

24 August 2017

Public Consultation: Family violence cross-examination amendments
Family Violence Taskforce
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

By email to familylawunit@ag.gov.au

Dear Sir or Madam,

Submission in response to Public Consultation Paper and Exposure Draft: *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2017* (Cth) – Women's Legal Services of the Northern Territory¹

Thank you for inviting comments on the *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2017* (Cth) ('the Bill'). Women's Legal Services of the Northern Territory welcome the opportunity to make a submission in response to the Public Consultation Paper published by the Attorney-General's Department in July 2017 ('the Consultation Paper').

About WLSNT

WLSNT is constituted by 3 community legal centres focused on the advancement of women's rights and funded by the Commonwealth Attorney General's Department and Department of Prime Minister and Cabinet. We provide legal advice, casework, referrals, community legal education and advocacy to women in the Northern Territory. Each service works in areas of civil law, including domestic and family violence, family law, compensation for victims of crime, sexual assault, housing, and consumer credit debts.

WLSNT Submission

The majority of legal matters for each service relate to family law, and a majority of clients have or are experiencing family violence. This submission seeks to reflect these clients' realities, instructions and experiences, which establish that it is not possible for victims of family violence to obtain procedural fairness in family law proceedings without legal representation.

A. Legal representation is essential for both parties.

It is essential for the family law courts to assess, address and respond appropriately to the vulnerability of family violence victims. Whilst the primary goal of the proposed reform is to protect victims from re-traumatisation, it is necessary to balance against this the need for each party to have an opportunity to test the other's evidence so that the court can determine relevant facts in complex high conflict matters.

¹ Central Australian Women's Legal Service Inc; Katherine Women's Information & Legal Service Inc; Top End Women's Legal Service Inc.

We strongly support the proposed prohibition on direct cross-examination and submit the only satisfactory solution is to secure legal representation for both the alleged victim and the alleged perpetrator. In this regard, we endorse the 2015 recommendation of the Family Court of Australia and Federal Circuit Court of Australia against a court-appointed advocate model for cross-examination, that states:

[A] better and more effective approach to the issue would be to provide sufficient resources to enable parties to have legal representation where there is an allegation of family violence at the upper end of severity.

Having regard to the avoidance of re-traumatisation, we note family violence is often held by clients' as an extremely sensitive, shameful and personal matter, such that it can be very difficult to disclose family violence to, for example, a lawyer. In addition to these realities, gendered and cultural factors can increase the difficulty of making disclosures.

In our experience, where disclosures of family violence are made, there is very often a sequestered component to that revealed. With time, support, connectivity and holistic service provision a fuller (but not necessarily entire) history may be provided over an extended period.

In discussing family violence and in communicating details, clients will often re-experience the original family violence such that the content is re-traumatising, despite the established rapport, because of psychological injury arising from the family violence, which itself can be reactivated and aggravated by court processes.

In the above context, a previously unfamiliar and impartial court-appointed person is likely to create an additional barrier to informed and engaged participation in the court system, and to contribute to the victim's sense of disempowerment. It may also aggravate existing trauma such that the legal process experience is received as sanctioned systemic violence.

With regard to the need for the court to determine relevant facts, in often complex high conflict proceedings, we submit the asserted inherent deficits of a court-appointed person are likely to result in insufficient evidence being adduced and or tested by the parties on crucial factual issues relevant to determining the best interests of the child/ren.

The Consultation Paper suggests a parallel with the trauma experienced by victims of sexual abuse who give evidence in criminal proceedings. For example, a court-appointed person model is used under the *Crimes Act 1914* (Cth) where the complainant is a child. However, in criminal proceedings the witness/complainant is not a party, such that contact with the alleged perpetrator can be limited or eliminated. By contrast, in family law proceedings, the alleged victim is a party to proceedings and in constant contact with the respondent/alleged perpetrator. This strengthens the case for mandatory legal representation for both parties, noting also that, among existing equivalent legislation, there is no precedent in Australia for a court-appointed person who speaks on behalf of a victim.

B. Section 102NA(3)(a) of the Bill

We submit legal representation as a prerequisite to obtaining informed consent, as proposed in section 102NA(3)(a) of the Bill. In this respect, in our experience an unrepresented victim of family violence, unfamiliar with the legal system, and unrepresented, is unlikely to be able to provide informed consent to such an alteration in procedure without first receiving legal advice.

C. Legal representation of an alleged perpetrator

In the alternative to legal representation of an alleged perpetrator, we endorse mandatory single-purpose legal representation as in Victoria, where an alleged perpetrator *must* obtain legal representation to cross-examine a family violence victim. If the defendant refuses to obtain legal representation, cross-examination is prohibited.

Conclusion

In consideration of the above, **we recommend, at a minimum, that an alleged victim of family violence must have legal representation in family law proceedings where the allegations include coercive or controlling behaviors, sexual offending or physical assault causing harm.**

We thank you for your consideration of the above and would be pleased to be contacted should you wish to discuss this submission further on _____ or by email to _____

Yours faithfully,
WLSNT

Vanessa Lethlean
Managing Solicitor
Top End Women's Legal Service Inc.