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

1. Liberty Victoria is committed to the defence and advancement of human rights and civil liberties. We seek to promote Australia's compliance with the rights recognised by international law and the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic). We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. More information on our organisation and activities can be found at: <https://libertyvictoria.org.au/>.
2. Liberty Victoria is broadly supportive of the amendments the Bill will make. However, Liberty Victoria submits that before the Bill is passed, it should include legislative protections to ensure legal representation for parties when there is a prohibition on personal cross-examination. Liberty Victoria submits that provisions mirroring those such as ss 71 and 72 of the *Family Violence Protection Act 2008* (Vic) ('the FVPA') should be included in the Bill.

3. The explanatory memorandum recognises¹ that the Bill engages competing human rights, including:
 - (a) The eradication of discrimination against women — arts 2 and 3 of the *Convention on the Elimination of All Forms of Discrimination against Women*;²
 - (b) The right to a fair hearing — art 14(1) of the *International Covenant on Civil and Political Rights*;³
 - (c) The best interests of the child and the protection of children on dissolution of marriage — arts 3(1), 3(2), 23(4) and 24(1) of the *Convention on the Rights of the Child*.⁴
4. The Bill seeks to strike a balance between those competing human rights. However, Liberty Victoria is concerned that the Bill currently does not include any guarantee of legal representation in order to overcome any unfairness that the prohibition on cross-examination may cause.
5. Art 14(1) of the *ICCPR* outlines that every person is equal before the courts and is entitled to a fair and public hearing by an impartial, competent and independent tribunal. Its purpose is to ensure that all parties in a proceeding are treated equally. This right seeks to protect both sides of any proceeding.
6. In family law proceedings, prohibiting personal cross-examination by alleged perpetrators of family violence can protect a victim of family violence from suffering any further trauma. Ensuring that this cross-examination is only done by legal practitioners seeks to protect the right to a fair hearing for victims of family violence. However, in order to ensure that no party is disadvantaged by the prohibition on personal cross-examination the Bill should codify the requirement that both parties be legally represented in those circumstances. Legal aid funding for legal representation in these circumstances should also be assured.
7. The EM states that a process is anticipated through which a court could make a request or direction that a party engage a lawyer and that a party could seek representation

¹ Explanatory Memorandum, Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018 4–7 ('the EM').

² Opened for signature 1 March 1980, 1249 UNTS 3 (entered into force 3 September 1981) ('CEDAW').

³ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

⁴ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CROC').

through legal aid if they cannot afford private representation.⁵ In the Second Reading Speech, the Attorney-General stated that if a party was unable to obtain private representation they would be able to access legal aid and that the government was working with courts and legal aid to consider the appropriate processes and to ensure funding is available.⁶ The Attorney-General also stated that these processes would be in place prior to the provisions applying.⁷ The EM outlines that these arrangements would be provided for in the court rules and/or practice directions.⁸ However, the EM and Second Reading Speech do not include any further information as to how these processes will be made certain.

8. Liberty Victoria submits that more concrete protections should be legislated to ensure legal representation for both victims of family violence and alleged perpetrators of family violence. In order to properly protect the right to a fair trial, it is important that these protections are codified in legislation, rather than simply through practice directions or the rules of the courts. Appropriate legal aid funding should also be ensured by the Commonwealth and Victorian state governments so that parties can be represented by legal aid if they cannot afford private representation. Practice directions and rules of courts can be amended, however the codification of these rights in legislation would be more likely to ensure they remain in the future.
9. Liberty Victoria submits that legislative provisions similar to ss 71 and 72 of the *FVPA*.⁹ Sections 71 and 72 apply in contested hearings for intervention orders. Similarly to the changes that the Bill seeks to make, section 70 of the *FVPA* prohibits personal cross-examination of protected witnesses.
10. Sections 71 of 72 of the *Family Violence Protection Act* state as follows:
 - 71. Representation of respondent**
 - (1) If the respondent does not obtain legal representation for the cross-examination of a protected witness after being given a reasonable opportunity to do so, the court must order Victoria Legal Aid to offer the respondent legal representation for that purpose.
 - (2) Despite anything in the *Legal Aid Act 1978*, Victoria Legal Aid must offer to provide legal representation in accordance with subsection (1).

⁵ EM, Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018 12 [34]–[36].

⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2018, 13–14 (Christian Porter, Attorney-General).

⁷ *Ibid.*

⁸ EM, Family Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018 12 [34].

⁹ See also s 357(2) of the *Criminal Procedure Act 2009* (Vic) which gives the court the power to order Victoria Legal Aid to represent an accused in circumstances where a witness is declared a protected witness. Section 355 states that a court may declare at any time that a witness is a protected witness.

Note

See section 8 of the *Legal Aid Act 1978* which provides that legal aid may be provided by Victoria Legal Aid by making available its own officers or by arranging for the services of private legal practitioners.

- (3) However, Victoria Legal Aid may apply all or any of the conditions under section 27 of the *Legal Aid Act 1978* to the representation of the respondent as if the respondent had been granted legal assistance under that Act.
- (4) If the respondent refuses the legal representation offered under subsection (1), or otherwise refuses to co-operate, the court must warn the respondent that if the respondent is not represented and not permitted to cross-examine the protected person about events relevant to the application the subject of the proceeding, neither the respondent nor the respondent's witnesses may give evidence about those events.

72. Representation of applicant

- (1) This section applies if—
 - (a) a respondent is prohibited from cross-examining a protected witness under section 70; and
 - (b) the respondent is legally represented; and
 - (c) the protected witness—
 - (i) is the applicant; and
 - (ii) is not a police officer; and
 - (iii) is not legally represented.
- (2) The court must order Victoria Legal Aid to provide legal representation for the protected witness for purpose of cross-examination by the respondent's legal representative unless the protected witness objects to the provision of the legal representation.
- (3) Despite anything in the *Legal Aid Act 1978*, Victoria Legal Aid must provide legal representation in accordance with subsection (2).
- (4) However, Victoria Legal Aid may apply all or any of the conditions under section 27 of the *Legal Aid Act 1978* to the representation of the protected witness as if the protected witness had been granted legal assistance under that Act.

11. Sections 71 and 72 ensure that in contested hearings, legal representation is assured for applicants and respondents in contested hearings for intervention orders. The power of a court to order legal representation by Victoria Legal Aid means that an appropriate balance is struck between protecting victims of family violence from any trauma which may be caused by personal cross-examination by an alleged perpetrator of family violence and ensuring that all parties are afforded procedural fairness. Further, as the

court has the power to order representation, despite any of the means or merits test policies, there is no undue delay to the proceedings which might be caused by any application that has to be made to a legal aid organisation, including providing proof of means or appealing a refusal of a grant of aid.

12. Usually, s 71 and 72 orders are made as a matter of course at directions hearings when matters are adjourned for contested hearings. The respondent is also usually warned by the court that if they refuse representation from Victoria Legal Aid and do not arrange their own representation, they will be prohibited from conducting any personal cross-examination. In addition, s 72 ensures that victims of family violence are also represented whilst they are being cross-examined, so that they do not have to face cross-examination alone.

13. In summary, the Bill introduces an important change to the way in which family law proceedings are conducted, so that there is no undue stress and trauma caused to victims of family violence. However, the Bill does not adequately ensure that legal representation will be guaranteed and in its current form does not ensure that the right to a fair trial is not unduly restricted. Liberty Victoria submits that the Bill should not be passed without legislative protections which ensure that parties will be legally represented in circumstances where personal cross-examination is prohibited.

14. If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President _____ or the Liberty office on _____ or _____
This is a public submission and is not confidential.

Jessie Taylor
President, Liberty Victoria