
National Family Violence Benchbook

Professor Heather Douglas
Project Co-ordinator
T.C. Beirne School of Law,
The University of Queensland

14 July 2016

Table of Contents

Acknowledgement	2
Introduction.....	3
National Family Violence Benchbook.....	3
Section 1 – Purpose of the benchbook	3
Section 4 – Dynamics of domestic & family violence	5
Section 5 – Fair hearing and safety	5
Section 8 – Perpetrator intervention programs	6
Section 9 – Responses in criminal proceedings - Sentencing.....	8
Attachment A: Profile of the Law Council of Australia	10

Acknowledgement

The Law Council acknowledges the assistance of its Domestic and Family Violence Taskforce and Family Law Section in the preparation of this submission.

Introduction

1. The Law Council of Australia is appreciative of the opportunity to provide comments in respect of the draft National Family Violence Benchbook - Part 1 (NFV Benchbook).
2. The Law Council believes that a nationally consistent approach to domestic and family violence is essential, and that there must be a coordinated approach between all levels of government and Courts, both State/Territory and Commonwealth. The Law Council therefore welcomes this Government initiative to promote best practice and consistency in judicial decision making in cases involving family violence.
3. The Law Council notes that while the development of the NFV Benchbook is an integral step towards a whole of system approach, there are some fundamental issues which should be addressed in the refinement of the current draft, including:
 - a) the intended purpose and audience for the NFV Benchbook, and in particular, the potential to create one document for public and judicial use, and one for judicial education;
 - b) ongoing funding requirements to enable the NFV Benchbook to be kept up to date;
 - c) consultation with relevant research bodies including the Australian Institute of Family Studies; and
 - d) consideration of the recommendations of the reports from the Victorian Royal Commission into Family Violence and the Special Taskforce on Domestic and Family Violence in Queensland regarding perpetrator interventions.
4. The Law Council notes the short timeframe for consultation regarding the lengthy draft NFV Benchbook, and recommends further consultation be undertaken as the NFV Benchbook progresses. The following comments address sections 1, 4, 5, 8 and 9 of the NFV Benchbook.

National Family Violence Benchbook

Section 1 – Purpose of the benchbook

5. Traditionally, the purpose of a benchbook has been to act as a guide to assist judicial decision making. For example, the Honourable Chief Justice Holmes, and Chief Judge O'Brien noted in the foreword to the Queensland Supreme and District Courts Benchbook:

The Benchbook is intended to provide guidance, not to establish any inflexible or mandatory regime. It should assist the Judge to devise at trial a summing up appropriate to the particular case, while reminding of the necessary framework and matters which must be covered. Referring to the Benchbook should not only lessen the prospect of error, but also streamline summings up, better informing juries and generally promoting the interests of justice.¹

¹ The Hon Chief Justice C E Holmes and Chief Judge KJ O'Brien, 'Supreme and District Courts Benchbook' (Benchbook, Supreme Court of Queensland, 2008) 1.

-
6. While this theme is borne out in the NFV Benchbook, the purpose as stated in section 1 also includes that:

As well as serving as a guide in the judicial decision making process, this benchbook will be a publicly available resource that is intended to benefit other legal professionals and service providers who are working with victims and perpetrators of domestic and family violence.²

7. While the publication of the current NFV Benchbook for general use would have some positive outcomes, including increased transparency around these issues, the Law Council notes that publication may also have unintended negative consequences, including misinterpretation by self-represented litigants and other non-lawyers. For example, such parties may perceive the NFV Benchbook as an inflexible and mandatory regime, or may “cherry pick” what suits them as comprising the standard which the judicial office must meet, or outcome that must irreducibly follow. Further, public access to the NFV Benchbook may give victims and perpetrators false expectations about prospective court outcomes and court processes.
8. The Law Council accepts that many benchbooks are made public, but notes that their contents differ markedly from the current NFV Benchbook draft. Indeed, the Law Council considers that open publication of the NFV Benchbook in its current form, and particularly the sections that include social science research, is problematic because:
- a) The findings of social science research are not static.³ New social science research into the causes and effects of family and domestic violence is being published on a regular basis in Australia and around the world. The Law Council is concerned that the NFV Benchbook will quickly become out of date without funding being allocated for the NFV Benchbook to be maintained as current;
 - b) There are strict rules about how social science evidence may be lead in family law matters,⁴ and the publication of the NFV Benchbook in this form may lead unrepresented litigants into error about their position;
 - c) The social science that is included in the NFV Benchbook is skewed towards the impact on victims, and ought to include a broader range of research, including that which may not necessarily be in the interests of victims.⁵
9. The Law Council recommends that the tension between transparency and inadvertent misapplication of the NFV Benchbook be considered further, and in particular, that consideration be given to the possibility of creating two separate documents, including a public ‘benchbook’ which is a statement of the current law and is amenable to public

http://www.courts.qld.gov.au/_data/assets/pdf_file/0011/85997/sd-bb-0-foreword-by-chief-justice-chief-judge.pdf.

² The University of Queensland, and the Australasian Institute of Judicial Administration Incorporated, ‘National Family Violence Benchbook ‘ (Consultation draft, 13 May 2016).

³ See: Alan Hayes, ‘Social science and family law – From fallacies and fads to the facts of the matter’ (Family Matters No. 94, Australian Institute of Family Studies, 2014) 70-79 <<https://aifs.gov.au/publications/family-matters/issue-94/social-science-and-family-law>>.

⁴ The Honourable Chief Justice Diana Bryant AO, ‘The use of extrinsic materials – with particular reference to social science and family law decision making’ (Speech delivered at the Judicial Conference of Australia colloquium, Fremantle, 5-7 October 2012) <http://jca.asn.au/wp-content/uploads/2013/11/Extrinsic-Materials_paper.pdf>

⁵ For example, findings that family violence can hinder the parenting capacity of victims as well as perpetrators: Dr Jacqueline Beall, ‘The impact of conflict and family violence on parenting capacity and child development’ (Presentation, Family Law Court, 2012)

<<http://www.aija.org.au/Youth%20Justice%202012/Papers/Beall%20PPT.pdf>>.

access and use, and a 'resources manual' for use by judges, which includes the social science research.

Recommendations:

- Further consideration be given to the intended purpose and audience for the NFV Benchbook, and in particular, the potential to create a 'benchbook' for public and judicial use, and a 'resources manual' for judicial education.
- Consideration be given to ongoing funding requirements to enable the NFV Benchbook to be kept up to date.

Section 4 – Dynamics of domestic & family violence

10. The Law Council considers that the social science research included in section 4 of the NFV Benchbook in relation to the dynamics of domestic and family violence is not appropriate material for inclusion in a public resource in its current form, for the reasons outlined above. The Law Council recommends the information in section 4 be included in a 'resources manual' for judicial education.

11. The Law Council notes that the broad body of research undertaken by the Australian Institute of Family Studies (AIFS) in the area of family wellbeing may be of relevance to section 4 of the NFV Benchbook. AIFS was established under the *Family Law Act 1975* (Cth) to help identify the factors affecting marital and family stability in Australia by conducting, encouraging and coordinating research; and to promote the protection of the family as the fundamental group unit in society. The Law Council would encourage consultation with AIFS in the further development of section 4.

Recommendations:

- Section 4 of the NFV Benchbook should form part of the judicial 'resources manual' document, rather than the public 'benchbook'.
- Consultation should be undertaken with the Australian Institute of Family Studies regarding research and findings on the dynamics of domestic and family violence.

Section 5 – Fair hearing and safety

12. The issue of cross examination of a victim by an alleged perpetrator arises in the NFV Benchbook in section 5. The Law Council has previously commented on this issue, noting that while the trauma which may be caused to the aggrieved, if cross-examined by the accused, cannot be underestimated, the fidelity of the trial process and the evidence it produces, including but not limited to the testing of allegations, must prevail.⁶ The Law Council also noted, however, that the courts have ample opportunity to provide measures of protection for the aggrieved, including, for example:

⁶ Law Council of Australia, Submission to the Productivity Commission, *Access to Justice Arrangements*, 2015.

-
- a) The positive duty imposed upon judicial officers to disallow improper questions;⁷
- b) The limiting of questions; and
- c) That the aggrieved be cross examined by video link from another court, or a physical barrier be put in place so the cross examiner and cross examinee cannot physically see each other.
13. The legal representation of alleged perpetrators of family and domestic violence would eliminate the issue of alleged victims being directly cross-examined by the alleged perpetrator. However, at current levels of government spending, many Australians living below, and even above the poverty line are ineligible to receive legal aid under restrictive means tests. In 2014, the Productivity Commission recommended an immediate injection of \$200 million into legal assistance services, in their report on Access to Justice Arrangements.⁸ Despite recent funding pledges from the Government, including \$30 million targeted to address family violence, the funding crisis remains.⁹
14. Given the current legal aid funding crisis, and the resultant lack of representation for some alleged perpetrators, the NFV Benchbook presents a useful opportunity to remind the judiciary, practitioners, and litigants that the courts have a range of means and measures by which it can control the critical issue of testing evidence. While domestic and family violence must be condemned in the strongest terms, the testing of allegations occurs within a justice system, where the rule of law requires a fair trial for both parties. The Law Council's *Policy Statement on Rule of Law Principles* highlights the importance of fair trial principles to the rule of law.¹⁰

Recommendations

- Section 5 of the NFV Benchbook should invite the judiciary to actively consider the power of the court to regulate its own proceedings.
- The policy or aspirational aspects included in section 5 of the NFV Benchbook should be included in a separate resource for judicial education.

Section 8 – Perpetrator intervention programs

15. The Law Council notes that the recent reports from the Victorian Royal Commission into Family Violence (VRC Report) and the Special Taskforce on Domestic and Family Violence in Queensland (Not Now, Not Ever Report) contain significant research and recommendations in the area of family violence, including in the area of perpetrator intervention.
16. The VRC Report notes that:

⁷ *Evidence Act 1995* (Cth), s41.

⁸ Productivity Commission, *Access to Justice Arrangements*, Inquiry Report vol 1 (2014) 30.

⁹ Jane Lee, 'Family violence legal aid boost of \$30 million won't solve crisis: Lawyers', *The Sydney Morning Herald* (online), 12 May 2016 <<http://www.smh.com.au/federal-politics/federal-election-2016/family-violence-legal-aid-boost-of-30-million-wont-solve-crisis-lawyers-20160512-gotoqf.html>>.

¹⁰ Law Council of Australia, *Policy Statement: Rule of Law Principles* (2011) 3 <<https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>>.

Crime Statistics Agency analysis conducted for the Commission indicated that a relatively small number of recidivist perpetrators account for a disproportionate number of family violence incidents attended by Victoria Police. These perpetrators were more likely than others to be recorded by police as being unemployed, depressed or as having used drugs.¹¹

17. The VRC Report also noted that it had received evidence that few behaviour change and other relevant programs exist in rural, regional and remote communities, if at all. It was noted that in these circumstances, and particularly in areas where there are lengthy waiting lists, occasionally non-specialised counsellors may be a fall-back option to provide interventions for perpetrators.¹²

18. There is much work that needs to be done in the area of perpetrator intervention programs. The VRC Report found that the extent to which existing men's behaviour change programs are successful in changing an individual's behaviour and attitudes or in keeping victims safe is as yet unknown.¹³ It noted that:

- *there are insufficient programs to cater to all men who are referred to them;*
- *there is little or no follow-up to monitor someone's completion of a program;*
- *there is inadequate oversight of the quality of programs and providers or for assessing the appropriateness of the methodologies used; and*
- *existing programs do not cater for different cohorts of perpetrators, and are not designed to respond to those perpetrators with significant criminogenic factors such as serious mental illness or substance abuse.¹⁴*

19. The VRC Report found that to achieve perpetrator accountability, the system must comprise a number of elements, including:

...interventions and programs that are implemented according the latest knowledge and evidence about their efficacy in managing risk, achieving behaviour and attitude change, addressing criminogenic factors, reducing re-offending, and meeting the needs of victims...¹⁵

20. The VRC Report noted that these interventions and programs must also be subject to an effective compliance and oversight scheme, and made a number of recommendations to the Victorian Government to address these various issues.¹⁶

21. The Not Now, Not Ever Report noted that an effective integrated response to domestic and family violence is incomplete without an appropriate range of services to address and change the violent behaviour of perpetrators.¹⁷ It outlined the importance of early intervention for both victims and perpetrators and noted that it is essential that generalist service providers are trained in detecting early warning signs, and

¹¹ Victoria, Royal Commission into Family Violence, *Final Report* (2016) 10.

¹² *Ibid*, vol 3, 280.

¹³ *Ibid*, vol 3, 293.

¹⁴ *Ibid*.

¹⁵ *Ibid*, vol 3, 294.

¹⁶ *Ibid*, Summary and Recommendations, 69-71: (Recommendations 86-92).

¹⁷ Queensland, Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever* (2015) 234.

understand the available options for accessing specialist support.¹⁸ It further found that:

*An integrated response that successfully engages mainstream service providers and provides clear frameworks for assessing risk and taking action, will assist in intervening early. As will training for mainstream service providers in order to increase understanding of the dynamics and risks of domestic and family violence.*¹⁹

22. The Not Now, Not Ever Report makes a number of recommendations, focusing on perpetrator interventions,²⁰ which include the need for increased access to perpetrator intervention initiatives, and the review of professional practice standards for working with men who perpetrate domestic and family violence.

Recommendations:

- Consideration should be given to the recommendations of the VRC Report and the Not Now, Not Ever Report regarding perpetrator interventions.

Section 9 – Responses in criminal proceedings - Sentencing

23. While the Law Council believes that a nationally consistent approach to domestic and family violence is essential, the current reality is that sentencing for domestic and family violence offences is governed by State and Territory legislation and case law. In these circumstances it is not possible, and indeed, may even be unhelpful to set national guidelines which may be at odds with State and Territory requirements.
24. Section 9 of the NFV Benchbook highlights the Law Council's concerns regarding the kind of information that is useful for a public benchbook and that which is more appropriately targeted at judicial education. Publicly available benchbooks that deal with sentencing usually focus on procedure, legislation, sentencing principles, and case law.²¹ Some of the material in section 9, including for example, research on listening to victims, is not material that should be included in a public benchbook, but rather a judicial education resource. Equally, referring to intervention programs which exist in one particular jurisdiction, may provide unrealistic hopes for litigants in others.
25. The Law Council notes the importance of continuing education for judicial officers, as it facilitates an understanding of the complex dynamics and broader issues involved when dealing with domestic and family violence offences, and the gender-based attitudes that underlie this type of offending. The Law Council notes that it is important that the judiciary is consistent in their approach and use the opportunity to make comments when sentencing to communicate the acceptable attitudes towards women "as part of a shared whole-of-system approach to prevention".²²

¹⁸ Ibid, 224.

¹⁹ Ibid, 224.

²⁰ Ibid, 234-240: Recommendations 80-83.

²¹ 'Sentencing Bench Book' (Benchbook, Judicial Commission of New South Wales, 2006)

<<https://www.judcom.nsw.gov.au/sentencing/>>.

²² Domestic Violence Resource Centre, 'Out of Character? Legal responses to intimate partner homicides by men in Victoria 2005-2014' (Discussion Paper No. 10, 2016) 117: "*The justice system ...can extend its role in prevention by ensuring that, where relevant, the narratives and messages that arise from criminal proceedings and judgments are aligned with those identified in Australia's shared framework for the primary prevention of violence against women and children.*"

-
26. The Law Council invites further consideration of the purpose of and intended audience for this section of the NFV Benchbook, and recommends that the publically available benchbook contain the more traditional “state of the law” information on sentencing principles (acknowledging jurisdictional differences) and cases, while the statements of aspiration, along with the policy and program initiatives, are matters better suited to a resource manual for judicial education.

Recommendations:

- Further consideration be given to the content of section 9 of the NFV Benchbook in light of concerns that it is not possible, and indeed, may even be unhelpful to set national guidelines which may be at odds with state/territory requirements.
- Further consideration be given to the purpose and intended audience of section 9 of the NFV Benchbook.
- Information on the “state of the law”, sentencing principles, and cases should be included in a benchbook for public and judicial use, and statements of aspiration, along with the policy and program initiatives information should be included in a resources manual for judicial education.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Reported and unreported family violence Murder of family members Family violence reported to police Family violence recorded by police State prosecution of family assault Federal prosecution of domestic violence Family violence offenders in prison Family violence offenders in jail. U.S. Department of Justice Office of Justice Programs 810 Seventh Street, N.W. Washington, D.C. 20531.Â Fatal family violence About the data in this section Victim demographics (table 3.1) Offender demographics (table 3.2) Offender weapon use (table 3.3) Number of victims and offenders (table 3.4). 17. Family violence reported to police. 22. About the data in this section. Percent of family violence reported to police (table 4.1). Reporting rates by offense (table 4.2). (New Mexico Domestic Violence Benchbook, University of New Mexico School of Law)f. Law Enforcement. There were a total of 25,644 reported domestic abuse incidents to law enforcement in 2003: 15,517 victims were identified in 60% of reported incidentsg.Â Domestic violence: a national curriculum for childrens protective services. San Francisco: Family Violence Prevention Fund). 38Ibid. In its review of the legal response to domestic and family violence in Australia, Family Violence A National Legal Response, published in 2010, the Australian Law Reform Commission and New South Wales Law Reform Commission recommended that a National Domestic and Family Violence Bench Book should be developed.Â The Australian, state and territory governments should collaborate with relevant stakeholders to develop and maintain a national bench book on family violence, including sexual assault, having regard to the Commissions recommendations in this Report in relation to the content that should be included in such a book. Domestic Violence Benchbooks give guidance to judges on to how to address domestic violence per state statutes, case law and court rules. This resource contains various states benchbooks. Brochure: Crisis For Women In Family Court: What To Expect and How To Fight Back (PDF). In response to the discrimination and harassment women often face in family courts, the NOW Family Law Ad Hoc Committee has developed a brochure that provides practical recommendations for women encountering a difficult divorce or child custody case. It includes tips to help women better understand the judicial process, h Family violence is defined as a pattern of abusive behaviors by one family member against another. Learning Objectives. Discuss the various types of domestic violence, such as physical or economic, as well as the effects on all people involved. Key Takeaways. Key Points. Physical abuse is abuse involving contact intended to cause feelings of intimidation, pain, injury, or other physical suffering or bodily harm. Sexual abuse is any situation in which force or threat is used to obtain participation in unwanted sexual activity. Verbal abuse is a form of emotionally abusive behavior involving the