

Women's Domestic Violence Court Advocacy Services NSW

Open justice review

Court and tribunal information: access,
disclosure and publication

Preliminary Submission

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1. About WDV CAS NSW

Women's Domestic Violence Court Advocacy Services NSW (WDV CAS NSW), soon to be renamed Women's Safety NSW, is the state-wide peak body, representing women's specialist domestic and family violence services across New South Wales (NSW). Members encompass the 29 Women's Domestic Violence Court Advocacy Services (WDV CASs), 43 Local Coordination Points (LCPs) and four Family Advocacy Support Services (FASSs) across NSW along with a range of other women's specialist services who support women who have experienced domestic and family violence. Our WDV CAS members provide the primary specialist response for women who have experienced domestic and family violence in NSW in a fully integrated way with key Government and non-Government partners across all frontline service portfolios. During 2018, WDV CASs provided 193,680 services to 45,863 women, with 40,130 accompanying children across NSW.

WDV CAS NSW supports better outcomes for women and children; identifying and advocating on these issues within social, political and legal contexts. WDV CAS NSW operates from a human rights and feminist perspective to support better outcomes for women and children experiencing domestic and family violence. We are funded by Legal Aid NSW's Women's Domestic Violence Court Advocacy Program and by our members.

2. Overview

The current legislative framework governing access, disclosure and publication of court and tribunal information is failing to adequately protect women and their children who have experienced domestic and family violence from intrusions of privacy which in many cases result in women and their children being re-traumatised. On the flipside, victims of domestic and family violence often feel further "silenced", "controlled" and "paternalised" when they are unable to speak out about the injustices which have been committed against them, particularly if such an order has been made for the purpose of avoiding "*undue distress or embarrassment to a party...*"¹ where that party may be the offender, or it is otherwise regarded as "*necessary in the public interest*",² and the Court has determined that the parties, including the victim, are to be protected from exposure, but without the victim having self-determination in the process.

¹ *Court Suppression and Non-publication Orders Act 2010 (NSW) s 8(1)(d).*

² *Ibid s 8(1)(e).*

Domestic and family violence is centred on power and control. It is thus further compounding of the disempowerment experienced by the victim of domestic and family violence if the decision as to the information about the offences perpetrated upon her³ is taken away from her.

Traditionally, our Courts have taken a very defendant-centric approach to questions of rights and fairness. However, over time, as our knowledge of the trauma impacts on victims has developed, we have seen an increased focus on their rights, and of fairness to them. We are beginning to see this more so with child victims of sexual assault and now to some extent with adult victims of sexual assault. However, there are still significant improvements that need to be made for both adult and child victims of domestic and family violence.

It is thus submitted that the issues to be considered as part of this review be framed with greater attention to the rights and fairness of victims of violent crime, and in particular victims of violence in the context of significant abuse of power, such as domestic and family violence.

3. Our scope

WDVCAS NSW welcomes the opportunity to help frame the issues to be addressed in the consultations on the Open Justice Review in accordance with the [terms on reference](#). Given the work of WDVCAS NSW and our members, the focus of our submission is on the issues of access, disclosure and publication of court and tribunal information as it affects women and their children impacted by domestic and family violence.

4. Our methodology and data

In developing our submission, WDVCAS NSW sought and obtained direct input from members in inner and outer metropolitan, regional and remote areas who support women every day affected by the current legislative scheme governing access, disclosure and publication of court and tribunal information, as well as survivors of domestic and family violence themselves who have been affected by these provisions. We have supplemented this feedback with that which we as a representative member organisation have received on this topic over time.

5. Terms of reference

WDVCAS NSW has addressed the items which remain within our scope.

³ The paper has assumed a female adult victim and a male adult offender for the purpose of this analysis due to the overrepresentation of female adult victims and male adult offenders of domestic and family violence and the client groups services by WDVCAS NSW members.

a) Consideration of NSW legislation that affects access to, and disclosure and publication of, court and tribunal information

Whilst the most common grounds relied upon for a suppression or non-disclosure order in matters involving domestic and family violence is to protect the safety of any person, followed by the proper administration of justice, specialist women's domestic and family violence workers and survivors of domestic and family violence themselves regard the operation of the legislation governing these matters to be somewhat lacking in reliable protections and realisable rights from the perspective of the victim of coercive violent crime. In the words of one specialist women's domestic violence worker:

"I find that they [suppression and non-disclosure orders] often are used to protect the defendant not the victim." (WDVCAS worker- Outer Metropolitan)

In the words of a survivor who has lived through the experience herself:

"The current suppression restrictions as they stand are just another barrier for survivors moving forward. They are a tool for continued systematic abuse and silencing." (Domestic violence survivor)

b) Whether the current arrangements strike the right balance

It is the view of WDVCAS NSW that the current arrangements do not strike the right balance when viewed from the perspective of victims of coercive violence.

There are still many cases where crucial identification information is made available, giving away the location of the victim to the offender, and this can severely compromise victim safety. This reportedly occurs more frequently in the District Court and in the Tribunal where, for example, she may be dealing with matters under social security legislation, however, it also happens in the Local Court:

"[Q]uite often [we've] seen victim addresses and contact details being disclosed on ADVO's which the defendant receives thereby compromising the victims safety even when there are conditions like 2, 5 or 6abcd on an order." (WDVCAS worker- Inner Regional)

Many victims also expressed extreme levels of distress and re-traumatisation at having to give evidence and be cross examined in an open court environment. Indeed, this is a significant barrier to many women even capable of appearing as a favourable witness in such conditions:

"Most of my clients are terrified of being in the same vicinity as the perpetrator and that can make them nervous when giving evidence. They also get nervous when they discover

that court is open to the public and that members of the community may find out their personal business.” (WDVCAS Worker- Outer Regional)

At the same time, whereupon a victim of domestic and family violence has managed to survive through the ordeal of a court process, there is a frequently cited experience of not having any self-determination or autonomy in the manner and extent to which they can speak out about their experience:

*“Victims should have the right to tell their stories without being silenced by a law.”
(Domestic violence survivor)*

Being restricted from telling their stories and speaking out can have profound effects on survivors of domestic and family violence, who may feel a continuation of being controlled and further, not believed and validated by their families and communities whom they may have been isolated from as a result of the abuse to which they were subjected.

There can also be very real consequences for the victim's safety when, in the future they need to rely upon previous history of domestic violence to access essential safety supports and in the family law system for the protection of themselves and their children:

“A key issue is that the information then cannot be used to increase victim safety in the future. Re: future incidents, evidence of past history of DV and Family Law proceedings.” (WDVCAS worker – Outer Regional)

*“To say that a parent must have rights because they are biologically responsible for a child should not negate the fears and concerns for the safety of victims and children”
(WDVCAS worker – Outer Metropolitan)*

Further, when survivors of domestic and family violence are unable to come forward to speak freely about their experience in a safe and empowering way, it means that law and policy makers do not hear crucial perspectives that need to be heard in order to effectively reform the system:

“The general public and experts etc cannot understand the full impact of dv if victims are not allowed to disclose.” (Domestic violence survivor)

e) Whether suppression and non-publication orders can remain effective in the digital environment

Technological breaches of suppression and non-publication orders in the digital environment, particularly in relation to social media and the sharing of personal and intimate data is something which is regularly and increasingly raised by WDVCAS workers as an issue for women in the context of domestic and family violence:

“Social media is [a] difficulty when it comes to maintaining suppression orders as it is hard to prove who actually posted the information” (WDVCAS worker – Outer Regional)

This is an extension of an issue which is occurring more broadly for women in the context of domestic and family violence breaches of Apprehended Domestic Violence Orders, and the difficulty being encountered in obtaining enough evidence for the police to effect the breach. Breaches of suppression and non-publication orders suffer from the same issues, however, are reportedly less likely to be followed up or successfully followed through.

“Proving that it was indeed the perpetrator that posted something on social media is difficult and is rarely proven in a court of law” (WDVCAS worker – Outer Metropolitan)

As a result, many women continue to be subjected to ongoing abuse through the release of personal and sensitive information, including information which is often untrue and defamatory:

“[People who perpetrate domestic and family violence] will make public their lies to protect people from Hearing the truth. It’s a cycle and victims continue to be victimized.” (Domestic violence survivor)

g) Whether, and to what extent, technology can be used to facilitate access to court and tribunal information.

WDVCAS NSW are strongly of the view that technology can be utilised to improve the safety and accessibility of courts to victims of violent crime, particularly victims of coercive violent crime such as victims of domestic and family violence.

As noted by some WDVCAS workers, a significant amount of court and tribunal information is already available online, although here, safeguards around the level of information available through this means by the other party, including location information, must be assured:

“Clients and perpetrators can access lots of info about court and tribunal online which could be beneficial to both parties, however it can create issues as the information can be use[d by] the perpetrator...” (WDVCAS worker- Outer Metropolitan)

However, WDVCAS NSW would like to see technological advancements applied to the procedures involved in court hearings in cases involving domestic and family violence.

Whilst outside the scope of this review, WDVCAS NSW shares just some of the comments of WDVCAS workers and survivors in this regard for consideration:

“[Technology could] provide greater access to survivors.” (Domestic Violence Survivor)

“Victims who are afraid to be in the same room as a perpetrator should be able to [provide] evidence via video link in a safe room.” (WDVCAS worker- Outer Metropolitan)

"I would have liked to have had access to the final verdict of the abuser and heard exactly what the magistrate had said." (Domestic Violence Survivor)

"It should also be that unless you are directly involved in the matter mentioned, you should have to leave the court room except for court workers, WDV CAS, police and solicitors" (WDVCAS worker- Outer Metropolitan)

"There should be a level of privacy [from] the general public" (Domestic Violence Survivor)

h) Any other relevant matters.

WDVCAS NSW asked WDVCAS workers and survivors of domestic and family violence who have been the of subject suppression and/or non-disclosure orders an open question as to whether they would like to add any further comments or share their personal experience to demonstrate the effectiveness, or limitations, of current suppression and/or non-disclosure order laws in the context of domestic and family violence. These are some of the responses:

"[My suggestion is [f]or victims to be considered when these [suppression and/or non-disclosure orders] are made." (WDVCAS Worker- Outer Metropolitan)

"Survivors... run the risk of not being able to use their lived experience to create positive change and discuss their experiences, due to the threat of litigation from their perpetrators." (Domestic violence survivor)

"My ex abuser has blatantly spread lies and rumors about me to try and make himself look like the victim. I have to stay silent." (Domestic violence survivor)

"Suppression &/or non-consideration of AVO's during my divorce left me and my child [unprotected]. [I had] no child support & child sexual abuse [took place with my child] during contact visits. [It has been an] absolutely horrible life experience." (Domestic violence survivor)

"I can't speak my truth. I don't feel safe." (Domestic violence survivor)

"I don't think the law protects me really. It's an illusion of safety." (Domestic violence survivor)

6. Conclusion

The current legislative framework governing access, disclosure and publication of court and tribunal information is too heavily focussed upon protecting the rights and interests of the accused. More recently, some consideration has gone into ensuring provisions take into account the particular needs and vulnerabilities of victims in the most extreme circumstances, such as child victims of sexual assault

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and now some adult victims to a lesser degree. However, WDV CAS NSW submits that the rights and needs of victims of domestic and family violence must not be relegated to being of secondary importance, merely because of the high volume of cases courts and tribunals encounter. For the victims involved, the trauma experienced can be lifelong, and the court process itself can compound this harm. Court and tribunal access, disclosure and publication laws must be viewed from the perspective of victims of coercive violent crime to ensure that they take into account both the needs for privacy and safety mechanisms whilst at the same time not silencing victims once they have concluded proceedings and are in a position to own their own experience and the story of the traumas they have endured. This is important, not only for trauma recovery, but also for very tangible reasons of safety, and in the interests of justice and public scrutiny, where this can be achieved in a safe and empowering process to the victim.

WDVCAS NSW looks forward to the discussion paper and to engaging more fully in concrete recommendations for reform to the respective legislative instruments in due course.