



12 July 2018

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Via email: legcon.sen@aph.gov.au

Dear Colleagues

Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018

Who we are

The Domestic Violence Legal Workers' Network of WA (DVLWN) welcomes the opportunity to provide input into the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (the Bill).

The DVWLN was established in 2004 as a peak body for family violence legal workers in Western Australia. Our members consist primarily of solicitors from community legal centres who work with family violence victim-survivors throughout the Perth metropolitan region and regional Western Australia.

Our members and clients

Our members work with family violence victim-survivors who experience disadvantage, have complex needs and require additional support to participate in and engage with the family law system.

Our clients come from a range of diverse cultural and linguistic communities, including remote Aboriginal and Torres Strait Islander communities. The family violence trauma suffered by our clients is frequently compounded by other challenges including poverty, disability, differences in language and culture, lack of education and mistrust of the legal system.

What we do

Our members provide legal advice and representation across the various areas of law that arise with family violence, including family law, criminal law, family violence restraining orders and care and protection.

We believe it is important that the Senate Legal and Constitutional Affairs Committee (the Committee) has the benefit of hearing from our members to ensure that the experiences of our clients as the more vulnerable in society are heard.

Bill is welcomed

The DVLWN welcomes the introduction of legislation banning direct cross-examination between family violence victim-survivors and perpetrators in the Family Court.

We have seen firsthand the trauma our clients suffer as a result of such direct cross-examination. We have also seen many clients settle early with unfavourable and potentially unsafe outcomes or disengage from the family law system altogether in order to evade this traumatic process.

Despite our overall welcome of the Bill we have some concerns and recommendations that are outlined below.

Response to AIFS research regarding frequency of direct cross-examination in family violence matters, future numbers may be higher than anticipated

We note that the Australian Institute of Family Studies (AIFS) found that there were 173 final hearings in the federal family law courts over two years between 2015 and 2017 that involved family violence allegations where one or both parties were self-represented.

However, as noted above it is our experience that many victim-survivors either settle before the final hearing or disengage from the family law system altogether due to the fear of being directly cross examined by the perpetrator. This course of action has also been acknowledged in paragraph 22 of the Explanatory Memorandum to the Bill.

We therefore anticipate that once the prohibition and protections are in place there will be significantly higher numbers of family violence victim-survivors proceeding to final hearings than what has been identified by the AIFS.

One indication of the anticipated volume can be found from the survey conducted by Women's Legal Services Australia (WLSA) in 2015-2016 that was discussed in the AIFS report where over half of participants who settled before trial said the prospect of fear of direct cross-examination was a factor in their decision to settle.

Need for proper legal aid funding for legal representatives to make a real difference

For the Bill to be effective once passed and make a real 'on the ground' difference, it's implementation must occur as part of broader family law system reforms, including the proper funding of legal aid in family law matters.

In addition to our concern above, it is also important to note that for cross-examination to be effective, the legal representative engaged on the party's behalf needs to be properly informed about the whole of the legal matter as between the parties. This is the only way that a legal representative can know what is relevant and what needs to 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. Proper funding is required so that where the prohibition of direct cross-examination applies, the Court is able to have the benefit of the best tested evidence.

We are concerned that without adequate funding:

- Legal representatives will not have the capacity to gain a thorough understanding of the complexities of the matter required to cross examine effectively;
- There will be further delays in the family law system, resulting in uncertainty and increased risk of harm for victim-survivors and their children;

- The judiciary may be discouraged from exercising discretion in the new section 102NA widely if delays and the resulting safety concerns noted above are a result;
- Funding will simply be taken away from other legal needs currently being met by the Community Legal Centre sector and Legal Aid Commissions that are equally important.

Further reforms needed to increase specialisation of family violence for those working in the family law system

We note that the proposed new section 102NA prohibits personal cross-examination in matters where family violence is alleged and there has either been a conviction, family violence order or a section 68B or s114 injunction order. Where there is no conviction, family violence order or injunction, the Court can still order that the prohibition applies.

If the prohibition doesn't apply, then the new section 102NB requires the Court to ensure that during cross-examination there are appropriate protections for the victim-survivor.

In our members' experience, it is common for victim-survivors not to report family violence at all. The reasons for this are varied and complex and include concerns that reporting the violence can lead to further risk of harm, feelings of shame and convictions of not being believed. There are also 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. These experiences are widely reported in the family violence sector and are also identified in government reports.¹ For some victim-survivors, not reporting is simply the safest course of action for themselves and their children.

The experience of our members is that family violence is not always recognised or sufficiently understood in the Family Court. There is also the lack of an early and ongoing risk assessment process. Some forms of family violence, such as coercive control, don't result in obvious physical symptoms and identification requires a nuanced and detailed understanding of family violence dynamics. Trauma is not always visible or easily identified, and there is a risk that without comprehensive and ongoing family violence training, trauma symptoms may be misinterpreted and used to discredit accounts of victim-survivors instead of being viewed as evidence itself of trauma and the need for additional protection.

Too often the primary perpetrators of family violence are not properly identified and applications are heard from perpetrators using the family law system as a means of continuing abuse and control. (For example, in cases where the very disclosure of family violence by a victim-survivor mother is used by the perpetrator father as evidence that the mother poses a psychological risk to the child. The mother is then placed in the difficult situation where she either needs to agree to the child spending time with a violent parent or risk the child being removed from her care and placed with the violent parent as a result of her 'alienating' the child.)

The safety these victim-survivors relies on the Court being able to:

- properly assess whether the prohibition should apply notwithstanding that a conviction, family violence order or injunction is not present; and/or
- determine which safeguards should be put in place to protect the victim-survivor.

Comprehensive and on-going training on the nuances of family violence and the frequently hidden patterns of coercive control is essential for this judicial discretion to be exercised effectively. The ability of the Court to exercise discretion in a manner that increases safety to victim-survivors is

¹ For example see 'Family Violence - A National Legal Response', Australian Law Reform Commission Report 114, 2010, Chap 18 Evidence of Family Violence, Difficulties in Giving Evidence.

contingent on the Family Law Courts retaining their specialisation in family law and supplementing that specialisation with further education and training in the dynamics of family violence.

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

1. Family violence risk assessment and screening,
2. Trauma-informed and trauma-based practices; and
3. Cultural competency.

For many victim-survivors the trauma from family violence is compounded by the intersections of different cultural and language backgrounds and/or disability. Trauma is experienced differently by different groups within our community, including Aboriginal and Torres Strait Islander families, those from culturally and linguistically diverse (CALD) communities, LGBTIQ communities and those with disability.

DVLWN therefore also recommends the Government consult with representatives from Aboriginal and Torres Strait Islander communities, CALD communities, LGBTIQ communities and disability advocates and organisations so that the family violence training ensures the work of family law professionals is conducted in a culturally competent and safe manner.

Questions or further information

If you have any questions or would like any further information about this Submission please contact
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Yours sincerely

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