



Women's Legal Services Australia

Response to Family Law Amendment (Family violence and Cross- Examination of Parties) Bill 2018

Prepared by:
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Endorsed by:

AWAVA
National FVPLS Forum

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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. Some of our centres have operated for over 30 years.

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. Therefore, our primary concern when considering any proposed legal amendments is whether they will make the legal system fairer and safer for our clients – vulnerable women.

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 training programs and educational workshops to share our expertise regarding effective responses to violence and relationship breakdown.

Finally, both WLSA and its individual member services work to contribute to policy and law reform discussions, primarily focused on family violence, to ensure that the law does not unfairly impact on women experiencing violence and relationship breakdowns.

We are informed by a feminist framework that recognises the rights of women as central.

Summary: Bill is welcomed

Women's Legal Services Australia (WLSA) congratulates the Turnbull Government for introducing long overdue legislation to ban the direct cross-examination of family violence victim-survivors by their abusers in the family court system.

These reforms are an important step towards making the family law system more trauma informed and bringing it into line with measures already available to protect women who have experienced violence in the family violence jurisdictions in some states.

WLSA wishes to specifically commend the Turnbull government on the following aspects of this Bill:

1. The extension to both parenting and financial matters in the family court;
2. The proposed extension of the protections to include intervening witnesses;
3. The proposal that a legal representative will perform the cross-examination on behalf of both parties in family violence matters;
4. The requirement for the Court to consider additional protections even when the prohibition is not triggered;
5. The acknowledgement in the Bill's Explanatory Memorandum that:

"personal cross-examination by an alleged perp can expose victims of family violence to re-traumatisation and can affect their ability to give clear evidence"

and that a fair hearing applies to *all* parties (including family violence victims-survivors) which,

"...requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings".

However, the protections offered by this Bill can only make a real difference with:

- proper funding to ensure that both the victim and the perpetrator have a legal representative to act on their behalf and conduct the cross-examination properly for them; and
- further reform to improve the understanding of the family law courts and all professionals within the system of the dynamics of family violence and trauma informed and trauma based responses.

Prevalence and AIFS Report

WLSA acknowledges the report from the Australian Institute of Family Studies into the prevalence of direct cross-examination of parties in family law matters where there is family violence.

While the findings of that report are useful and informative, the findings in the report should not be used to inform the anticipated volume of court users whose circumstances may trigger the protections in this Bill as the AIFS study:

- did not consider those women who did not engage at all with the family law system (did not pursue their legal rights in the family courts) from fear of further harm from the perpetrator and from the system itself;
- did not consider those women who did engage but chose (or who were pressured) to settle their matter prior to trial. This includes women who felt the system would not result in a safe or fair outcome and those who felt the experience of proceeding to trial would cause them or their children further harm and/or trauma.

Once these protections are in place, WLSA considers that the number of women and victim-survivors of family violence who proceed to trial will significantly increase and will be greater than that flagged in the AIFS report.

Appropriate funding and steps need to be in place so that the additional protections which the Bill seeks to provide to women and victim-survivors of family violence can be properly and safely implemented to all those eligible for such protections.

Funding

Specific Additional funding required

The changes in this Bill can only make a real difference with proper funding to ensure that both the victim and the perpetrator have a legal representative to act on their behalf and conduct the cross-examination properly for them.

WLSA welcomes the comments made by Commonwealth Attorney- General Christian Porter in the media release of 28 June 2018 announcing the Bill¹ that,

“....parties will also have access to representation through legal aid commissions, and the Government is working closely with National Legal Aid regarding implementation of the Bill”

However, WLSA is concerned about the inconsistent comments attributed to the

¹ <https://www.attorneygeneral.gov.au/Media/Pages/protecting-victims-of-family-violence-from-cross-examination-in-family-courts-28-june-2018.aspx>

Commonwealth Attorney-General in an article in *The Australian*² of that same day that,

“...there would be no extra legal aid funding as a result of the legislative change, and those prevented from cross-examining their ex-partner would only be able to access legal aid if they met its usual rules for qualifying.”

The need for proper funding for lawyers in family law matters, particularly where there is family violence, cannot be underestimated.

While the extent to which there are legal aid funded lawyers for family law matters varies as between States and Territories, across Australia Legal Aid Commissions, community legal centres (CLCs) and Family Violence Prevention Legal Services are already overstretched, under resourced and struggling to deal with the increased volume of clients with complex needs requiring legal assistance in the related areas of family law, family violence and care and protection matters.

Most of the assistance provided is minor in nature and does not extend to trials.

Without specific additional funding:

- Legal Aid Commissions, CLCs and Family Violence Prevention Legal Services will not be able to cope with providing lawyers specifically to conduct cross-examination without redirecting their resources from others in need - we would simply be ‘robbing Peter to pay Paul’
- the additional protections provided by this Bill in theory will remain theoretical and cannot be implemented into practice.

This not only leaves victim-survivors of family violence without the protections promised by the Bill but creates an access to justice issue as it is not clear what is to happen when the Bill prohibits direct cross-examination but a legal representative is not engaged.

Proper funding for family law matters required

Engaging a lawyer to only cross-examine the other party means the Court will not have the benefit of the best available evidence.

Cross examination cannot be done in isolation and will require the legal representative to have capacity to gain adequate knowledge and understanding of the entire matter and all its complexities. For cross-examination to be effective, the legal representative engaged on that party’s behalf needs to be properly informed as to the whole of the legal matter as between those parties. This requires a lawyer to be engaged for the whole of a client’s matter.

This is the only way that that legal representative can know what is relevant and what needs to

² <https://www.theaustralian.com.au/national-affairs/shield-against-crossexamination-offered-to-family-violence-victims/news-story/0df6c40e748a6e62ae54f271f63715fa>

be the subject of cross-examination (and re-examination).

We note that the Government is consulting with National Legal Aid to determine the process by which parties would obtain legal representation. WLSA notes that a potential issue arising from the current National Partnership Agreement requires priority to be given to victims when the proper implementation of the Bill requires a legal representative for both parties (or where there is more than one respondent for all parties).

To address these issues and ensure the Bill can deliver on the protections, WLSA advocates for:

- additional and separate funding to CLCs, Legal Aid Commission/s and) and Family Violence Prevention Legal Services to finance the additional costs of providing parties in family law matters where there is family violence the option to have a legal aid funded lawyer; and
- the proper funding for family law matters for CLCs, Legal Aid Commission/s and) and Family Violence Prevention Legal Services

Further family law reform needed

The Bill relies heavily on judicial discretion.

For the reforms to improve safety for victims, WLSA considers it imperative that the judicial officers and legal representatives engaged in the matter are properly trained and specialized in family violence as well as in family law and that this Bill be part of further reforms to make the family law system more trauma informed and safer for families experiencing family violence.

For example, the proper implementation of the Bill relies on the Court being able to:

- properly assess whether the prohibition should apply notwithstanding none of the other s102NA factors may be present; and/or
- determining what safeguards should be put in place to protect the victim-survivor (including when s102NA is not triggered).

In WLSA members' experience, it is common for a victim-survivor to not report family violence. The reasons for this are varied and complex, and include:

- concerns that reporting the violence can lead to further risk of harm (from the perpetrator directly but also further trauma from participating in the family law system itself),
- feelings of shame and convictions of not being believed
- as well as cultural and/or language barriers to reporting and fear or lack of trust in legal systems for some groups of victim-survivors, including Aboriginal and Torres Strait Islander or culturally and linguistically diverse (CALD) victim-survivors.

The ability of the Court to properly exercise their discretion Bill in a manner that increases safety to victim-survivors requires family law courts retaining their specialisation in family law and expanding that specialisation to include family violence.

Specifically WLSA advocates for comprehensive and ongoing and accredited training for the judiciary and all professionals working in the family law system with respect to:

1. Early and ongoing risk assessment and screening;
2. The dynamics and nuances of family violence;
3. Effects of family violence;
4. Trauma informed and trauma based practice (including cultural competency and disability awareness training noting that for many victim-survivors the trauma from family violence is compounded by the intersections of different cultural and language backgrounds and/or disability. This means that family violence and trauma is often experienced differently by different groups within our community, including Aboriginal and Torres Strait Islander families, those from culturally and linguistically diverse (CALD) communities and those with disability.

Other Comments

Extending s102NB Protections to all victim-survivors of family violence

The AIFS report found that in the majority of cases involving cross-examination where family violence allegations were raised, specific safeguards for either self-represented party were not put in place (p44). This highlights the need to more explicitly list the protections available in legislation and a legislative requirement that appropriate protections be applied.

The inclusion of s102NB and the list of possible protections outlined in the Explanatory Memorandum is intended to ensure adequate protections of victims-survivors are applied. However, this should not be limited to victims-survivors who are being directly cross-examined. Such protections should also be extended to victims-survivors whom are legally represented but may need the protection, for example, of giving evidence their evidence remotely via CCTV.

Victim-survivors should have the right to choose whether or not prohibition should apply

At the heart of family violence is coercion and control. Therefore, empowerment for victim-survivors of family violence is central to their recovery. It is important that processes and systems which are designed to protect victim-survivors do not inadvertently remove from them their

choices. Processes and systems which are imposed mandatorily on victim-survivors risk becoming another means by which that victim-survivor is being controlled instead of being a means by which that person is able to move forward with their recovery.

WLSA members very strongly consider that the Bill should be amended so that victim-survivors of family violence who are eligible for the prohibition of direct cross-examination ultimately have the ability to choose (and can make the final decision) as to whether that prohibition should apply.

Factors triggering the prohibition in s102NA

WLSA members consider that s102NA (1)(ii) should be amended to include interim family violence orders as well as final orders.

While interim orders are usually acquired without a state or territory court making findings of fact, it is also possible for final orders to be made without requiring findings of fact (e.g. settling on an without admission or consent basis). Interim orders are also often based on an assessment of risk made by either the police or a court. Interim orders can also last for 1- 2 years before final orders are made.

Commencement of the Act

The proposed commencement date for this Act is 6 months. WLSA members consider that a commencement date of 6 months may cause unnecessary trauma to victims currently in the system. WLSA requests consideration be given to a commencement date of 3 months to allow time for the family law courts to make the necessary changes to rules and/or practice directions while not unduly exposing those already in the system to further trauma from being directly cross-examined.

Review Period

WLSA welcomes the inclusion of a review period of 2 years in the legislation and encourages the Government to make this review publicly available in a timely fashion.

Acknowledgments

Firstly, we acknowledge the family violence victim survivors for whom we work, and in particular the family violence survivors who have shared their stories in this submission and in the WLSA surveys in the hope for positive change.

Secondly, this submission was created with the help and work of many wonderful women. In particular, we thank the members of WLSA Coordinating Committee who have contributed to and helped draft this submission.

Submission Endorsements

This submission was prepared by the National Policy Coordinators of Women’s Legal Services Australia and it’s content and recommendations have been endorsed by the following organisations and associations:

1. AWAVA: See attached letter of endorsement.
2. National Family Violence Prevention Legal Services Forum

The National FVPLS Forum is comprised of 14 Family Violence Prevention Legal Service ('FVPLS') member organisations across the country that provide culturally safe and specialist legal assistance and support to Aboriginal and Torres Strait Islander victim/survivors of family violence – predominantly women and children. They also deliver essential community legal education and early intervention and prevention activities.

Further Information

If you have any queries or would like any further information in relation to this submission, please contact WLSA National Policy Coordinator, Sarah Bright at .