



FAMILY VIOLENCE AND HOMELESSNESS

REMOVING THE PERPETRATOR FROM THE HOME

DISCUSSION PAPER NO.3 2002

Domestic Violence and Incest Resource Centre, Melbourne

Contents

| | |
|---|----|
| I. Introduction | 4 |
| Background and Context | 4 |
| The Purpose of this Paper | 7 |
| Note on Terminology and Focus | 9 |
| | |
| II. Legal Options for Removing Perpetrators from the Home | 10 |
| Exclusion and Sole Occupancy Orders | 10 |
| Family Court Exclusion Orders | 13 |
| Who can Apply for Protection? | 13 |
| Factors Considered when Making an Order | 14 |
| Property Rights | 15 |
| The Application Process | 17 |
| Evaluating the Effectiveness of Family Court Injunctions | 17 |
| Sole Occupancy Intervention Orders | 18 |
| What the Law Says | 18 |
| Who may be Protected | 19 |
| Applications | 19 |
| Grounds for Making a Sole Occupancy Intervention Order | 20 |
| Child Contact and Custody | 21 |
| When Orders are Breached | 22 |
| How the Law is Interpreted | 22 |
| Grounds for Making Interim and Sole Occupancy Orders | 23 |
| Victim Safety versus Perpetrator Accommodation Needs | 27 |
| Victim Safety versus Perpetrator Parenting Rights | 28 |
| Relationship of the Crimes (Family Violence) Act to Family and Criminal Law | 30 |
| Breaches | 34 |
| Inconsistency in Judgements | 34 |
| Summary | 35 |
| Naming Legal Rights and Options: The Invisibility of Sole Occupancy Intervention Orders | 36 |

| | |
|---|----|
| III. Major Obstacles to Remaining in the Home | 43 |
| Introduction | 43 |
| An Inadequate Sense of Entitlement to the Family Home | 45 |
| Problems in the Legal System | 47 |
| Registrars, Solicitors and Police as Gate-keepers of Women's Legal Options | 49 |
| Ineffective Enforcement of Orders | 56 |
| Other Obstacles to Maintaining Occupancy of the Family Home | 58 |
| Obstacles Faced by Women Living in Rural or Remote Locations | 60 |
| Summary | 61 |
| | |
| IV. Strategies for the Future | 61 |
| Introduction | 61 |
| Improving Police Responses to Breaches | 63 |
| Court-based Domestic Violence Advocacy Services | 66 |
| Accommodation for Perpetrators | 69 |
| Domestic Violence Courts | 72 |
| Legislative Reform | 74 |
| Reviewing the Purpose and Scope of Family Violence Legislation | 75 |
| Containing and Directing the Use of Discretion by Courts and Police | 79 |
| Discretion Regarding the Use and Occupation of the Family Home | 80 |
| Discretion Regarding Accepting Undertakings and Making Mutual Orders | 81 |
| Discretion Regarding Child Contact Orders | 82 |
| Discretion Regarding Police Initiation of Orders | 83 |
| Improving the Implementation of the Law | 84 |
| Reforming Residential Tenancy Legislation | 85 |
| Summary | 86 |
| | |
| V. Conclusion | 86 |
| Summary of the Main Issues | 87 |
| Comments on the Direction of Government Policy | 92 |
| | |
| References | 95 |

I. Introduction

Background and Context

Women and children who are subjected to family violence are vulnerable to homelessness in two ways. First, family violence disrupts and violates the sense of safety and belonging that are culturally associated with the home and to this extent robs its victims of such a space.¹ Secondly, when women and children make the decision to leave a situation of family violence, this usually requires that they literally flee their homes. A protracted experience of insecure and inappropriate housing often follows, with ongoing disruption to employment and the schooling of children. Relationships with support networks and cultural or linguistic communities are often severed or disrupted in the process. Women can face isolation, emotional trauma and acute economic disadvantage as a result of their decision to leave. Mental illness, the development of substance dependencies and incarceration in correctional facilities have also been identified as consequences of exposure to family violence and homelessness. Women with physical, intellectual and psychiatric disabilities often face a whole realm of additional problems if they are forced from their homes. For some, it can mean long-term loss of independence and identity. Fear of such devastating loss and social disadvantage may imprison women in violent relationships.

In recent months, the Victorian government has released several important policy documents which articulate support for enabling women and children experiencing family violence to remain in their homes while the perpetrators of violence are removed.² Although this policy agenda is not new, its consistent articulation in strategic policy documents suggests a shift from, or a widening of the traditional focus of social policy responses to family violence. That focus has been on supporting women and children to *leave* situations of family violence, through funding a network of emergency and transitional accommodation and support services.

Interest in this policy direction is also reflected at a Commonwealth level, through the choice of research being commissioned by the Office of the Status of Women under the *Partnerships Against Domestic Violence* initiative. The *Home Safe Home*

1 MacDonald 2001

2 These include the *Victorian Homelessness Strategy*, the *Family and Domestic Violence Crisis Protection Framework* and *Key Directions in Women's Safety*, which is the policy framework for the forthcoming *Women's Safety Strategy*.

report, released in 2000, explored in detail the connection between women's experiences of family violence and homelessness. *Home Safe Home* 'identified strategies that challenge the continuation of the majority of women and children experiencing domestic violence being forced to leave their homes and seek alternative accommodation'. It called for 'a change in service orthodoxy and legal, judicial, police and housing responses to ensure women's and children's safety'.³ This has been followed by a call for tenders for research to further explore 'ways of enabling women and children experiencing domestic violence to remain safely in their homes', with a particular focus on legal interventions and the re-orientation of support services.⁴

While the extent to which this agenda is receiving political attention is new, the idea that women and children have a right to be safe in their own homes, and should be supported to assert this right, is by no means a new addition to policy discourse. Throughout the 1970s and 1980s, feminists across industrialised societies argued that women's experiences of family violence – and their diminished access to safe and appropriate housing on account of such violence – undermine their capacity for citizenship and self-determination, and as such constitute significant social justice and gender-equity issues. Feminists demanded that male violence against women and children in the home become the subject of Criminal Law and social policy. Over the last few decades, arguably in response to feminist agitation and the women's refuge movement, there has been a gradual shift in community attitudes concerning the acceptability and criminality of family violence, as well as a growing awareness of the diverse nature and enormous personal and social costs of this violence.⁵ By the end of the 1980s, this cultural shift had culminated in the enactment of family violence protection legislation in all Australian States and Territories. Family violence legislation was designed to provide more explicit, comprehensive and immediate protection to victims of family violence than was previously available under existing legislation such as the Commonwealth *Family Law Act 1975* and the Victorian *Crimes Act 1958*.

In Victoria, the view that women and children have a right to be safe in their homes through removal of the perpetrator was central to the 1985 report of the Women's Policy

3 Chung et al 2000: 1

4 Partnerships web site:
[http://www.padv.dpmc.gov.
 au/imp_safety2.html](http://www.padv.dpmc.gov.au/imp_safety2.html)

5 Office of the Status of
 Women 1995

Coordination Unit, *Criminal Assault in the Home*.⁶ This report laid the foundation for the enactment of the *Crimes (Family Violence) Act 1987* (hereafter CFV Act). The CFV Act gave victims of family violence the option of applying for an intervention order to protect themselves from family violence, even to the extent of having the perpetrator excluded from the family home. The gradual funding of domestic violence outreach services from the late 1980s was designed to complement this legislative development, providing flexible support and advocacy to women outside the refuge system – including those who remained in or returned to their homes.⁷

While the focus of social policy responses to family violence has remained largely on assisting women and children to leave their homes, the presence of this alternative policy agenda has continued to challenge two important cultural assumptions: first, that women and children *should* leave the family home to escape violence; and second, that 'women [are foremost] victims who need protection and seclusion rather than . . . citizens with rights which can and should be asserted and enforced'.⁸ Culturally and historically, women's citizenship rights have stopped well short of equal entitlement to family property. The provisions of the CFV Act allow for women's property rights to be prioritised *over* those of other family members in the interests of ensuring their protection as citizens.⁹ It implies that perpetrators of family violence should rightfully be expected to wear the material consequences of their actions. To this extent, it denotes or heralds a significant shift in cultural attitudes towards women and about the acceptability of male violence in the family.

Yet despite the emergence of this policy agenda, the passage of progressive legislation, and the funding of outreach support services, the flight of women and children from their homes since the 1980s has continued seemingly unchallenged. In Victoria in 1998/99, over 40 per cent of women who gained access to the Supported Accommodation Assistance Program (SAAP) – the major policy response of State and federal governments in Australia to homelessness – cited family violence as their reason for seeking assistance. Over 20 per cent of SAAP support periods in that year were provided by agencies whose target group is women escaping family violence.¹⁰ While this is clearly an insight into the seriousness of the situation, it is estimated that the vast

6 Women's Policy Coordination Unit 1985

7 Victorian Community Council Against Violence 1992

8 Chung et al 2000: 2

9 Under protection order legislation in Australia, prioritising women's property rights over those of men is not intended as a punitive sanction, but rather to ensure the safety of those who are affected by violence.

10 Australian Institute of Health and Welfare 2000

majority of women experiencing family violence do not use SAAP or other domestic violence services. According to the Women's Safety Survey undertaken by the Australian Bureau of Statistics, only 4.5 per cent of women who have experienced violence have used crisis services.¹¹ This signals that the extent of the problem is far greater than is currently known.

Research and anecdotal evidence provided by those working with survivors of family violence indicates that – despite the availability of legal mechanisms to remove perpetrators – women and children face significant obstacles in engaging legal protection and subsequently sustaining their housing. Two of these obstacles are that magistrates are extremely reluctant to make orders that exclude men from their homes, and police are resistant to arresting, removing and prosecuting men for breaching such orders. In practice, arguably, the extent to which 'justice for women and children [has been] . . . represented in terms of reducing men's rights and entitlements',¹² would seem to denote the extent to which it has been viewed as negotiable. As Stubbs has noted, women's inferior economic position and vulnerability to poverty have collaborated with a range of other obstacles to further ensure that 'women most able to mobilise legal protection are those women who are most informed, most financially privileged, those in urban settings, and those who belong to the dominant cultural group'.¹³

The Purpose of this Paper

The Victorian government has recently announced a decision to review the CFV Act. This provides a tremendous opportunity to re-think the purpose, scope and construction of the legislation that, together with the relevant criminal codes, forms the foundation of legal and social policy responses to family violence. Nunn and D'Arcy note that the 'approach [in Victoria] to date has been to introduce piecemeal changes to legislation and court and police procedures without undertaking substantive research into problems which appear endemic within the legal system, and which form part of a broader social and legal context'.¹⁴ It is critical that the Victorian government does not approach the review of the Act in a piecemeal way and without effective engagement with the implementation and

11 Australian Bureau of Statistics 1996, Keys Young 1998, Department of Human Services 2001

12 Cumberland 2001: 37

13 Stubbs 1994: 4

14 Nunn and D'Arcy 2001:15

enforcement issues that have consistently and forcefully eroded the progressive potential of the existing legislation.

In light of this concern, and in the context of renewed policy interest in supporting victims of family violence to be safe in their own homes, we at DVIRC feel the need for a clearer and more comprehensive understanding of the legal and other systemic obstacles faced by women who seek to have a perpetrator of family violence removed from the family home. How women negotiate these obstacles, the type of support that is most effective in assisting them, and the nature of social change that may be required to ensure that 'removing the perpetrator' is a genuine option for women, are also of critical interest. The requirement for systemic change to overcome these barriers does not appear, in our view, to be well understood or adequately acknowledged in the strategic policy being generated at present by the State government.¹⁵ A future in which women continue to flee their homes at great cost to themselves, their children and the broader society is the likely outcome of a failure to deal with this issues systemically. It is also possible, and of much concern, that policy which is poorly informed or developed in this area may result in women being encouraged to remain in the homes without the necessary structures and safeguards in place to ensure they are not exposed to unconscionable risk.

This Paper therefore aims to contribute to better understanding of the systemic obstacles women face in having perpetrators removed from family homes, and it presents suggestions as to how policy could be directed to address these issues. The Paper has been developed by combining the insights of existing research and commentary with the practice knowledge of those working in the family violence field. A diverse group of workers from the sector participated in focus groups held at DVIRC in May 2002 and completed questionnaires for this purpose. We gratefully acknowledge the time, energy and insights they have contributed in this way. While this Paper contains various recommendations for the direction of policy, it is not our intention to present a hard and fast position on a complex issue. Rather, we hope that by raising issues, posing questions, making observations and restating points that have been made by others, this Paper will generate further discussion, in the community and in government, about the objectives and appropriateness of our social and legal responses to family violence.

15 Two of the government's policy documents, the *Family and Domestic Violence Crisis Protection Framework* and the *Key Directions in Women's Safety*, go so far as to name some of the obstacles. However neither document acknowledges the systemic change that will be required to address these issues. Nor do they present a strategy for achieving such change. The strategic response to this issue in both documents appears to focus on improving the extent and flexibility of support options available to women.

The Paper is divided into three main parts. Section II outlines and evaluates the two main legal interventions that exist in Victoria to enable victims of family violence to have perpetrators removed from their homes. This section emphasises that there is a significant deviation between the intention of legislators and the interpretation that is brought to bear on the statutes. It also problematises the way these interventions have been named (or *not* named) in legislation and legal processes, such that survivors of family violence and their advocates alike find it difficult to clearly identify what it is they are claiming or what they are entitled to claim. This section concludes with the argument that, in effect, neither legal option is particularly visible, accessible or effective as an intervention into women's family violence-related homelessness.

Section III brings together what is known about other obstacles typically faced by women and children who pursue these legal interventions. While some of the issues raised are not new to public knowledge, they have been included because of their conspicuous absence from public policy discourse at this time.

Finally, Section IV explores some of the strategies and initiatives that have emerged locally and elsewhere to address a number of the identified problems. There is a strong focus on law reform, in light of the forthcoming review of the CFV Act.

It is hoped that these ideas will inspire policy makers and activists alike in reshaping and refining our approaches in this area. We hope that this Paper will contribute to reflective and creative policy development by stimulating discussion and debate in the community and in government about the direction and nature of our social responses to family violence. DVIRC welcomes your feedback on the ideas presented here, and invites you to involve us in your conversations on this important issue.

Note on Terminology and Focus

The term 'family violence' will be used throughout this Paper to refer to the diverse forms of violence – both criminal and non-criminal – that may be enacted in relationships between intimate partners, parents, children, extended family and other household members. Family violence 'includes any behaviour which causes damage to another person (the damage