

Exercise

Evidentiary Challenges of Proving Allegations of Family Violence

AVERT
FAMILY VIOLENCE



**Collaborative Responses in
the Family Law System**



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Evidentiary Challenges of Proving Allegations of Family Violence

Purpose:

- To highlight the range of barriers that present for victims of family violence in providing the court with evidence in relation to psychological and emotional abuse
- To explore the ways in which these barriers might be further compounded by diversity/difference.

Materials required:

- Tip Sheets(at end of this Exercise): *Giving Evidence in relation to Family Violence Issues for:*
 - Women with Disabilities
 - Indigenous Women
 - CALD and Refugee Women
- Handout – Fact Sheet: *Emotional and Psychological Abuse and its Impact*

Time required:

- 60 minutes

Process:

1. Facilitator presents the following information:

Some state legislation expressly refers to emotional or psychological abuse as a form of family violence.
2. Facilitator then divides the room into small groups, allocating each group with one of the following scenarios:
 - a) The witness has an intellectual disability and has complex communication needs
 - b) The witness is an Indigenous woman. She is from a remote community in the Northern Territory and does not speak English.



- c) The witness is newly arrived to the country (less than a year). She has spent six years in a refugee detention camp before arriving in Australia. She speaks extensively about the financial deprivation she suffered at the hands of her husband. Evidence is submitted suggesting that the outright denial of money is clearly seen as bad behaviour and a form of violence within that particular community, unlike other forms of non-physical abuse.
3. The facilitator invites judicial participants in each group to consider the following questions as they might apply to their particular scenario:
- What are the evidentiary challenges that might present?
 - What is the role of the judicial officer (if any) in addressing the barriers/challenges that victims of family violence might experience in presenting evidence of psychological and emotional harm?
4. Facilitator invites feedback on discussion.

Key things to draw out of the Discussion:

- Cases where the violence can be categorised as abusive controlling violence, (often emotional and psychological), research suggests that there is a risk that the intensity and lethality of violence actually escalates
- Often the victim is the only witness to the abuse
- A party may choose not to raise issues of family violence, particularly in family court proceedings for fear of further angering the party to whom the allegation relates or making the situation worse for themselves or their children
- Giving evidence of family violence can be a traumatic experience for victims of family violence
- Parties may be discouraged from raising allegations of family violence because of concerns that this will make them 'unfriendly parents' or lead to an adverse costs order.¹
- Family violence can constitute more than single 'incidents' and indeed often involves a continuum of controlling behaviour and violence, which can occur over a number of years'.²

1 *Family Law Act 1975 (Cth) ss 60CC(3)(c), 117AB, respectively.*

2 *Access Economics, The Cost of Domestic Violence to the Australian Economy, Part I (2004), 3.*



Tip Sheets: Giving Evidence in relation to Family Violence Issues for:

Women with Disabilities

- It is well documented that people with intellectual disability experience higher levels of domestic and family violence and sexual assault than the rest of the population
- Women with disabilities may experience forms of abuse not experienced by women without disabilities, such as the withholding of food or medicine, the removal or sabotage of accessibility devices (wheelchairs, ramps, TTYs, etc), unnecessary institutionalisation, and chemical restraint
- Despite the overwhelming evidence that people with intellectual disability regularly become the victims of violence, few cases are prosecuted in Australia
- There is a need to recognise a broad spectrum of intellectual abilities. It is both dangerous and insulting to people with an intellectual disability to assume that all people with an intellectual disability would have the same level of credibility before a court.
- People with an intellectual disability may be significantly disadvantaged giving evidence in court, through communication difficulties or lack of understanding of the court process
- Prejudices about people with an intellectual disability may be particularly damaging to the reliability of their evidence
- There may be particular complexities around acquiring, retaining and retrieving information from memory for people with intellectual disabilities.
- The witness may be intimidated by the courtroom environment and by cross-examination, and so appear evasive, nervous, hesitant, or frustrated and angry
- Appropriate support people should be recognised in the same way as a court interpreter in cases where witnesses have limited use of language, and can only be understood by those familiar with their speech patterns and vocabulary. (What is the possibility of bias in these cases, particularly where the support person may be a relative?)



Additional Reading:

'Family Violence & Sexual Assault: A Criminal Justice Response for Women with Disabilities'
Paper Presented by Chris Jennings, Violence & Women with Disabilities Project Domestic
Violence & Incest Resource Centre (2005) accessed at:
<http://www.wwda.org.au/jennings4.pdf>

Goodfellow, Jonathon ; Camilleri, Margaret (2003) *Beyond Belief, Beyond Justice: The difficulties for victim/survivors with disabilities when reporting sexual assault and seeking justice* -Disability Discrimination Legal Service.

People with an Intellectual Disability - Giving Evidence in Court – Committee on Intellectual Disability and the Criminal Justice System, June 2000 - This Report was prepared by a Committee on Intellectual Disability and the Criminal Justice System, coordinated by the Criminal Law Review Division of the NSW Attorney General's Department. The report particularly highlights how prejudices about people with an intellectual disability may be particularly damaging to the reliability of their evidence.

Fisher, R. P., et al. (2000), 'Adapting the cognitive interview to enhance long term recall of physical activities', *Journal of Applied Psychology*, 85, 180-89.



Tip Sheets: Giving Evidence in relation to Family Violence

Issues for:

Indigenous Women

- The term “family violence” has always been the preferred terminology in describing Indigenous situations – as opposed to domestic violence - because it recognises the complex interaction of kinship structures and extended family relationships
- Indigenous women are six times more likely than the non-Indigenous population to fall victim to domestic or family violence (People 2005).
- The homicide rates of Indigenous women are between 9 and 23 times higher at different times in the life cycle than they are for non-Indigenous women.
- Perpetrators and the victims are often related in complex ways. Whole family groupings can often be involved in tensions and conflicts. Sometimes violence between intimate partners can trigger other violent acts amongst kin
- Strategies for addressing family violence in Indigenous communities need to acknowledge that as a consequence of the kinship networks and responsibilities, an Indigenous woman may be unable or unwilling to report violence or to leave her partner. In order to leave an abusive partner an Indigenous woman would most likely have to leave her community. But to do so would separate her from extended family, from her ancestral lands and her entire social, cultural and spiritual world (Tom Calma, 2009)
- In non fatal violence, Indigenous women were 44 times as likely to be hospitalised for assault as non-Indigenous women
- Indigenous Australians have unequal access to remedies to prevent or mitigate violence such as police services and safe houses

Additional Reading:

- Cripps K & McGlade H 2008, 'Indigenous family violence and sexual abuse: considering pathways forward', *Journal of Family Studies*, vol. 14, no. 2-3, pp. 240-253
- People J 2005, Trends and Patterns In Domestic Violence Assaults, *Contemporary Issues in Crime and Justice*, no. 89, NSW Bureau of Crime Statistics and Research, Sydney



Tip Sheets: Giving Evidence in relation to Family Violence Issues for:

CALD and Refugee Women

- It is widely acknowledged that the majority of refugee women experience rape and sexual and gender based violence as part of the refugee experience (Mehraby 2001)
- A refugee woman has a gender, race, nationality, ethnicity, religion, a socio-economic and a socio-legal status, all of which are political identities making up her subject position
- Family structure is often significantly changed and disrupted through refugee and migration experiences. This can involve responsibility for extended family members and likewise can also result in some family roles missing and inaccessible. The impact of this family restructuring can mean support for victims of violence can be significantly reduced
- Financial pressures for refugee and migrant families can contribute to the levels of stress that lock families together to survive and in this way escaping family violence can itself be experienced as a violation of the family
- Limited access to culturally responsive legal services inhibits refugee and migrant victims' ability to escape family violence
- The pathologising or labelling of migrant and refugee women because of their experiences of trauma and abuse becomes its own barrier to a culturally appropriate response to family violence. Instead, the resilience and survival of migrant and refugee women needs to be recognised as a resource to support victims overcome family violence.

Additional Reading:

- Marlowe, J.M. (2010) Beyond the Discourse of Trauma: Shifting the focus on Sudanese Refugees' *Journal of Refugee Studies* May 7, 2010
- Morgan, A. & Chadwick, H. (2009) Key Issues in domestic violence' *Research in Practice* No 7 Australian Institute of Criminology, Canberra
- Sawrikar, P. & Katz, I. (2008) 'Enhancing family and relationship service accessibility and delivery to culturally and linguistically divers families in Australia' *Issues Paper No 3* Australian Family Relationships Clearinghouse