



24 February 2017

Committee Secretary
Senate Community Affairs References Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email only to: seniorclerk.committees.sen@aph.gov.au

Dear Sir/Madam

Submission to inquiry on the complaints mechanism administered under the Health Practitioner Regulation National Law

We welcome the opportunity to make a submission to this important inquiry.

Our submission focuses on the current inadequacy of a clear and simple complaints mechanism for health practitioners who act as family consultants, single expert witnesses, or expert witnesses in family law proceedings.

This is in part due to the inadequacy of current arrangements under the *Health Practitioner Regulation National Law*, as well as a lack of its integration with pertinent aspects of the *Family Law Act*.

Summary of recommendations

We make the following recommendations:

1. That the *Health Practitioner Regulation National Law* is amended to provide a clear, simple, and accessible complaints mechanism for complaints in relation to health practitioners acting as family consultants or expert witnesses in a family law proceeding.
2. That section 121 of the *Family Law Act* is amended to make clear that disclosures of accounts of a family law proceeding for the purposes of making a complaint against a health practitioner under the *Health Practitioner Regulation National Law* are excluded from the prohibition under section 121.

About WLSA

Women's Legal Services Australia (**WLSA**) is a national network of community legal centres specialising in women's legal issues, which work to support, represent and advocate for women to achieve justice in the legal system. We seek to promote a legal system that is safe, supportive, non-discriminatory and responsive to the needs of women.

Our members provide free and confidential legal information, advice, referral and representation to women across Australia in relation to legal issues arising from relationship breakdown and violence against women. Our legal services are directed to vulnerable and disadvantaged women, most of whom have experienced family violence.

Our members' principal areas of legal service work are family violence (family violence intervention orders), family law, child protection and crimes compensation. Our members also deliver community legal education programs and workshops. Individually and together we advocate for laws that are fair for women experiencing violence and relationship breakdowns. We are informed by a feminist framework that recognises the rights of women as central.

Family consultants and single expert witnesses in the family law system

Psychologists, psychiatrists, and other health practitioners have significant involvement in family court proceedings. This may be in the following ways:

- As a court-appointed "family consultant" who provides a family report to the court. A family report is an "independent assessment of the issues in the case and can help the judge hearing the case to make decisions about arrangements for the child/ren."¹ A family consultant is usually either a qualified social worker or psychologist with skill and experience in working with children and families.²
- A single expert witness (**SEW**) is a witness appointed by either both of the parties, or the Court, to provide evidence on a question in dispute in the proceedings. In family law proceedings, a SEW is often either a medical practitioner, psychologist, or psychiatrist.
- A health practitioner may otherwise be an expert witness for only one of the parties in the proceeding.

Problems with family consultants and SEWs

In the experience of Women's Legal Services' lawyers, there are numerous problems with particular family consultants and SEWs in family law proceedings, including:

- They do not understand the dynamics and risks of family violence. This was recently confirmed by Moorabbin Court Magistrate Anne Goldsbrough, who told a national

¹ Family Court of Australia, "Family Reports", <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/child+dispute+services/family-reports>

² Family Court of Australia, "Family Consultants", <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/child+dispute+services/family-consultants>

family violence conference she frequently read court reports from psychiatrists, psychologists and medical practitioners who clearly had little knowledge of family violence.³ At that conference, Ms Goldsbrough said 70-80 per cent of people appearing before her for a specialist mental health sentencing list were perpetrators or victims of family violence. However, she went on to say that “in many of the reports I read, many of the imminent psychiatrists and psychologists, medical practitioners, in my humble opinion, display little idea about the dynamics and consequences of family violence.”

- They lack cultural competency in relation to working with people of an Aboriginal or Torres Strait Islander, and culturally or linguistically diverse, background. This includes in particular the ability to communicate effectively through interpreters and the ability to appreciate how culture may influence behaviour.
- They at times under-estimate the risks and effects of family violence on children.
- As in Joanne’s case below, they exhibit bias in relation to race, gender, or other attributes of one of the parties, and on the basis of that bias make statements in their report that preference the other party’s point of view.

Joanne’s story – the consequences of perceived bias in a family report

Joanne⁴ was born in a South East Asian country, and she only speaks Khmer, a language that it is difficult to get interpreters for. She lives in Melbourne, and her sole income is a Centrelink benefit. She was referred to Women’s Legal Service Victoria (**WLSV**) in relation to a parenting dispute with her ex-partner, Peter. He lives in Werrimull and also requires a Khmer interpreter.

In about 2004, Peter and Joanne met overseas, where Joanne lived. For a few years, they would only see each other every 6-12 months when Peter visited from his home in Australia. In about 2006, Joanne became pregnant with their son, Richard. In 2013, when Richard was 6 years old, the couple decided he should live with Peter so that he could be afforded the opportunities of life in Australia. Joanne could not accompany Richard for financial reasons.

In July 2016, Joanne and her daughter from a previous relationship, Chloe, came to live with Peter and Richard in Werrimull. In late August 2016, Joanne left Peter with her two children, alleging physical and emotional family violence, and the three went to live in a refuge in Melbourne. Joanna and Chloe obtained Intervention Orders for their safety against Peter. The Department of Health & Human Services (**DHHS**) was involved briefly in relation to child protection matters, but determined that the children were safe with Joanne, who was deemed as protective.

Peter made an application to the Federal Circuit Court for an order for sole parental responsibility and for Richard to live with him in Werrimull – the proceeding in which WLSV is now assisting Joanne. As part of this proceeding, the judge made an order for a family report (a section 11F Report or a Child Inclusive Memorandum to Court) by a family consultant.

In preparing her report, which was done in the court house, the family consultant spent about one hour with each of Joanne, Peter, and Richard. In the case of meetings with Joanne and

³ <http://www.heraldsun.com.au/news/victoria/magistrate-says-psychs-have-little-idea-about-family-violence/news-story/a9e95354714533804b3f5d67f84e643f>

⁴ This story has been fully de-identified, and is provided with the consent of our client.

Peter, this had to be done with the assistance of interpreters.

Despite having only brief meetings with Richard and his two culturally diverse and non-English-speaking parents, and limited time to prepare the family report, the family consultant states conclusively in her report that “*there are no indications that the claims of family violence are other than opportunistic to provide [Joanne] with options*”.

In the report, the family consultant does not give much weight to a record of interview with DHHS, during which Richard had reported that he had been hit by Peter and that Peter had controlled Joanne since her arrival. The report contains a record of two observations of Richard with his father, which are described as “*poignant*” and emotionally “*tumultuous*”, and no observations of Richard with his mother. Although Peter is reported as having recently attempted to commit suicide by hanging (indicating grave mental health issues and increased risk of violence in the Victorian Common Risk Assessment Framework) this is not explored in detail. On the basis of little evidence, the consultant concludes that Richard “*has become a pawn in the parental conflict*”, and recommends that Richard live with his father, and see his mother intermittently.

On the basis of this report, the court ordered that Richard live with his father, and see his mother every fortnight in Werrimull. It was ordered that Richard return to Werrimull with his father immediately from court. This left Joanne with little opportunity to say goodbye to Richard in court, as he was led sobbing away from her.

As Joanne is on Centrelink and has no car, she now travels many hours to Werrimull from Melbourne by bus every fortnight to visit Richard. The dispute is ongoing.

As Dr Deborah Wilmoth writes, that in the experience of the Western Australia Board of Psychologists, complaints against psychologists in family court proceedings have been increasing:⁵

As presiding officer of the Western Australia Board of Psychologists, I have been increasingly concerned with the rising number of complaints being lodged against psychologists in relation to Family Court evaluations, a concern also shared by other Psychology Boards in Australia. At least in terms of Western Australia, many of the complaints centre on issues of the competency of the psychologist to provide such reports, the perceived bias of the psychologist, the methodology of the evaluation, and the existence of dual relationships (the psychologist as both expert witness and therapist).

The APA guidelines emphasise that psychologists who undertake child custody evaluations need to be aware that special competencies and knowledge are required, such as understanding the role of developmental history and developmental issues in evaluating children for the Family Court. Psychologists have to be not only mindful of their own biases that may influence the conclusions at which they arrive, but must “actively seek information that will differentially test plausible rival hypotheses (American Psychology-Law Society, 1991).

Inadequate complaints mechanism for family consultants and SEWs

Currently, there is no clear complaints mechanism health practitioners in the family law

⁵ Deborah Wilmoth (December 2007) “Family Court psychological evaluations: how not to be part of the fallout”, *inPsych*, https://www.psychology.org.au/inpsych/family_court/

system, and, in particular, family consultants or SEWs. The Family Court of Australia (**FCA**) website refers anyone with a complaint about a family consultant to either its complaints policy, or the equivalent Federal Circuit Court (**FCC**) complaints policy.⁶ However, the FCA complaints page states that its policy does not apply to expert witnesses, and that any issue with the contents of a family report should be tested by way of the court process.⁷ The FCC complaints page states that the Regional Dispute Resolution Coordinator may be able to assist with a complaint about a family report writer, but to the extent that a litigant is unhappy with the content of a family report, this must be challenged by way of cross-examination. It further states that “If you wish to cross-examine the Family Consultant who prepared your Report you, or your lawyer, must write to the Family Consultant at least 14 days before the hearing.”⁸

Our experience working with family law litigants, many of whom have experienced family violence, is that a self-represented litigant will have difficulty effectively cross-examining a witness in a way that challenges their credibility. This would be particularly so where the expert witness is experienced in the court system, and the litigant is not, as is most often the case. Cross-examination is also not an appropriate mechanism by which to challenge the inadequate practice of a “repeat offender” – a family consultant that WLS lawyers have come across again and again in their practice, and whose reports are consistently inadequate.

Another key inhibitor of making a complaint in relation to this group of practitioners is that section 121 of the *Family Law Act 1975* (Cth) prohibits publication or transmission of identifying information about parties in a family court proceeding. This has resulted in the Australian Association of Social Workers (**AASW**), out of what may be an abundance of caution, publishing a guidance note limiting its ability to receive complaints about social workers that have acted as a family report writer in family law proceedings:⁹

The AASW is generally prohibited by virtue of section 121 of the Family Law Act 1975 from receiving and responding to complaints about social workers (whether a Family Consultant or not) that relate to proceedings of the Family Court of Australia and Federal Circuit Court including anything relating to the content of a report prepared for the purposes of the court proceedings. This includes complaints relating to a court-ordered activity.

Further contact

We would be happy to assist you with any other questions you may have, or contacts that you required. Please do not hesitate to contact me by email at agata@womenslegal.org.au or on (03) 8622 0606 (Mon – Thur).

Yours faithfully

Agata Wierzbowski
National Law Reform Coordinator

⁶ <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/child+dispute+services/family-reports>

⁷ <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/contact-us/feedback/complaints-policy>

⁸ <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/contact-us/feedback-complaints/complaints>

⁹ <https://www.aasw.asn.au/document/item/3863>