

'Good' domestic and family violence lawyering

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1

JOURNAL ARTICLE

What is 'good' domestic violence lawyering?: views from specialist legal services in Australia

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2

2

Our project

We spoke to Women's Legal Services in Sydney, Melbourne and Brisbane.

We conducted focus groups as part of the qualitative project

Participants were asked about their experiences as a lawyer working in DFV matters, what they identified as the features of good and poor DFV lawyering, the role of professional ethical obligations, impediments to good DFV lawyering.

In their responses, some participants drew on prior experiences working in private practice.



3

3

Women's Safety and Justice Taskforce (Qld), *Hear Her Voice*

"It is not just family lawyers who need to understand coercive control and domestic violence. A wide variety of lawyers work in the domestic and family violence space, including duty lawyers, prosecutors, legally aided and private criminal defence lawyers, family lawyers, and independent children's lawyers. Regardless of their practice area, every lawyer may work with clients affected by domestic and family violence at some time. It is vital that all lawyers are properly trauma-informed and equipped to recognise and respond to domestic and family violence, including coercive control and its impacts" (p. 222).



4

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Australian Law Reform Commission, [Family Law for the Future – An Inquiry into the Family Law System: Final Report](#), ALRC Report 135 (March 2019)

Recommendation 52 of the *Family Law for the Future Report* calls on the Australian Law Council to: *work with state and territory regulatory bodies for legal practitioners to develop consistent requirements for legal practitioners undertaking family law work to complete annually at least one unit of continuing professional development relating to family violence.*

Consultation Paper of the Council of Attorneys-General Family Violence Working Group exploring options for improving the family violence competency of legal practitioners, 30 Sept 2019, concedes that lawyers interact with clients experiencing DFV in a range of areas:

Criminal law is an obvious example, however equally, a plaintiff in a personal injuries matter may be subjected to family violence at home to accept or not accept an offer. Succession law is another area where family violence may well exist and be shaping a party's position in litigation. Lawyers considering the enforceability of a contract may need to consider whether or not a party who has entered into, for example, a mortgage or a loan agreement or guarantee, was in circumstances where they have been the subject of family violence. It is submitted that most, if not all, legal practitioners could benefit from training towards having the capabilities: [including]

- understanding DFV
- DFV risk assessment, evaluation and management
- specific capabilities in working with perpetrators; working with at risk communities
- Vicarious trauma resilience
- ethical obligations around confidentiality and client capacity

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5

Systems abuse and secondary trauma

Kerry Orra, Nicola Sheerana and Heather Douglas 'The psychological impact on mothers who have experienced domestic violence when navigating the family court system: a scoping review' (2023)

Psychiatry, Psychology and the Law [Full article: The psychological impact on mothers who have experienced domestic violence when navigating the family court system: a scoping review \(tandfonline.com\)](#) found:

- (a) perpetrators using the system as a mode of coercive control,
- (b) secondary victimisation as a result of interacting with the system,
- (c) victims required to relive their abuse, and
- (d) long-term psychological consequences of having engaged with the system.

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6

Academic research - Concerns about survivor's own lawyer

The lawyer:

- did not have a sufficient understanding about DFV and how to respond to it in their work;
- did not have an 'understanding [of] what trauma is and how it can affect the people who experience it' (ie not trauma-informed);
- did not screen adequately for DFV, or have confidence in being able to identify and respond to safety issues;
- did not listen to them, appeared 'disinterested' in DFV, or minimised their experiences'
- displayed 'judgemental attitudes', including not believing their allegations;
- told them not to raise DFV (particularly in the context of family law proceedings) or led them to feel silenced through their interactions;
- did not appreciate the impact of non-physical forms of abuse or its patterned nature,
- did not recognise that DFV was a relevant factor in the case, or assumed that DFV was not relevant to their area of practice;
- failed to understand the impact that the violence had on the children of the relationship;
- did not use 'the current law effectively when they lead evidence of abuse and [made] submissions';
- provided insufficient information about their case or the options available;
- pressured them to consent to orders that they did not think were safe in family law parenting matters; and
- did not appear to be competent in the handling of their matter, with some women suggesting that their lawyer did not appear to be 'truly acting in their best interests'.

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7

Academic research - Concerns about perpetrator's lawyer

- Some victims felt that they were bullied by that lawyer;
- Some felt pressured to agree to orders that were unsafe or provided inadequate protection (eg stating that the person who used violence would agree to a civil protection order if the children were not included);
- Perceptions that the lawyer for the other party facilitated legal systems abuse (even if inadvertently); and
- Perceptions that the lawyer for the other party minimised or denied the allegations about violence made against their client.

Lara Anstie in a paper 'Ethical Issues in Representing Alleged Perpetrators of Family and Domestic Violence' in 2018, [Ethical-issues-in-representing-alleged-perpetrators-of-family-and-domestic-violence.pdf \(gtp.com.au\)](https://www.gtp.com.au/ethical-issues-in-representing-alleged-perpetrators-of-family-and-domestic-violence.pdf)

discusses some of the issues to be alert to and poor practices observed including:

- 'lawyers who still employ and are driven by the old chestnuts of minimising the alleged perpetrator's behaviours and victim blaming';
- lack of awareness of common attributes of perpetrators which present in 'the use of language like "parental alienation" talking about things as "incidents" that might not be, urging a lawyer to ask for unreasonable timeframes, to refuse reasonable procedural orders or other things for children like school activities, counselling'.

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Our study – concerns about a lack of DFV knowledge

Clients reporting that “...my very abusive partner has found a very abusive lawyer in the way that they then speak to me or the way that they approach me” (QLD1).

“I do think that it probably is a jurisdiction [civil protection orders] where a lot of people feel that they can dabble. A lot of lawyers feel that they can just pop into intervention orders without really having much expertise or experience”. (VIC2)

“They’re less aware of family violence as a pattern of behaviour, because of that very incident-based approach of the criminal law I think they don’t view this as a problematic ... And they therefore tend not to present it to the court as being a problematic pattern of behaviour, which needs to be addressed in a systematic way. It’s, ‘oh, this was a one off incident’. Which of course, we know, working in this space that it usually isn’t.” (NSW1)

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Anstie’s tips for ‘good lawyering’ for perpetrators

‘Start as you intend to go on. Remain objective, and give the client advice even if it’s what they don’t want to hear. Tell them that you cannot assist them if they want you to do or say anything that would lead you to breach’ duty to the Court

‘Reality test the instructions they give. If it sounds like the dog ate their homework, take them to task. Be direct. Ask “who did what to who” and reframe evasive answers into the active voice’. Be careful of being lied to or manipulated. A lawyer cannot abuse the administration of justice.

Lara Anstie in a paper ‘Ethical Issues in Representing Alleged Perpetrators of Family and Domestic Violence’ in 2018, [Ethical-issues-in-representing-alleged-perpetrators-of-family-and-domestic-violence.pdf](https://www.gtp.com.au/ethical-issues-in-representing-alleged-perpetrators-of-family-and-domestic-violence.pdf) ([gtp.com.au](https://www.gtp.com.au))

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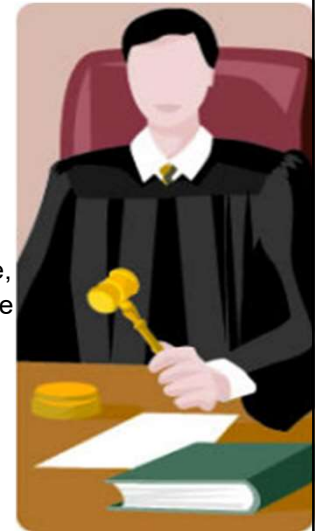
Duties to the court and the profession

ASCR rr 3.1, 5.1

A solicitor's duty to the court and administration of justice is paramount

A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:

- 5.1.1 be prejudicial to, or diminish public confidence in, the administration of justice; or
- 5.1.2 bring the profession into disrepute.



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Honesty or Frankness in Court

BR r 26; ASCR r 19.1

A barrister/solicitor must not deceive or knowingly/recklessly mislead the Court

BR r 27; ASCR r 19.2

A barrister/solicitor must, as soon as they are aware, correct any misleading statement made by the [barrister/solicitor] to a court

BR r 28; ASCR r 19.12

A barrister/solicitor must alert the opponent and if necessary inform the court if any express concession made in the court of a trial in civil proceedings by the opponent about evidence, case-law or legislation is to the knowledge of the barrister/solicitor contrary to the true position and is believed by the barrister/solicitor to have been made by mistake.

12

12

Our study

“And so, if you get instructions, for example, in the private practice days, when I did occasionally act for the alleged DV perp, I thought it was my responsibility as a lawyer to push back a little bit on the client’s instructions, and say, ‘well, she says all this all this happened. What do you say about that? Oh, okay, so you only did that, but that’s still problematic behaviour, we need to address this. We can’t just blanket deny everything, because it’s not ... This allegation is not going to go away. You need to address what happened and you need to address your future behaviour’, because that’s going to ultimately lead to a more favourable outcome”. (NSW1)

You don’t just act on instructions without some critical perspective particularly around safety, and a need to check the evidence for yourself.

ASCR r 17.1: do not act as the ‘mere mouthpiece of the client’

Legal Profession Board of Tasmania v Glynn Williams [2023] TASFC 1

13

13

Academic research – clients’ experience of good lawyering

Positive experiences are ones in which survivors felt their lawyer had:

- listened to them,
- took the violence seriously,
- displayed empathy,
- provided emotional support,
- displayed an understanding of DFV in their work, and
- were attentive to safety concerns importantly including for children.

14

14

Our study – WLS lawyers' views on 'good DFV lawyering'

Features of good lawyering identified in the focus groups included:

- how a lawyer works with an individual client,
- how a lawyer conducts litigation or a case, and
- the extent to which the lawyer is engaged with systemic reform.

In general, participants emphasised that good DFV lawyering is about legal knowledge and ethical awareness, combined with a deep understanding of DFV:

"... it's really the legal knowledge, both of the [civil protection order system], family law, how violence actually is treated in the legal system, but also that underpinning understanding of the dynamics of [DFV]. Of how clients are affected, and how they're likely to present and yes, that deeper understanding of really what [DFV] is, and how it affects people". (NSW3)

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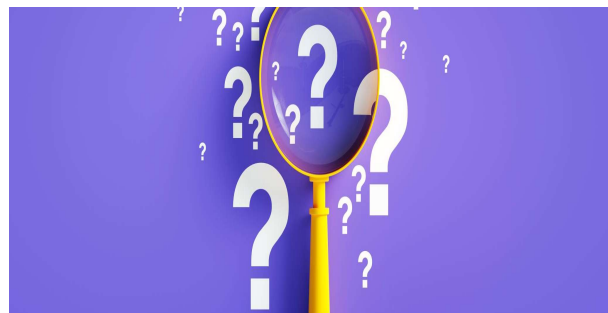
"To be a good duty lawyer in [DFV] is to also have a really good understanding of what domestic violence is like and how it might present". (QLD1)

It's about how you frame your work, based on a knowledge of DFV as types of violence and abuse used and the context of control and impacts, and legal consequences, and non-legal needs (knowing when and how to refer)

Safety lens is crucial at all times

This knowledge informs the skills that lawyers bring to their work:

- how the lawyer asks questions (including questions that 'reality test' a client's account);
- the conduct of risk assessment;
- how they communicate with their client and the other party; and
- the need to adjust or innovate practices to ensure accessibility for different groups of victims and the institutional environment.



16

16

Trauma-informed lawyering

Being trauma-informed not only focuses on understanding the nature of trauma and how it might impact on a person and shape their responses and reactions, but also involves recognising the 'impact that working with issues related to trauma can have on lawyers', and how the legal system itself might contribute to and compound trauma.

It is being attentive to the following interrelated aspects of practice:

- time spent with clients;
- trying to avoid or ameliorate possible re-traumatisation through the legal process, including through dealings with the lawyer themselves;
- being aware that trauma can manifest in different ways;
- adopting 'whole' client-centred practices; and
- how the lawyer frames and describes the experience of DFV and its impacts for their clients and the court.

17

17

Taking time

"You need to carve out that time in your day to give the appropriate space for that client to then unpack those issues with you. So I think, yes, it always just takes a lot of time" (NSW5).

One participant stated that the longest duration she has engaged with a client was "maybe eight months ... where she just kept coming back, but she wasn't yet ready to tell me everything" (NSW1).

'Hanging in there' may not always be possible in private practice or where there are other institutional constraints. The best practice possible might be to try to build in sufficient time to build trust and a rapport.

18

18

Good duty lawyering

“You’re obviously constrained by the situation that you’re dealing with ... if you’re at duty court, then it’s a matter of getting the information you need. So knowing what questions you need to ask to get that information quickly, but also doing that in a trauma-informed way, in a non-traumatising way of getting it done. So I would always get a copy of the [civil protection order] application, for instance So I could see what was going on, I could see what had been reported. So I didn’t have to go through and ask her, ‘oh, what actually happened?’ ... by getting that bit of paper, I didn’t have to actually go through it with her” (NSW3).

- Trying to avoid re-traumatisation or alleviating some secondary trauma

19

19

Avoiding re-traumatisation

“I’m also very conscious about not re-traumatising the client. And if they’re perhaps not ready to talk about their experience in the first meeting, I might say, well come and have a look at an [civil protection order] application. And then that gives you something to work with. To see what was reported to police, and then maybe sort of once the trust has been built to ask more narrow questions, might make it easier.” (NSW2)

Need to be careful about language and what us ‘coming back from the other side’ in correspondence and court documentation. Strategies to address this included:

- using different language to that used by the other party or their lawyer,
- calling beforehand to explain the nature of the document that they are forwarding,
- being conscious of the timing for the delivery of the information (eg does the client have access to support at that time), and
- using humour in a sensitive way.

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Awareness that trauma can manifest in different ways

“I’ve had calls where clients recently called very angry, very upset, can’t get proper instructions and we need to say, ‘I’ve given you all the information I can for today, but let’s have a call next week and unpack this further’ at a time that suits, and I think, in doing that, over a period of time, again, building rapport, but also potentially a higher threshold of [understanding ...] I can’t imagine it in other [private practice] contexts that I’ve worked, a client expressing frustration and then not saying, ‘well, that’s you saying that you don’t have confidence in us and we’re ceasing to act’. And just knowing that often, when clients call angry, it’s a trauma response, or can be a result of a complex range of factors, and just needing to hang in there and being open and also being patient”. (NSW6)

21

21

Client-centred practices – participation and ‘wrap around’ approach

“[O]ne of the things that makes really good lawyering in the DV space, is that ability ... to travel hand-in-hand with the client along that journey. And to make them feel like this legal process is not necessarily ... I mean it’s happening to them, but it’s also something that they’ve got some ... agency and some empowerment about what’s going to happen and at least even just the agency that comes from making an informed decision. Of course, once you end up in court, there’s sometimes very limited outcomes that are available. You basically will have to live with, in most cases, live with whatever orders the court decides to make. But at least then the client understands what is happening, and why. And I would say that, whether you’re talking about in the community legal centre, or whether you’re talking about private practice, that is very, very important to make sure that the client feels that this ... They’re part of what’s going on and it’s not just something that’s happening, without them having any say or any understanding.” (NSW1)

22

22

Helping clients to identify violence/abuse/coercive control

“But I think being able to take some good instructions, and to know how to ask questions and often it’s a regular occurrence here that we will say to clients, ‘have you experienced violence in your relationships’, say on the [telephone] advice line. But they will say ‘no’. But in giving you instructions about the circumstances of their relationship, or of what’s gone on that’s led them to get some advice, it’s about then circling back and starting to unpack with your client and naming violence, for what it is. And being able to help your client, I think, see that violence is not necessarily just a hit. So being able to unpack and name it for your clients, and then frame their legal problem within the domestic violence framework”. (NSW 4)

23

23

Re-framing, empowering and educating

“The ways that we frame [the] evidence, it’s the language that we use, as [NSW7] talked about. I think I’m ... I’m quite conscious in the ways that we draft [documents] and ... rather than [saying...] something along the lines of, oh, ‘my client experienced domestic violence’. [Instead] ‘Well the ex was the perpetrator of domestic violence against my client’. And I think it’s about that language and I think it just shifts the focus into keeping perpetrators to account ... And holding them to account, I think, just in the ways that we can frame what, on the face of it is quite a simple sentence. I think that’s the sign of good lawyering, is being very aware of our language to all of the players, I think we’ve got a really important role to play in the framing of domestic violence and the use of our language, because, you know, our words are so powerful, and the ways that we frame things can be so powerful for our clients, as well. So just hearing from us, the ways that we might frame their experiences can be such an empowering and validating experience for the clients. And on the flip side, if we do it badly, we can be just yet another player in the system, who has failed to validate and that has failed that client in being believed”. (NSW4)

24

24

Difficulties or tension for 'good' lawyering techniques

- Tensions in trauma-informed work (believing a client) but also having to establish a case to a legal standard;
- not being a mere mouthpiece for clients but reality testing their claims; and
- the fact that lawyers encounter a variable legal landscape where how they approach a case may be shaped by who is on the bench or the jurisdiction in which they are appearing.

"[A]nother big problem that I often find is just the different approaches of the magistrates and I hate giving the advice that it really depends on who we're going to get today. 'Oh, we've got this magistrate. Oh, well, I should be fine. We can go in'. I'll say all this stuff. Or 'no, we've got this difficult magistrate and you're not going to get it. You're going to have to do this'. I hate that because that's not how the system should be working. It should all be the same and it should all be uniform." (QLD1)

25

25

Ethical tensions

"But I think we also find ourselves in the position where sometimes we have to disengage from clients altogether. Where we will not be compromising our ethical position by continuing to act for them. It does happen sometimes that you become aware of information, and this is a difficult decision to make, which the client's refusing to be put to the court or which the client is wanting to put to the court in a rather disingenuous way, and we're just simply not going to do that. So I think, yes, there are difficulties, and we will make those decisions. I think a lot of my role ... is actually talking with the lawyers about when we're going to disengage. Or how are we going to manage the client's instructions, which are putting their safety at risk. This is a sort of almost a daily dilemma for our kind of practice". (VIC4)

26

26

Ethical duty to confer with the client

A solicitor must provide **clear and timely advice** to assist a **client to understand** relevant issues and to **make informed choices** about action to be taken during the course of the matter, consistent with the terms of engagement

- Rule 7.1, Australian Solicitors Conduct Rules

A solicitor must **follow** a **client's** lawful, proper and competent **instructions**.

- Rule 8.1, Australian Solicitors Conduct Rules

27

27

Current lack of training

Our participants commented that there were private practitioners who “might never have done domestic and family violence training. Ever. Because it’s not compulsory. If it’s not an area of practice that they’re interested in, it’s not going to be a [Continuing Legal Education] that they attend, then their level of understanding is probably what’s in the media”. (QLD2).

Those participants who had previously worked in private practice stated that it was all about “learning on the job”. (NSW1, NSW3).

Participants pointed out that some practitioners “dabbled” (VIC2, VIC4) or “tacked on” (QLD2) DFV work to their other legal work. This was seen as a concern because these lawyers lack specific understanding of DFV and/or the law, particularly in the area of civil protection orders.

28


28

THE UNIVERSITY OF QUEENSLAND AUSTRALIA

Women's Safety and Justice Taskforce

Recommendations 38 and 39

- advocate for the new prescribed Areas of Knowledge requirement [within Priestley 11 for admission to legal practice] to include that students study the impact of laws on Aboriginal and Torres Strait Islander peoples since colonial times, Indigenous perspectives and cultural competency, and the substantive law relating to domestic and family violence, including coercive control and its nature and impact on victims, the community and the study and practice of law.
- The Queensland Government work with the Bar Association of Queensland and the Queensland Law Society to ensure that all lawyers in Queensland have a current understanding of the nature and impact of domestic and family violence, including coercive control, the substantive and procedural law, and how to refer clients to services and supports.



Hear her voice

Report one
Addressing coercive control and domestic and family violence in Queensland

29


29

THE UNIVERSITY OF QUEENSLAND AUSTRALIA

Women's Safety and Justice Taskforce

Recommendations 40-47

- mandatory CPD training for all lawyers
- requirements for DFV training for specialist accreditation in family and criminal law
- requirement and regular training for those on preferred supplier lists for Legal Aid
- The Queensland Law Society and the Bar Association of Queensland ensure that supports and services provided to lawyers to help them navigate ethical issues include a focus on the complex ethical issues likely to arise both in domestic and family violence-related legal practice and from domestic and family violence across all practices.
- The Queensland Law Society and the Bar Association of Queensland develop and implement a trauma-informed practice framework for practice for legal practitioners in Queensland



Hear her voice

Report one
Addressing coercive control and domestic and family violence in Queensland

30

30