system and the rights of those who engage with it must be provided in a range of formats and settings, so it is fully accessible for people with disabilities. This includes providing

⁵⁷ Department of Justice and Community Safety. (2019). p12.

⁵⁸ *ibid*

information on what family violence is, what legal options are available and if victim-survivors choose to report violence they are experiencing, what supports are available in a range of formats and settings.

Currently, there is no consistency in the physical structure or support services available at courts in Victoria and the services that are at court struggle to meet demand. As noted in the RCFV this results in the response and services a person receives being dependent on where they live. These structural barriers result in basic adjustments to accommodate people with a disability not always being made and court practices and procedures do not always meet the access needs of witnesses with sensory, physical, learning or communication disabilities⁵⁹.

As noted earlier in this submission, whilst some improvements have been made, particularly in the use of technology and infrastructure at some court buildings, this is inconsistent across locations.

Conclusion

Victim-survivors of family violence with disabilities, face systemic, structural and attitudinal barriers that make it extremely difficult for them to report and disclose family violence and to equally participate in and access the justice system. This can render them invisible to the system and impact on their ability to live safely and free from violence.

The criminal justice system and those working within that system must have a contemporary understanding of family violence risk and disability so that a victim-survivors' support and safety needs are comprehensively assessed from the moment they engage with the justice system. This would facilitate a violence and trauma informed response and minimise the potential for re-traumatisation.

In the absence of a fully accessible system that ensures the diverse and often complex needs of those that rely on the criminal justice system for protection and safety are addressed, victim-survivors with disabilities will continue to experience poor, inappropriate, inadequate and retraumatising responses.

To ensure accessible, equitable, fair and just outcomes for all, the criminal justice system must change and the 'system' must assess and manage risk and safety throughout the legal process so that this does not become the responsibility of an individual victim-survivor.

⁵⁹ State of Victoria (2014-16), Vol V, p189