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6 October 2017

Dear Dr Cullen

The ACT Human Rights Commission (HRC) welcomes the opportunity to provide this submission to the Standing Committee on Justice and Community Safety Inquiry into Domestic and Family Violence – Policy approaches and responses.

The HRC is an independent agency established by the *Human Rights Commission Act 2005* (ACT). The main object of our Commission is to promote the human rights and welfare of people in the ACT, and we work to create an inclusive community that respects and realises everyone's rights. The HRC includes:

- The President and Human Rights Commissioner
- The Public Advocate
- The Children and Young People Commissioner
- The Disability and Community Services Commissioner
- The Discrimination Commissioner
- The Health Services Commissioner and
- The Victims of Crime Commissioner

The adequacy and effectiveness of policy approaches and responses in preventing and responding to domestic and family violence (DFV) is an area of concern for the Commission as a whole.

Domestic and family violence is a human rights issue, and can violate rights protected under the *Human Rights Act 2004* (HR Act) including the right to be free from torture and cruel, inhuman and degrading treatment (s 10), the right to equality (s 8) and the rights of children to the protection they need (s 11). The Human Rights Commission has a role in promoting human rights through providing input into law and policy in the ACT and ensuring that public authorities understand and comply with their human rights obligations in relation to the prevention and responses to domestic and family violence. The ACT Government recently strengthened the protections for victims of family and domestic violence by amending the ACT Discrimination Act to protect people from

discrimination on the basis of subjection to family or domestic violence in areas of public life including employment, provision of accommodation and goods and services and education. Individual Commissioners within the Human Rights Commission also bring particular perspectives and expertise to this issue, including a focus on the needs and rights of victims of crime, children and young people, people with a disability, Aboriginal and Torres Strait Islander people and people from non-English speaking backgrounds.

The Victims of Crime Commissioner performs a wide range of functions in relation to domestic and family violence. The Victims of Crime Commissioner (VOCC) is the agency head of Victim Support ACT – the Government’s ‘one stop shop’ for victims of crime in the ACT. Victim Support ACT delivers the Victims Services Scheme in accordance with the *Victims of Crime Act 1994* and the *Victims of Crime Regulation 2000*. The VOCC is the decision maker for the ACT’s new Victims of Crime Financial Assistance Scheme in accordance with the *Victims of Crime (Financial Assistance) Act 2016*. The VOCC is also the Domestic Violence Project Coordinator (DV Project Coordinator) under the *Domestic Violence Agencies Act 1986* and sits on the Domestic Violence Prevention Council in this capacity. The VOCC also chairs the ACT’s Family Violence Intervention Program Coordinating Committee.

The Family Violence Intervention Program (FVIP) commenced in the ACT in 1998. An integrated and coordinated criminal justice response to family violence, the goals and objectives of the FVIP are to:

- Maximise the safety and protection of victims of family violence
- Work together cooperatively and effectively
- Provide opportunities for offender accountability and rehabilitation
- Seek continual improvement in response to family violence in the ACT.

The FVIP comprises two core initiatives – a coordinating committee and case tracking program. The FVIP partner agencies include:

- ACT Policing
- Office of the Director of Public Prosecutions (DPP)
- ACT Law Courts and Tribunal
- ACT Corrective Services (ACTCS)
- Legislation, Policy and Programs Branch, Justice and Community Safety Directorate
- ACT Health Directorate
- Child and Youth Protection Services, Community Services Directorate
- Victims of Crime Commissioner (VOCC)
- Domestic Violence Crisis Service (DVCS)
- Canberra Rape Crisis Service (CRCS)
- Legal Aid ACT

The FVIP Coordinating Committee is a forum for partner agencies to identify and explore systemic issues as they relate to family violence matters in the criminal and civil justice system.

The FVIP case tracking program has an operational focus and aims to improve the safety of victims of family violence in the lead up to criminal justice proceedings through an inter-agency response. The case tracking program is convened by the ACT Policing Victims of Crime Team and representatives from ACT Policing, Office of the Director of Public Prosecutions; the Domestic Violence Crisis Service; Child and Youth Protection Services; ACT Corrective Services and Victim Support ACT attend the weekly meetings.

The Review of Domestic and Family Violence Deaths and the initial work for the Domestic Violence Data Collection Framework were conducted in the office of the VOCC on behalf of the Domestic Violence Prevention Council.

### **Measuring outcomes and effectiveness**

Until recently, the VOCC has been responsible for collating data from criminal justice agencies for the purposes of evaluating the FVIP CC. This process became increasingly burdensome, and the limitations outweighed any benefits from collecting and analysing the data.

The *ACT Family Violence Intervention Program review* conducted in relation to 2008-09 data<sup>1</sup> concluded that overall

The results demonstrate that the FVIP is operating effectively. They do not however, identify any trends to guide future program development in a meaningful way. Given that family violence is a dynamic offence behaviour, it seems likely that there is much more to be known about family violence and how it is experienced in the Australian Capital Territory. Data collection and analysis must be made a priority to ensure the FVIP has the information it needs to provide appropriate responses for all victims and offenders involved in family violence.<sup>2</sup>

The ACT Law Reform Committee prepared a report on Domestic Violence in 1995. The Committee identified the same limitations in domestic violence data collection as have been raised time and again in the years since:

data collection by each agency in isolation is only a starting point. It does not resolve the problem of how to track specific cases, which is a "key element in effectiveness evaluations. While it is important for resourcing purposes to know how many and what types of cases are dealt with by individual agencies in the system, some measure of client overlap is required. If agencies are dealing with the same clients, then one of the significant measures of intervention effectiveness must involve tracing of those cases common to agencies.<sup>3</sup>

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<sup>1</sup> T Cussen & M Lyneham, 2012, *CT Family Violence Intervention Program Review*, Australian Institute of Criminology. NB The evaluation was initially prepared in 2008 however there was a delay in publication.

<sup>2</sup> Ibid, 113.

<sup>3</sup> The Community Law Reform Committee of the Australian Capital Territory, 1995, *Domestic Violence – Report No 9*, ACT Community Law Reform, 42-43.

In 2015 the VOCC referred the issue of DFV data collection to the Domestic Violence Prevention Council in recognition of the challenges including:

- Data from the FVIP criminal justice agencies relates primarily to matters that come to the attention of police (with some additional data from the Domestic Violence Crisis Service). It is well documented that a majority of DFV incidents do not come to the attention of police.
- The way that DFV has been coded by agencies appears to have changed throughout the operation of the FVIP and some agencies were reluctant to collate data.
- Data currently collected allows measurement of outputs only as data cannot be linked.

Other issues in relation to the measurement of DFV in the ACT include:

- Lack of consistent definitions causes challenges in comparing data.
- Information management systems are not designed to support reporting of DFV.
- Many non-criminal justice agencies do not consistently record or report on disclosures relating to DFV.
- Lack of leadership across the ACT relating to collection of DFV data and outcomes measurement in general in the human services space.

Without effective measurement of DFV it is difficult to comment with great authority on outcomes or effectiveness of policy approaches and responses in preventing and responding to domestic and family violence. This submission, therefore, is prepared based on the anecdotal observations of Commissioners.

### **The ACT Government's 2016-17 funding commitments**

The Office of the Coordinator General for Family Safety co-design approach to the development of a Family Safety Hub is important work. The Review of Domestic and Family Violence Deaths in the ACT identified an absence of interagency communication and collaboration relating to families experiencing domestic or family violence where they were not involved in the criminal justice system.

It is significant that Government has worked closely with people with lived experience of domestic violence in the co-design process for addressing service provision to those who may not intersect with the criminal justice system. The VOCC and Victim Support ACT have also been involved as service providers in the design process. Getting the design process right is important and a key step in the policy development process. It is too early to comment on the outcomes of the Family Safety Hub work, however, it is important that monitoring and evaluation be built into the pilot process to ensure it is possible to measure outcomes.

The HR Commission looks forward to working with government on this reform.

### **Adequacy and effectiveness of current policy approaches and responses: legislation**

Over the past two years a large body of law reform has taken place in relation to civil protection orders and criminal matters involving family violence. Significant reforms we acknowledge relate to the expanded definition of family violence in the new *Family Violence Act 2016*; provisions relating to special interim family violence orders and the family violence evidence in chief provisions. These reforms go some way in recognising the human rights of victims of family violence.

There is a gap in legislation in protecting the right to privacy of victims of family and domestic violence. There is a distinct need to extend the protection of counselling communications for sexual assault to domestic and family violence matters.

Since the 1990s all Australian jurisdictions have enacted legislation to limit the subpoena and disclosure of communications made in the context of counselling for sexual assault. In the ACT, this is reflected in section 57 of the *Evidence (Miscellaneous Provisions) Act 1991*.

The sexual assault communications privilege arose out of a number of concerns. A lack of assurance of the confidentiality of such documents deters victims from seeking counselling, providing accurate disclosures about their symptoms and experiences, or reporting matters to the police.

The protection of sexual assault communications serves the important public interest of preventing victim blaming attitudes in court, encouraging people who have been sexually assaulted to seek therapy, and encouraging them to report the crime to the police.

The issues giving rise to the protection of counselling communications for sexual assault are wholly applicable to DFV. Victims of DFV, similarly to victims of sexual assault, are frequently subjected to victim-blaming and unreasonable attacks in court. They may also be deterred from reporting crimes and seeking support due to confidentiality concerns. The VOCC is aware of several instances where victims have refused to engage with services based on a fear that their counselling notes will be made available to their perpetrator and potentially aired in open-court. In considering the rationales for introducing the sexual assault communications privilege and the parallels with DFV, it is logical to extend the protection to DFV matters.

I have documented my concerns relating to the protection of privacy of victims in court proceedings previously in an issues paper. The issues paper is attached for the committee's reference.

In relation to legislation governing responses to family and domestic violence, the HRC welcomed the government's creation of the Coordinator-General for Family Safety (CGFS). We are concerned, however, that there is a significant and inefficient overlap between the CGFS and the DV Project Coordinator / Domestic Violence Prevention Council. For example, the functions of the DV Project Coordinator in relation to family violence are:

- To monitor and promote compliance with the policies of the ACT and Commonwealth governments
- To assist government agencies and non-government organisations involved in law enforcement; or the provision of health, education, crisis or welfare services to victims or perpetrators of family violence:

- o To provide services of the highest standard
- o To provide appropriate educational programs
- o To cooperate
- To assist in the development and implementation of policies and programs as directed by the Domestic Violence Prevention Council

There are obvious advantages to continuing to support the work and relative independence of the Domestic Violence Prevention Council, however, given that the DV Project Coordinator role has never been resourced it would seem to be an ideal time to amend the Domestic Violence Agencies Act 1986 and remove the DV Project Coordinator role. Government may also see fit to amend or remove some of the functions of the Domestic Violence Prevention Council to reduce duplication and overlap with the role of the CGFS.

### **Legislative protection against violence against children and young people within the family**

One area of DFV which has not been adequately addressed through legislative reform in the ACT is the gap in the protection of children (including young people under 18) from family violence, which falls within the scope of the common law defence of ‘parental chastisement.’ This defence against the crime of assault limits the legal protection available to children against physical violence which is inflicted for disciplinary reasons within the family.

While a degree of minor physical violence against children is still considered acceptable by many parents in Australia, there is growing and consistent evidence that corporal punishment, including ‘smacking’ is ineffective as a disciplinary measure, and is associated with a range of adverse outcomes for children, including increased aggression, poor relationships and mental health issues. Children who are smacked are also at higher risk of more extreme physical abuse within the family.<sup>4</sup>

The Royal Australasian College of Physicians Paediatric & Child Health Division have called for the prohibition of physical punishment of children, citing poor health outcomes and noting that “the circumstances when physical punishment is likely to be used place a child at risk of an unintended escalation to serious physical assault.”<sup>5</sup> In other jurisdictions, including New Zealand (which prohibited family violence against children in 2007), legislative change and education have led to change in social attitudes towards the use of violence against children. Internationally, 53 countries have prohibited corporal punishment in all settings. A further 54 countries have committed to achieving a complete legal ban.<sup>6</sup> It is possible to introduce such legislative changes while allowing discretion not to prosecute parents for minor offences, so that the primary focus of reform is to achieve social change through leadership and education.

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<sup>4</sup> Gershoff, E., & Grogan-Kaylor, A. (2016). Spanking and child outcomes: Old controversies and new meta-analyses, *Family Psychology*, 30(4), 453-469.

<sup>5</sup> RACP Position Statement Physical Punishment of Children July 2013

<sup>6</sup> Global Initiative to End All Corporal Punishment of Children <http://www.endcorporalpunishment.org/>

Having a clear legislative prohibition against the use of violence against children, including within the family, would be consistent with Australia's obligations under the United Nations Convention on the Rights of the Child, and the right to protection in s 11 of the HR Act.<sup>7</sup> A clear prohibition of violence against children makes it more difficult for parents to justify serious physical violence as discipline, and reduces the risk of discipline escalating into unintended levels of physical abuse.

As the Council of Europe's Commissioner for Human Rights, Thomas Hammarberg has stated:

*It should be embarrassing for all of us that children have had to wait until last to achieve full legal protection of their human dignity and physical integrity. This is not a complex issue – hitting people is wrong and children are people too – yet adults still find all sorts of excuses to put off providing children with a basic legal protection that they take for granted themselves.<sup>8</sup>*

The reasonable chastisement defence continues to be relied on in the ACT as a defence to DFV that goes beyond mere smacking. In the case of *LA v TC*, Chief Magistrate Walker found that the defence had been established in relation to an assault by a step-mother using 'moderate force' against a teenaged girl, noting the difficulty in determining the scope of 'reasonable' physical punishment. Her Honour highlighted the inconsistency of this common law defence with human rights obligations and the approaches taken in many other jurisdictions.<sup>9</sup>

The message of zero tolerance of DFV against women sits uncomfortably with the acceptance of a level of violence within the family against children, who are among the most vulnerable people within our society. Legislating to prohibit corporal punishment within the family, and providing ongoing community education about more effective parenting techniques will send a clear and consistent message that DFV is unacceptable in any context.

### **Best practice approaches and responses being undertaken in other jurisdictions**

It is time for Government to take action towards developing ACT Police issued safety notices. New South Wales Police and Victoria Police have successfully been making use of police-issued family violence orders for some time. Consideration should be given to the following issues:

- Amendments relating to after-hours family violence orders have been in place since 1 May 2017, the *Family Violence Act 2016*.

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<sup>7</sup> See also *A v The United Kingdom* (1998) 27 EHRR 611 where the European Court of Human Rights found that the defence of reasonable chastisement violated article 3 of the European Convention on Human Rights.

<sup>8</sup> Save the Children Sweden, *Ending legalised violence against children*, Global Report (2008) 12.

<sup>9</sup> 14 December 2011 (CC 10/7532; CC 10/6854).

- Police issued safety notices may have the capacity to fill a gap in the non-arrest interventions available to police.
- The VOCC is informed that a significant number of reported family violence incidents that are brought to ACT Police' attention do not include a report of a criminal offence. This can be due to inadequate information about the offence, victims being unwilling to disclose an offence or the incident not constituting a criminal offence. Police issued safety notices would provide an important intervention opportunity for police where an offence may not meet the burden of proof required at court.
- Recent changes in ACT Policing, including the pilot of the family violence risk assessment tool, have increased police capability to identify situations where there is a risk of further family violence that cannot be addressed through police charges.
- Police issued safety notices provide an important opportunity to reduce the burden on victims to take steps to protect their own safety. In all other jurisdictions, police have a role in either making or applying for orders on behalf of victims.

### **Principal practitioner model in family violence**

Other reforms interstate are worthy of consideration such as the extension of the principal practitioner model in Victoria which was recommended in the Victorian Royal Commission into Family Violence to 'build family violence capability, lead practice reform across the departments and support key priorities for practice development'.<sup>10</sup>

Family Violence Principal Practitioners in Victoria now exist in the Department of Education and Training, in the Department of Health and Human Services and in Justice and Regulation. The role and functions of the Principal Practitioner is pivotal in providing leadership, specialist knowledge and in facilitating and strengthening responses to family violence across whole of government and community. Such a model supports and recognises vulnerability, the experiences of trauma and assists in achieving whole of government and community responses to family violence.

### **Need for child-right and child-focused policy and service responses**

The issue of family and domestic violence engages several rights in the United Nations Convention on the Rights of the Child (the Convention), as follows:

- Every child and young person has the right to live life free from all forms of violence, abuse and neglect (Article 19).

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<sup>10</sup> Victorian State Government, One Year On from the Royal Commission into Family Violence, [https://www.vic.gov.au/system/user\\_files/Documents/fv/DPC01%20One%20year%20on%20from%20the%20Royal%20Commission%20into%20Family%20Violence.pdf](https://www.vic.gov.au/system/user_files/Documents/fv/DPC01%20One%20year%20on%20from%20the%20Royal%20Commission%20into%20Family%20Violence.pdf)



- Children and young people have the right to participation in decision making, and for their views to be listened to and taken seriously (Article 12).
- Government agencies, courts or community organisations working for or with children and young people must make the child's best interests their primary consideration (Article 3).
- Governments have an obligation to ensure each child has appropriate protection and care in order to support his or her wellbeing (Article 3).
- Governments have an obligation to provide assistance and services to parents and families in order to promote the care and development of their children (Article 18).

The United Nations Convention on the Rights of the Child (the Convention) requires that legislative and administrative processes of State Parties assure that children who are capable of forming their views on matters affecting them be given the right and opportunity to express those views freely, either in writing, orally, in print form or thorough other media chosen by the child.<sup>11</sup>

Although the Convention gives children and young people these rights, research highlights their ongoing marginalisation in decision making and legal proceedings in Australia and overseas. The views and wishes of children and young people can be selectively used or disregarded, family violence can be reframed and minimised as 'family conflict' and the influence of pro-contact ideologies and dominant values relating to the ongoing preservation of relationships between children and young people and the perpetrating parent can overshadow the individual experience of violence by children and young people.<sup>12</sup>

Empirical evidence indicates that children and young people are not passive or silent observers to violence occurring in their family,<sup>13</sup> and children and young people who experience, or are exposed to, family violence experience long-lasting effects. Violent episodes occur in a wider context of coercion and control. Children and young people are deeply intertwined in the emotional dynamics of their family, and if violence is occurring around them they may live in a state of vigilance, fear or insecurity. Further, if the wellbeing and parenting capacity of the non-violent parent (usually the mother) is undermined by violence, this can in turn fundamentally effect the child's or young person's development.

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<sup>11</sup> *United Nations Convention on the Rights of the Child*, articles 12-13.

<sup>12</sup> Hart, A. S. (2010, June). Children's needs compromised in the construction of their 'best interests'. In *Women's Studies International Forum* (Vol. 33, No. 3, pp. 196-205). Pergamon; Macdonald, G. S. (2016). Domestic Violence and Private Family Court Proceedings: Promoting Child Welfare or Promoting Contact? *Violence against women*, 22(7), 832-852; Macdonald, G. S. (2017). Hearing children's voices? Including children's perspectives on their experiences of domestic violence in welfare reports prepared for the English courts in private family law proceedings. *Child Abuse & Neglect*, 65, 1-13.

<sup>13</sup> Callaghan, J. E., Alexander, J. H., Sixsmith, J., & Fellin, L. C. (2015). Beyond "Witnessing" children's experiences of coercive control in domestic violence and abuse. *Journal of interpersonal violence*; Callaghan, J. E. M., & Alexander, J. H. (2015). *Understanding Agency and Resistance Strategies, Children's Experiences of Domestic Violence Report*. Northampton. Retrieved from [www.unars.co.uk](http://www.unars.co.uk); Holt, S., Buckley, H., & Whelan, S. (2008). The impact of exposure to domestic violence on children and young people: A review of the literature. *Child Abuse & Neglect*, 32(8), 797-810

The current public discussion and discourse on family and domestic violence is adult-centred. Children and young people have different needs and perspectives that should receive ‘explicit focus’:<sup>14</sup>

*Children and young people can be affected by family violence in a range of ways which are often independent of their non-violent parent, and their needs can be different to those of adults. At times children and young people’s needs have been overlooked or conceived as secondary to those of adults when strategies are put in place to address family violence.*<sup>15</sup>

Children’s and young people’s perspectives, experiences and needs differ in important ways to those of the adult victims in their home. We need to listen to children and young people in order to understand their experiences of living with family and domestic violence.

A key area for the Public Advocate and Children and Young People Commissioner (PACYPC) is therefore on promoting the recognition that children and young people are not just secondary victims as a result of the violence that they witness between adult family members, but that they are also primary victims, both through their own direct experience of violence and/or through the impact that family violence has on them and their social, emotional and physical development.

The PACYPC is a member of the Australian Children’s Commissioners and Guardians (ACCG), which comprises national, state and territory children and young people commissioners, guardians and advocates. The ACCG aims to promote and protect the safety, wellbeing and rights of children and young people across Australia by contributing to public policy and program development.

The PACYPC is coordinating the development of a joint ACCG position paper on violence in the lives of children and young people. The position paper will highlight the importance of understanding family and domestic violence from the perspective of children and young people. The primary message in this position statement is that “[c]hildren’s experiences of family and domestic violence must be understood in their own right and not just as part of an adult situation.”<sup>16</sup>

Further, in looking at family violence from a child-centric perspective, the needs and rights of the child/young person must be central to decision-making and resultant actions. Often the impact of family violence on children and young people themselves is diminished by the language and references that are used in such matters (e.g. victims ‘and their children’). It is well founded that children and young people are affected by family violence regardless of whether they are the direct targets of the violence or not.

Legal, policy and service responses therefore need to be informed by children's experiences and be child-focused in responding to their needs.

## **Multidisciplinary trauma-informed approaches and interventions**

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<sup>14</sup> National Children’s Commissioner (2015) *Children’s Rights Report*, 165.

<sup>15</sup> Commissioner for Children and Young People Tasmania (2016) *Children and Young People’s Unique Experiences of Family Violence: Family violence and children and young people in Tasmania*, 3.

<sup>16</sup> National Children’s Commissioner (2015) *Children’s Rights Report*, 144.

Seeking to improving access to timely therapeutic services and specialist supports for children and young people who have experienced family violence and fostering the development of services specifically for children and young people is a priority area for the PACYPC.

To achieve this outcome, policy and service responses need to be trauma-informed and children and young people also have the right to access specific trauma therapeutic interventions. Whilst private practitioners in the ACT may provide and offer various trauma services, and children involved with territory Child Youth Protection Services can potentially access services provided by the Child at Risk Health Assessment Service and Melaleuca Place, children and young people in the community may not have ready and timely access to therapeutic support services.

The HR Commission advocates for additional funding to be targeted towards multidisciplinary trauma services specifically for children and young people who have experienced domestic and family violence.

### **Child-led research needed to inform policy and service responses**

Despite 25% of Australian children having experiences of domestic and family violence<sup>17</sup>, there is a paucity of research on how children make sense of and understand this violence and how they themselves believe the issue might be addressed.<sup>18 19.</sup>

Challenges for children's participation in this research, such as reluctance from various gatekeepers to enable and consent to children's participation, has contributed to this research gap.<sup>20 21</sup> Unique ethical challenges and methodological concerns for engaging children in domestic and family violence research and children's perceived vulnerable position in society have also 'limited the amount of empirical research' with them on this issue. If services are to effectively meet the needs of children and young people, it is essential for children and young people be included and actively engaged in future research and review processes.<sup>22</sup>

Although the PACYPC at this stage has not undertaken a systemic inquiry into the experience of family violence for children and young people in the ACT, the need to ensure that children and young people are recognised as victims in their own right and that relevant and appropriately

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17 Indermaur, D. (2001). *Young Australians and Domestic Violence*. Canberra: Australian Institute of Criminology.

18 Øverlien, C. (2010). Children Exposed to Domestic Violence, Conclusions from the Literature and Challenges Ahead. *Journal of Social Work*, 10(1), 80-97.

19 Swanston, J., Bowyer, L., & Vetere, A. (2014). Towards a richer understanding of school-age children's experiences of domestic violence: the voices of children and their mothers. *Clin Child Psychol Psychiatry*, 19(2), 184-201.

20 Baker, H. (2005). Involving Children and Young People in Research on Domestic Violence and Housing. *Journal of Social Welfare and Family Law*, 27(3-4), 281-297.

21 Rizo, C. F., Macy, R. J., Ermentrout, D. M., O'Brien, J., Pollock, M. D., & Dababnah, S. (2015). Research With Children Exposed to Partner Violence Perspectives of Service-Mandated, CPS-and Court-Involved Survivors on Research With Their Children. *Journal of Interpersonal Violence*, 0886260515596534.

22 Baker, H. (2005). Involving Children and Young People in Research on Domestic Violence and Housing. *Journal of Social Welfare and Family Law*, 27(3-4), 281-297.

targeted supports are available to them as required, is one that we are actively pursuing. Ensuring that children and young people have the opportunity to be actively involved in ongoing service development is a current focus of the PACYCP.

Each child's or young person's experience of family and domestic violence is dependent on their individual circumstances and personal characteristics.<sup>23</sup> Emerging research suggests that some children and young people living with family and domestic violence display great resilience and agency in spite of their adverse experiences.<sup>24</sup> Some children and young people are also more vulnerable than others or their circumstances result in them being more vulnerable.

Responses for young victims therefore should be tailored to each child, according to the particular risks and protective factors in their lives. Greater research is needed to understand the diverse circumstances of the different groups of young people who experience family and domestic violence, and how best to design interventions that are accessible and appropriate for their different needs.

In collaboration with university partners, the PACYCP is scoping the feasibility and resource commitment of undertaking future research or systemic review regarding children and young people's experiences of family violence and their service delivery needs. In undertaking future systemic review processes and joint opportunities, the PACYCP is consolidating linkages with the Office of the Coordinator-General for Family Safety.

### **Provision of individual public advocacy services**

If people with experiences of domestic and family violence are referred to the PACYCP for advocacy assistance a collaborative approach with the person underpins our approach. The PACYCP can undertake a broad range of individual advocacy functions in protecting, upholding and advocating for their rights and interests such as attending court hearings (family violence, family law proceedings), participating in case conferences or meetings, convening multi-agency panel meetings or the PACYCP can liaise with other agencies to achieve improved services for people. Various matters are also brought to our attention through provisions in the *Family Violence Act 2016*, in situations where the court considers that a party to a proceeding for a family violence order has impaired decision making. Matters are referred to the PACYCP for consideration as to the need for advocacy assistance or for the appointment of a litigation guardian. The Public Advocate may be appointed as a litigation guardian and if acting in this capacity, the Public Advocate must do everything that is necessary in the proceeding to protect the person's interests.

The PACYCP has experience being appointed as litigation guardian for young people in family law proceedings in situations where a conflict of interest may have existed and no other suitable person

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<sup>23</sup> Commissioner for Children and Young People Tasmania (2016) *Children and Young People's Unique Experiences of Family Violence: Family violence and children and young people in Tasmania*, 15.

<sup>24</sup> Commissioner for Children and Young People Tasmania (2016) *Children and Young People's Unique Experiences of Family Violence: Family violence and children and young people in Tasmania*, 20.

known to young person could undertake the role. In these matters collaborative relations have been established with the independent children's lawyer allowing for a joint approach in upholding the rights and best interests of the young person, ensuring that relevant assessment and clinical material is put before the court and in advocating for the particular needs of individual young people. Beneficial outcomes have been achieved in cases where the PACYPC performed this role; of significance has been the additional advocacy support available to young people, particularly in assisting them to have greater understanding of proceedings and to facilitate their voice in proceedings.

In order for courts to have a greater comprehension of the impacts of violence on children and young people, there must be greater scope for children and young people themselves to be heard in the legal processes. Judicial decision-making can fall short in centralising the experience of family violence by children and young people and the impact of this violence on their lives. It is vital that judicial decision-makers have a comprehensive understanding about the nature of family violence, the realities and traumatic impacts on individual children and young people (including on their social, emotional and physical development), dynamics and perpetrator tactics, and knowledge about the ongoing impact of violence,<sup>25</sup> and its potential long-term impacts on child victims, regardless of whether they have directly experienced violence or witnessed it against a family member.

In making determinations in the interests of children and young people, courts must have adequate clinical information on the experience of family violence by a child or young person, which includes having sufficient information to enable due consideration of additional complexities and co-morbidities, such as mental health and substance misuse issues that may be evident. This necessitates specific training, and detailed and comprehensive assessment information being available to the court on the complexities and nuances of each individual child/young person's experience of family violence. Ensuring a child or young person has access to independent advocacy assistance is also critical.

Whilst the PACYPC has individual advocacy functions as outlined in legislative underpinnings, the PACYCP only receive referrals from the Magistrates Court for people who are party to a proceeding where the court considers the party has impaired decision making ability. The PACYPC is currently scoping demand to ascertain whether the need exists for greater public advocacy for people who have experienced domestic and family violence, in particular for children and young people who may require further support to express their views and wishes in decision-making and in their communications with legal representatives, family consultants and other service providers.

## **Monitoring and oversight of services for the protection of children and young people**

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<sup>25</sup> Thiara, R. K., & Humphreys, C. (2017). Absent presence: The ongoing impact of men's violence on the mother-child relationship. *Child & Family Social Work*, 22, 137-145.

The Public Advocate (PA) has a legislative function to monitor services for the protection of children and young people, specifically, children and young people involved with Children, Youth and Protection Services.

In undertaking this role, the PA receives information about children and young people's circumstances through a range of statutory pathways, primarily associated with a number of provisions within the *Children and Young People Act 2008*. For example the PA receives annual review reports for children and young people in care, notification advices when emergency action is taken by the director-general who on reasonable grounds believes that a child or young person is in need of emergency care and protection and various other documents (court documents, reports) are submitted to the PA.

Demands for individual advocacy and resource limitations have impacted the capacity of the Public Advocate to undertake systemic advocacy or project work related to children and young people with experiences of family violence. The PA however remains committed to reviewing this capacity in potentially undertaking future advocacy projects.

Thank you for taking the time to consider the content contained in this submission. The Commissioners look forward to answering any additional questions you may have.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Hinchey', written in a cursive style.

John Hinchey  
Victims of Crime Commissioner  
A/g President and Human Rights  
Commissioner

## POSITION PAPER

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### PROTECTING PRIVACY OF VICTIMS IN COURT AND TRIBUNAL PROCEEDINGS OF SUBPOENAED PERSONAL HEALTH INFORMATION

JULY 2015

**Victims of crime often find themselves powerless to prevent details from their past health records being aired in court or to third parties, often without their knowledge, by documents produced in compliance with a subpoena. Case examples in the ACT suggest this is an area in need of legislative reform to ensure victims are protected in our legal system and are not re-traumatised through this process. This is an area of concern for the ACT Health Services Commissioner who will be providing a report to Government on this issue in coming months.**

A subpoena is an order from a court or tribunal, issued at the request of a party to a proceeding, which compels the person who has been subpoenaed to give oral evidence, to produce documents, or both.<sup>26</sup> Subpoenas can only be issued if legal proceedings have commenced<sup>27</sup> – this applies in both criminal and civil proceedings. Failure to comply with a subpoena can be deemed to be in contempt of court, and can attract penalties of imprisonment and fines.<sup>28</sup> This paper will focus on subpoenas issued to produce documents, in particular health records of health consumers who are often victims of crime.

The key issues this paper will identify is that a person's personal health records may be subpoenaed, produced, inspected, copied and divulged to third parties, entirely without the knowledge of the person to whom the health record relates.<sup>29</sup> This occurs when the person is not a party to the proceedings before a court or tribunal, and is not notified their health records

have been subpoenaed and produced. A victim of crime in criminal proceedings is not a party to the proceedings.

In the ACT, there is no legal obligation that requires either the record holder, or party issuing the subpoena, to inform the health consumer that their records have been subpoenaed or produced.<sup>30</sup> It is possible for a person with a 'sufficient interest' (for example the person to which the health record relates) to raise an objection to the production of documents, or apply to the court for an order to set aside the subpoena in certain circumstances.<sup>31</sup> The grounds of objection can be abuse of process on the basis of relevance of the subpoena, the subpoena is too wide and oppressive, is a "fishing" expedition, or privilege can be claimed in certain circumstances, such as sexual assault counselling communications privilege.<sup>32</sup> However, **the ability to object relies on awareness that the subpoena exists**, and a person who has not been informed their health records have been produced, obviously cannot raise an objection. The record holder, such as a medical practice or hospital, may raise these objections but often do not have the time or resources to do so, and also may not be able to ascertain whether information is particularly sensitive for an individual.<sup>33</sup>

In our community, people expect to be able to freely and frankly disclose their personal information to health practitioners, including psychologists, medical practitioners and counsellors, and this is certainly crucial for accurate diagnosis and treatment.<sup>34</sup> Consumers reveal highly sensitive information on the assumption that

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<sup>26</sup> *Court Procedures Rules 2006* (ACT), Reg 6601

<sup>27</sup> Tami Murrells, *Protecting privacy of subpoenaed personal health information*, Draft report prepared for the ACT Health Services Commissioner, November 2014, 7 (unpublished).

<sup>28</sup> *Court Procedures Rules 2006* (ACT), Reg 6612.

<sup>29</sup> Murrells above n 2, 3.

<sup>30</sup> *Ibid*, 3.

<sup>31</sup> *Court Procedures Rules 2006* (ACT), Regs 6604, 6609.

<sup>32</sup> Murrells above n 2, 9-10.

<sup>33</sup> *Ibid*, 12.

<sup>34</sup> Murrells above n 2, 4, citing *Court Procedures Rules 2006* (ACT) Reg 6604, *Health Act 1993* (ACT), s 125, *Evidence (Miscellaneous Provisions) Act 1991* (ACT), Div 4.5.

the communicated information will be treated confidentially.

During the 2012-2013 financial year, a single health service provider in the ACT received over 450 subpoenas to produce personal health information.<sup>35</sup> This indicates that defendants (or their legal representatives) in criminal proceedings may be invading victims' privacy by seeking personal health records on a regular basis.

The impact on victims of crime who have their personal health records subpoenaed can be devastating and, in some cases, it can re-traumatise them.<sup>36</sup> Victims feel their right to privacy has been violated.

There is currently a practice in the ACT of defence counsel in criminal proceedings issuing subpoenas of a broad scope to obtain highly confidential medical records.

Examples of subpoenas being issued for personal health information, which raise privacy issues, include:

- A criminal defence team issued a subpoena for the *entire* health records of a victim from a medical practitioner. While a copy of the subpoena was served on the Office of the Director of Public Prosecutions, the victim was unaware their personal records had been subpoenaed.<sup>37</sup> **There is no general obligation on the prosecution to advise the victim of the existence of the subpoena.**
- In criminal proceedings, a self-represented accused person subpoenaed a copy of the entire personal health records of a victim of crime, and the contents of the records were **disclosed to third parties** including relatives of the accused person.<sup>38</sup> This is a clear example when subpoenas have been misused.

- A subpoena issued in proceedings in the Coroners Court that was determining the cause of death of a person. The subpoena was for the health records of all consumers admitted to a health service provider facility (hospital) with assault related injuries within a certain time period.
- In domestic violence order proceedings in the ACT Magistrates Court, a subpoena was issued by the respondent's solicitor, and was served on the applicant without explanation. The subpoena came completely unexpectedly and the person served was unaware what was expected of them in relation to the subpoena.
- A criminal defence team issued a subpoena for the entirety of the victim's psychiatric records. The victim later discovered that their entire medical file, which detailed childhood sexual abuse, suicidal thoughts and major depression, had been provided to and read by all parties to proceedings and the judicial officer earlier in the court proceedings, without the victim's knowledge.<sup>39</sup>
- In family law proceedings, subpoenas are often issued for psychiatric records of the estranged spouse, as a 'fishing expedition.'<sup>40</sup> Information can then be used to disadvantage the party by stigmatising them as they have consulted psychiatrists.<sup>41</sup> **In some situations, subpoenas may be issued as a mechanism to gain advantage using intimidation and humiliation of the opposing spouse.**<sup>42</sup>

There are also situations in which health records of a person who is not a party to proceedings in the ACT Civil and Administrative Tribunal are obtained, by means other than a subpoena. This may arise in health practitioner disciplinary cases involving a complaint of inadequate record keeping of a medical practitioner, and health records of numerous health consumers may be tendered in tribunal proceedings.<sup>43</sup>

<sup>35</sup> Murrells above n 2, 12.

<sup>36</sup> H Alexander, The Sydney Morning Herald, *Psychiatric patients' records being aired in court*, 8 August 2014.

<sup>37</sup> Murrells above n 2, 11.

<sup>38</sup> *Ibid*, 10.

<sup>39</sup> Sydney Morning Herald above n 11.

<sup>40</sup> *Ibid*.

<sup>41</sup> Levy, Galambos and Skarbek, 'The erosion of psychiatrist-patient confidentiality by subpoenas', *Australasian Psychiatry*, 2014, 22, 332.

<sup>42</sup> *Ibid*, 335.

<sup>43</sup> Murrells above n 2, 11.



These examples highlight a number of issues with the current processes involving subpoenas in the ACT, and more generally, issues in relation to the release of a person's health records. It is clear the existing legal provisions are failing to protect medical-patient confidentiality. Unfettered access to a person's personal health records undermines a victim's right to privacy and violates the confidential nature of health practitioner-patient relationship. Failing to safeguard confidentiality of health records poses a risk that members of our community are deterred from seeking medical attention, or not providing accurate disclosures about their symptoms, experiences and/or history, due to fear their privacy might be breached in legal proceedings.<sup>44</sup>

The ACT has acknowledged a right to confidentially by the introduction of section 126B of the *Evidence Act 2011* (ACT) in 2011. This section provides a 'quasi-privilege' of "protected confidences". Section 126B states that the court **may direct that evidence not be presented in a proceeding if the court finds that presenting it would disclose a protected confidence**. It is a 'quasi-privilege' as the right for the material to remain confidential is limited and based on the court's discretion.

This protection is intended to extend to a wide range of health professions, including doctors and other health professionals, where confidentiality is the key and the confidant (the health professional) was acting in a professional capacity, and was under an express or implied obligation not to disclose its contents.

Section 126B provides the court with a guided discretion to direct that evidence not be presented in a proceeding if the court **is satisfied that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is presented, and the nature and extent of the harm outweighs the desirability of the evidence being presented**. The court must take into account a number of factors, including:

- The probative value of the evidence in the proceeding;

- The importance of the evidence in the proceeding;
- The nature and gravity of the offence, cause of action or defence and the nature of the subject matter of the proceeding;
- The availability of any other evidence relating to the matters to which the protected confidence relates;
- The effect of presenting evidence of the protected confidence;
- If the proceeding is a criminal proceeding, whether the party seeking to present evidence is a defendant or the prosecutor; and
- The public interest in preserving the confidentiality of the protected confidence.<sup>45</sup>

The practical effect of this section is that **the onus is cast upon the health practitioner or the patient to invoke the quasi-privilege by demonstrating to the court's satisfaction that the disclosure should be prevented as it would cause harm**. In making such an application to the court, a health practitioner and/or health consumer would be required to give evidence and be available for cross-examination to detail the grounds of why the subpoena should be set aside. In light of the frequency in which subpoenas are served on health practitioners, it is impractical for health practitioners to attend court each time a subpoena is received.<sup>46</sup>

Further, this means that the health consumer to whom the health records sought relates, would also need to be notified that such a subpoena has been issued. Currently no person or authority has been given responsibility for notifying the health consumer and explaining their rights to them and nor are they obliged to do so. If they are notified and they wish to challenge the subpoena, they would likely be required to attend court to give evidence and demonstrate the harm that would be caused to them if the health record was released. This creates an additional burden on a victim of crime in having to attend court and give evidence, and potentially be subject to vigorous cross-examination about their personal health

<sup>44</sup> Levy, Galambos and Skarbek above n 16, 333.

<sup>45</sup> *Evidence Act 2011* (ACT), s 126B(4).

<sup>46</sup> Levy, Galambos and Skarbek above n 16, 334.

information, at the early stage of court proceedings, prior to a trial or hearing.

Following a health consumer or health practitioner giving evidence, the court may still determine that the health records are to be produced in compliance with a subpoena if they find the desirability of the evidence outweighs any harm to a victim.<sup>47</sup>

This provision does not apply to Family Court proceedings and there is currently no similar provision in the Commonwealth *Evidence Act 1995*. The Australian Law Reform Commission has recommended a privilege be implemented in Commonwealth legislation that will provide for the Family Court to balance the likely harm to the confider if the evidence is adduced and the desirability of the evidence being given.<sup>48</sup>

It is interesting to note, in Tasmania, section 127A of the *Evidence Act 2001* provides an **absolute privilege** for medical communications in civil proceedings. An absolute privilege means that the court has no discretion about whether the evidence should be admitted (and effectively, the documents released).

A victim should be dealt with at all times in a sympathetic, constructive and reassuring way and with appropriate regard to his or her personal situation, rights and dignity.<sup>49</sup> The process of issuing of a subpoena should take into consideration this principle and have proper regard for a victim's personal well being throughout the process.

Legislation should be amended to strengthen protections of privacy for personal health records. This could be achieved by amendments to the *Court Procedures Rules 2006* (ACT). Suggested amendments include:

1. A *right* that a person with sufficient interest be notified of the subpoena as soon as practicable after it is issued. Such a provision would require the issuing party to serve the subpoena on any interested parties, including the person to whom the

health record is sought. The health consumer will then have the opportunity to challenge or object to the documents being produced.

2. A *right* for the health consumer to be notified if their health records are used in court or tribunal proceedings and have been obtained by means other than a subpoena. For example, documents obtained during the investigative stage of a complaint of inadequate record keeping by a medical practitioner.
3. An *express prohibition* on ulterior use, or disclosure to third parties, of subpoenaed personal health information. The current obligation requires that a person must only use documents obtained by subpoena for the purposes of the case before the court or tribunal, and must not disclose the contents or give a copy of any documents subpoenaed to any other person (except a lawyer representing them), without permission of the court. Self-represented litigants may not adhere to this obligation due to lack of awareness.
4. A person to which the subpoenaed health records relate, whether they are a party (or not) to the proceedings before the court or tribunal, to have the first *right* of access to inspect the documents that are produced to determine whether they will lodge an objection.<sup>50</sup>

The court should also consider developing an information sheet to highlight rights and obligations in relation to subpoenas for personal health information and enclose that information sheet with every subpoena issued.<sup>51</sup> This would assist victims of crime whose personal health records have been subpoenaed by a defendant or their legal representative to understand their rights and obligations, and how they could object to the records being released if they thought it appropriate.

The law must strike a balance between a victim's right to privacy and an accused person's right to a

<sup>47</sup> *Evidence Act 2011* (ACT), s 126B(3).

<sup>48</sup> Australian Law Reform Commission, *Uniform Evidence Law (ALRC Report 102)*, 15 – Privilege: Other Privileges, "Privileges protecting other confidential communications", 2006.

<sup>49</sup> *Victims of Crime Act 1994*, s 4.

<sup>50</sup> Murrells above n 2, 13-14.

<sup>51</sup> *Ibid*, 14-15.

fair trial. Current legislation does not adequately protect victims' right to privacy when seeking health services and additional safeguards are required.

The quasi-privilege set out in section 126B of the *Evidence Act 1995* can be used to abolish subpoenas which are unjustified and preserve a victim's right to privacy to some extent. However, knowledge of how that section operates needs to be more widely understood. Information on how section 126B operates should be included in the information sheet, previously suggested, as a means of educating people on their rights and entitlements.

The introduction of reforms aimed at protecting the rights and privacy of individuals who are the subject of subpoenas will assist victims of crime to prevent details from their past health records being aired in court or to third parties, often without their knowledge, by documents produced in compliance with a subpoena.