



**Angelhands
Victim Awareness Training Seminar**

*The Importance of Victim Inclusive Practices to the
Criminal Justice System*

by

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Maylands
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**The Importance of Victim Inclusive Practices to the Criminal
Justice System**¹

I am honoured to have been given the opportunity to speak to those with an interest in the provision of support and assistance to victims of crime, and commend Angelhands for its initiative in organising this seminar. However, I will be even more pleased to hear your views in relation to these important issues, and will abbreviate my observations this afternoon, in order to allow time for interactive dialogue. In my view, it is important for judicial officers, like me, to take every available opportunity to listen to and learn from those who have first-hand experience of the perspectives and needs of victims of crime.

Acknowledgment

I commence by acknowledging the traditional owners of the lands on which we meet, the Whadjuk people who form part of the great Noongar clan of south-western Australia, and pay my respects to their Elders past and present and acknowledge their continuing stewardship of these lands.

Acknowledging the interests of victims of crime

Acknowledgment of the interests of victims of crime is not especially novel - I participated in seminars on the subject, and reviewed the emerging field of literature in this area when I studied criminology at King's College, London in 1974. However, I believe that the criminal

¹ I am indebted to Dr Jeannine Purdy for her very considerable assistance in the preparation of this paper, although responsibility for the opinions expressed, and any errors, is mine.

justice systems of most jurisdictions, including Western Australia, have come a long way in the 40 years that have passed since then in recognising and respecting the rights and interests of victims of crime. No doubt there is more that can be done, which is another reason why I will be very interested to hear your views later in this session.

Significant changes which have occurred over the last few decades include the creation of the victim support service, legislative and practical changes for taking the evidence of vulnerable witnesses, including the pre-recording of the evidence of children, and the arrangements which enable vulnerable witnesses to give their evidence by audio-visual connection from a location distant from the courtroom, the use of victim impact statements in the sentencing process, the provision of compensation for criminal injuries, and more recently in Western Australia, the appointment of the Commissioner for Victims of Crime. There have also been substantive changes to the law which have reflected the interests of victims, including the prohibition on the publication of the identity of victims of sex crimes, the prohibition upon the leading of evidence of prior sexual experience in sex crime cases (in the absence of the leave of the court, which is seldom granted), and the admission of evidence of the propensity and relationships of alleged offenders. The last provision, which is found in section 31A of the *Evidence Act 1906* (WA), is not overtly directed to the interests of victims, but has a substantive impact upon those interests because it enables a court, and any jury, to take account of a wider range of evidence in determining the guilt or innocence of an alleged offender, and has increased the likelihood of serial offenders being convicted and punished.

Family violence

I will address the importance of victim inclusive practices to the criminal justice system in the particular context of family violence cases for a number of reasons. First, family violence is, appropriately, a very topical issue at the moment, and steps are being taken in a number of jurisdictions to improve the way in which we, as a community, respond to this vitally important issue. Second, in Western Australia, changes are afoot, as the government has announced the cessation of the family violence courts with effect from 30 June this year, and active consideration is being given to the arrangements which will apply as from 1 July 2015.

Although there is no doubt that family violence is extremely significant in our community, its precise prevalence is unknown. It is recognised that reporting rates in relation to family violence are likely to be quite relatively low, although there is reason to think that some of the changes to which I have referred and which provide greater support to victims have increased levels of confidence amongst victims of crime, including victims of family violence, and have thereby increased reporting rates.

Another significant feature of family violence cases is the recanting complainant. One regrettable characteristic of family violence cases is the relative frequency with which a complainant who reports violence to police will later withdraw her complaint and refuse to testify against the perpetrator, sometimes because a reconciliation between perpetrator and victim has occurred, and sometimes because of a concern which the effect of a conviction will have upon the family.

The sentences imposed upon offenders who commit crimes of family violence must be commensurate with the seriousness of their offence, and violence is no less serious because it occurs in a family context. However, we must bear in mind that inappropriately increasing levels of punishment for offences of family violence may have the unintended consequence of discouraging victims from reporting offences, and increasing the frequency with which victims resile from their complaint.

Because of the particular characteristics of family violence, and in particular the need to provide appropriate support and protection for victims of family violence, the metropolitan area of Perth has been served by a network of family violence courts for approximately 10 years now, and a court which is specifically directed to Aboriginal family violence offenders has operated in the Geraldton area for a number of years (the Barndimalgu Court).² The Attorney General of Western Australia has announced the discontinuance of those courts with effect from 30 June this year. The government has not announced what precise arrangements will take the place of those courts, and I understand that the details of those arrangements are under active consideration within the Department of the Attorney General.

The decision of the Attorney General to which I have referred followed analysis conducted by his department which was summarised

² Following a review of the trial Joondalup Family Violence Court which commenced operation in 1999, the other Family Violence Courts were established in 2007 and 2008.

in a report which has been made public.³ Part of the investigation involved the gathering of evidence with respect to the experience of victims in relation to the courts which I have mentioned.⁴ To that end, 17 victim interviews were conducted, and 661 victim feed-back surveys were received and analysed. That data revealed that victims of family violence hold very positive views with respect to the current arrangements for dealing with family violence through the Family Violence Courts in the metropolitan area, and the Barndimalgu Court.

In my view it is essential that whatever arrangements follow the discontinuance of those courts, the features of those courts which encourage such positive responses from victims should be retained and, if possible, strengthened. The nature of those features can be gleaned from the data summarised in the report, which includes the following passages:

- Overall, when asked to provide comments regarding their experience of the services, the vast majority of the comments were positive (971, 97%), noting that the service was 'outstanding' and the staff 'helpful, competent and friendly', as well as 'supportive, understanding and sympathetic'. Respondents described the assistance they received as 'encouraging and respectful' and said that it made them feel 'safe, reassured' and they were 'very grateful'. They related that they felt they were provided good advice, and that staff were informative and knowledgeable. Services were regarded as good, prompt and appropriate to their situation.

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³ Department of the Attorney General, Research and Analysis Branch, *Evaluation of the Metropolitan Family Violence Court and Evaluation of the Barndimalgu Court report* (January 2015).

⁴ Shelby Consulting conducted this research in relation to the metropolitan Family Violence Courts.

- All seventeen interviewees were very positive, all noting the range of services and supports provided to them such as counselling and support at a time when they felt vulnerable, as well as practical assistance with letters to the court or the PRB [Prisoners Review Board]. Many MFVC [Metropolitan Family Violence Court] clients specifically noted there was nothing more the FVC [Family Violence Court] case coordinator and/or worker could possibly have done or done better for them.

...

- Safety - MFVC victims said that they felt safe because of their case coordinator, assisting them with the actual VRO [violence restraining order] as well as intangible support such as a sense of security at a time when they were feeling vulnerable and unsafe.

...

- Emotional support - During interviews with victims, most could not praise their case coordinator highly enough for simply being there for them, offering emotional support before, throughout and after the FVC process. [The] Case coordinator offered guidance, advice and counselling to victims, informing them of their options but allowing them to make decisions for themselves knowing they had someone to support them.

- Empowerment - Victims reported the case coordinator restored a level of confidence, self-esteem and trust in victims, which they felt was important.

- Information about the court process - Most of those interviewed expressed their relief at not having to attend court, and having their case worker or case coordinator do so and report back to them.

...

- Access to services - Victims discussed how they accessed services that address other issues that they may be facing, for example: financial assistance; budgeting assistance; childcare; legal advice; housing; educational services for themselves or their children; and parenting programs. Victims reported that these services had helped them.
...
- Influence of the BCP [Behaviour Change Program] - Some of the victims interviewed also praised the BCP, saying it had made the offender understand the effect their violence was having on their children, and provided them with strategies for dealing with matters without resorting to violence.⁵

Positive characteristics of the Family Violence Courts

The reported results of this survey of victims who had experience of the Family Violence Courts suggests that there are a number of extremely positive characteristics of those courts, viewed from the perspective of victims, which should be taken into account in the redesign of any arrangements dealing with family violence and, if possible, retained and strengthened in those arrangements. Those positive characteristics include the following:

Family violence service case co-ordinators

It is clear from the survey data that victims highly valued the assistance of the family violence service case co-ordinator provided through the Family Violence Court.

⁵ Note 3, 14,15.

Protective bail conditions

Family Violence Court magistrates have developed expertise in the design and application of conditions attached to bail which enhance the protection of victims of family violence. As the WA Law Reform Commission pointed out in its recent report,⁶ more attention might appropriately be given to the way in which protective bail conditions can interact with the precise terms of family and domestic violence protection orders⁷ (violence restraining orders), to ensure consistency and maximum efficacy.

Bail risk assessments

Current arrangements with respect to the Family Violence Court enable more detailed assessments of the risk of offenders re-offending while on bail, and can engage the services of the Department of Child Protection, and the Department of Community Services. In its discussion paper the Western Australia Law Reform Commission considered that more detailed assessment of the risk posed by the grant of bail was highly desirable.⁸

Perpetrator programmes

The survey suggests that victims considered that perpetrator programmes run through the Family Violence Courts were of assistance. Much has been written by criminologists with respect to

⁶ Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws Final Report* (June 2014) 134, 135.

⁷ The Law Reform Commission proposed using this term for family and domestic related violence restraining orders and supporting these with specific legislation and procedures to 'enhance awareness and understanding of the nature and dynamics of family and domestic violence as well as facilitating more informed decision-making' (ibid, 57).

⁸ Ibid, 136, 137

the methodology to be engaged in the assessment of the efficacy of such programmes. The literature suggests that there are problems with using reoffending rates as the only way of assessing the efficacy of these programmes, because of various methodological difficulties with such assessments, including the need for matching cohorts, differences arising from the definition of 'reoffending', the time over which offenders are followed up, and the prevalence of low rates of report with respect to this type of crime, which tends to obscure actual reoffending. A number of commentators have suggested that the perception of victims in relation to the efficacy of such programmes is a more reliable method of assessment.⁹ In this context commentators note that some victims regard broader behavioural change by perpetrators as significant, rather than focusing only upon offending behaviour.¹⁰

Vulnerable witness arrangements

Obviously any redesigned programme for dealing with family violence should maintain current arrangements to protect vulnerable witnesses, including arrangements with respect to the pre-recording of the evidence of children, and the arrangements which enable vulnerable witnesses to give their evidence from a remote location by audio visual link.

Regular court reviews

In my view it can be safely inferred that systems which involve regular court reviews of the progress made by perpetrators are likely

⁹ See Liz Kelly and Nicole Westmarland, *Domestic Violence Perpetrator Programmes: Steps Towards Change. Project Mirabal Final Report* (2015).

¹⁰ *Ibid*, 7.

to be more effective at changing offending behaviour than systems under which perpetrators are seen only once by a court. I note too that the metropolitan family violence courts are supported by an inter-agency case management team, which meets regularly to discuss the offender's compliance and share information, and includes a Family Violence Services worker, the prosecutor, program provider, Department of Corrective Services community corrections officer and others.¹¹

Continuing Professional Development

Continued victim support for court arrangements relating to family violence can only be expected if court staff and judicial officers are appropriately trained in the particular characteristics of family violence, and the issues which arise in cases of family violence, and best practice methodology in dealing with those issues. One advantage of a specialised system of courts is that the delivery of training in these issues can be focused upon the court staff and judicial officers who are most significantly engaged in their resolution. If it is decided that family violence will be dealt with by courts on a 'mainstream' basis after 1 July 2015, in my view it will be essential for government to provide the necessary resources to enable appropriate training for all court staff and judicial officers who are likely to have any contact with the victims of family violence.

¹¹ Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws Discussion Paper* (December 2013) 132.

Solution Focused Courts

The Family Violence Courts which currently operate in Western Australia are characteristic of a class of courts often now described as 'solution focused courts', because their focus is upon identifying a solution for the underlying causes of offending behaviour. They are an aspect of the developing field of therapeutic jurisprudence, about which much has been written in recent decades. Other examples of solution focused courts include drug courts, Indigenous courts (such as the community court in Kalgoorlie), and the Mental Health (Start) Court.

Experienced commentators in this area acknowledge that these courts have tended to focus upon a solution for the offender, on the assumption that such a solution will assist victims of crime, by reducing the risk of reoffending. These commentators acknowledge that there is scope for more specific attention to be focused upon the derivation of solutions for victims,¹² and to focus greater attention upon their interests in both the court processes and the programmes for the management of offenders.

Indigenous Victims

I have spoken and written many times about the gross over-representation of Aboriginal people in the criminal justice system of this State. It should always be remembered that the gross over-representation of Aboriginal offenders is matched by the gross over-representation of Aboriginal victims because, with some notable

¹² Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice* (2nd ed, 2014) 35, 36.

exceptions, Aboriginal offending is very often directed at Aboriginal victims. Because Aboriginal victims are so over-represented, and are significantly over-represented in the area of family violence, it is essential that any altered arrangements for dealing with family violence provide programmes and procedures that are culturally appropriate to Indigenous Australians, who should be consulted and involved in the design and delivery of such programmes and procedures.

Conclusion

Family violence has a profound impact upon our community and undermines the core values of our society, including the values which we attach to personal safety and the strength of the family unit. Public attention has been focused, appropriately, upon the significance of these issues in various Australian jurisdictions and overseas. The decision of the Western Australian government to alter the arrangements for dealing with family violence provides an opportunity to build upon and expand the strengths of our current systems. It is important that the design for the arrangements which are to prevail after 1 July this year focus specifically upon the needs and interests of victims of family violence, which will often include systems designed to identify and address the causes of offending behaviour in order to enable the restoration of a functional family unit.