

9 July 2018

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

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

Dear Mr Watling

Submission to the Senate Legal and Constitutional Affairs Committee in response to the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018*

1. Overview

- 1.1. Rape and Domestic Violence Services Australia (R&DVSA) thank the Legal and Constitutional Affairs Legislation Committee for the opportunity to comment on the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018*.
- 1.2. R&DVSA is a non government organisation that provides a range of counselling services to people whose lives have been impacted by sexual, family or domestic violence and their supporters. Our services include the NSW Rape Crisis counselling service for people in NSW who have experienced or have been impacted by sexual violence; Sexual Assault Counselling Australia for people who have been impacted by the Royal Commission into Institutional Responses to Child Sexual Abuse; and the Commonwealth Bank of Australia Domestic and Family Violence Line for staff and customers who are seeking to escape domestic or family violence.

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Counselling Services

24/7 NSW Rape Crisis 1800 424 017
CBA Domestic &
Family Violence Line 1800 222 387
Sexual Assault
Counselling Australia 1800 211 028

rape-dvservices.org.au

- 1.3. R&DVSA commend the Government for acting to prohibit personal cross-examination in family violence matters. This reform is vital to securing the safety and wellbeing of women and children who have experienced family violence when accessing the family law system.¹
- 1.4. As acknowledged by the Government, personal cross-examination can have several devastating implications for women and children who have experienced family violence. First, the fear of personal cross-examination can influence women to consent to arrangements that do not adequately take into account safety concerns. Second, the experience of personal cross-examination may expose women to further traumatisation. Finally, personal cross-examination may reduce the quality of evidence presented to the court where power dynamics underlying family violence inhibit women's capacity to present clear and persuasive evidence, or to test evidence that is adverse to her case.
- 1.5. As such, R&DVSA strongly support measures to prohibit personal cross-examination in the context of family violence.
- 1.6. However, we have several concerns about the way this Bill might operate in practice. In particular, we are concerned that:
 - Women may be prohibited from personally cross-examining their perpetrators, without being guaranteed access to free legal representation;
 - Legal services are not equipped to respond to additional demand; and
 - Judicial officers may not be equipped to identify and respond to issues of family violence in a trauma-informed way.

2. Full list of recommendations

- **Recommendation 1:** Where women who have experienced family violence are prohibited from personal cross-examination, they must be guaranteed access to free legal representation even where they do not meet eligibility requirements for legal aid.
- **Recommendation 2:** Dedicated funding should be provided to legal aid commissions to ensure that all parties prohibited from cross-examination have access to legal representation.
- **Recommendation 3:** Additional funding should be distributed to other legal services that provide specialist and culturally appropriate assistance to women who have experienced family violence, including specialist women's legal services, community controlled Aboriginal and Torres Strait Islander legal services, and specialist legal services for people with disability.
- **Recommendation 4:** The Australian Government should develop a national and comprehensive professional development program for all judicial officers who preside over matters involving family violence that includes components on:
 - The dynamics, complexities and impacts of sexual, domestic and family violence;

¹ R&DVSA prefer the term *people who have experienced sexual assault and/or domestic and family violence* to describe individuals who have suffered this type of violence, rather than the terms survivors or victims. This is in acknowledgement that, although experiences of sexual assault and/or domestic and family violence are very significant in a person's life, they nevertheless do not define that person. R&DVSA uses gendered language when discussing sexual, family and domestic violence. This reflects the fact that sexual, family and domestic violence are perpetrated by men against women in the vast majority of cases. However, we acknowledge that women can also be perpetrators of these kinds of violence.

- Identifying family violence risk factors and responding appropriately;
 - The intersection of family law and child protection;
 - Trauma informed practice;
 - Cultural competency in relation to working with: Aboriginal and Torres Strait Islander people; people from a culturally and linguistically diverse (CALD) background; lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) people; older people; and people with a disability.
- **Recommendation 5:** All court staff, family law professionals and judicial officers should have access to a vicarious trauma management program which incorporates education, risk reduction, monitoring, early intervention and offsetting symptom strategies.

3. Access to free legal representation

- 3.1. R&DVSA are concerned that a court may prohibit a woman who has experienced family violence from personally cross-examining her perpetrator, without guaranteeing her access to free legal representation.
- 3.2. In effect, this may operate as a penalty on women who have experienced family violence and face financial barriers to accessing legal representation.
- 3.3. The Explanatory Memorandum provides that where the court makes an order prohibiting personal cross-examination: “It is expected that a party would seek private legal representation, where possible. If they cannot obtain private legal representation, they could subsequently seek representation through legal aid.”²
- 3.4. However, we note that women who have experienced family violence often fall into the “missing middle” – the gap between those who are eligible for legal aid and those who can afford to pay a private lawyer.³
- 3.5. R&DVSA are concerned that women who do not qualify for legal aid may be forced to “endure significant financial hardship to engage legal representation” which may place them at greater risk of further harm. As the Victorian Royal Commission into Family Violence state in their final report:

Limited [legal] services are particularly concerning in the context of family violence, when the parties may have unequal access to resources and legal processes can be used by the perpetrator to continue dominating the victim. Victims may also endure significant financial hardship to engage legal representation, including depleting their savings, incurring debt and selling or mortgaging property and assets. Yet these assets and resources may be a protective factor, and their depletion may inhibit a victim’s autonomy and increase their vulnerability to further violence.⁴

- 3.6. In addition, the threat of such financial pressures may influence women to consent to parenting arrangements which are unsafe or unjust for the women and/or her children.

² Explanatory Memorandum to the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018*, 12.

³ Women’s Legal Services Australia, cited in House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence final report*, December 2017, paragraph 4.160.

⁴ State of Victoria. (2014-16). *Royal Commission into Family Violence: Report and recommendations*, Vol III, Parl Paper No 132, Ch 16, 169.

- 3.7. Thus, R&DVSA believe that it is vital that women who are prohibited from personally cross-examining their perpetrator are guaranteed access to free legal representation, even where they do not meet the eligibility requirements for legal aid.

Recommendation 1: Where women who have experienced family violence are prohibited from personal cross-examination, they must be guaranteed access to free legal representation even where they do not meet eligibility requirements for legal aid.

4. Dedicated funding for legal services

- 4.1. The Bill envisages that legal aid commissions will provide assistance where parties are prohibited from personal cross-examination but cannot afford to access private representation.
- 4.2. However, R&DVSA are concerned that legal aid commissions are not equipped to respond to even the current level of demand for legal assistance in relation to family violence. In 2014, the Productivity Commission recommended that Legal Aid Commissions receive an additional \$200 million a year in funding for civil matters, including family law matters.
- 4.3. R&DVSA believe that additional, dedicated funding to legal aid commissions is vital to ensure that legal assistance is accessible to all parties who are prohibited from personal cross-examination, especially women who have experienced family violence. Moreover, a dedicated funding stream will ensure this initiative does not detract from other vital services provided by legal aid commissions to people who have experienced sexual, family or domestic violence.
- 4.4. R&DVSA submit that additional funding should also be distributed across other legal services to ensure that women have access to specialist and culturally appropriate services. Women's legal services are uniquely qualified to provide trauma-informed services to women who have experienced family violence. Community-controlled Aboriginal and Torres Strait Islander legal services are essential to overcoming the barriers faced by Aboriginal and Torres Strait Islander women when accessing the family law system. Further, specialist disability services are able to respond to the unique needs of people with a disability who have experienced family violence.
- 4.5. The distribution of funding across legal services will also ensure that women have a choice of legal services which is necessary to empower women with a sense of agency and ensure access to justice where a conflict of interest arises.

Recommendation 2: Dedicated funding should be provided to legal aid commissions to ensure that all parties prohibited from cross-examination have access to legal representation.

Recommendation 3: Additional funding should be distributed to other legal services that provide specialist and culturally appropriate assistance to women who have experienced family violence, including specialist women's legal services, community controlled Aboriginal and Torres Strait Islander legal services, and specialist legal services for people with disability.

5. Training for judicial officers

- 5.1. The Bill affords significant discretion to judicial officers to identify and respond to circumstances of family violence. For example, judicial officers will be required to

determine whether to prohibit cross-examination where an interim family violence order currently applies to both parties, or where allegations of family violence are raised for the first time during a family law proceeding.

- 5.2. Thus, it is critical that every judicial officer has the relevant expertise to understand and respond to complex family violence risks and safety concerns.
- 5.3. R&DVSA is concerned that without adequate training, the objectives of this reform initiative may not translate from policy to practice.
- 5.4. This concern is especially pertinent in light of the recent announcement by the Government that the Family Court will be amalgamated with the Federal Circuit Court, as these proposed changes will potentially see more judicial officers without family law expertise hearing family court matters.
- 5.5. The importance of judicial education on family violence has been a consistent theme emerging from recent inquiries, including the Victorian Royal Commission into Family Violence. In their Final Report, the Commission stated that judicial officers' skills and approach are "critical" to "the outcome of a hearing, the victim's safety, and a perpetrator's level of accountability."⁵ Further, as Women's Legal Service Victoria stated in their submission to the Commission:

Magistrate interaction with victims can have a real impact on whether victims feel empowered or disempowered in the court process.⁶

- 5.6. Several other inquiries have also recommended the need for specialised knowledge and training to ensure the family law system is equipped to respond to domestic and family violence, including:
 - The Parliamentary inquiry into a better family law system to support and protect those affected by family violence – Recommendation 27 and 28.
 - The 2016 Victorian Royal Commission into Family Violence Report – Recommendations 215 and 216.
 - The 2016 FLC Final Report on Families with Complex Needs and the Intersection of Family Law and Child Protection – Recommendations 11 and 12.
 - The 2015 Federal Senate Finance and Public Administration References Committee inquiry report titled Domestic violence in Australia – Recommendations 9.71 and 9.72.
 - The 2009 report of Professor Richard Chisholm titled Family Courts Violence Review report – Recommendations 4.3, 4.4 and 4.6.
- 5.7. R&DVSA endorse the 2017 House of Representatives Committee's recommendations that the Australian Government develops a national and comprehensive professional development program for all judicial officers who preside over matters involving family violence (Recommendation 27).
- 5.8. This training package should include components on:
 - The dynamics, complexities and impacts of sexual, domestic and family violence;
 - Identifying family violence risk factors and responding appropriately;

⁵ State of Victoria (2014-16) Royal Commission into Family Violence: Report and recommendations, Vol VI, Parl Paper No 132, Ch 40, 210.

⁶ Ibid182.

- The intersection of family law and child protection;
- Trauma informed practice;
- Cultural competency in relation to working with: Aboriginal and Torres Strait Islander people; people from a culturally and linguistically diverse (CALD) background; lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) people; older people; and people with a disability.

Recommendation 4: The Australian Government should develop a national and comprehensive professional development program for all judicial officers who preside over matters involving family violence that includes components on:

- The dynamics, complexities and impacts of sexual, domestic and family violence;
- Identifying family violence risk factors and responding appropriately;
- The intersection of family law and child protection;
- Trauma informed practice;
- Cultural competency in relation to working with: Aboriginal and Torres Strait Islander people; people from a culturally and linguistically diverse (CALD) background; lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) people; older people; and people with a disability.

6. Vicarious trauma management

- 6.1. R&DVSA commend the Government for their efforts to reduce the risk of re-traumatisation for people who have experienced family violence accessing the family law system. In a similar vein, we believe the Government must work to reduce the risk of vicarious trauma on all family law professionals, including court staff and judicial officers.
- 6.2. Vicarious trauma describes the negative psychological impacts experienced by people not directly affected by traumatic events but nevertheless exposed to them in some way. Vicarious trauma is common amongst professionals working with people who have experienced sexual or family violence. Given that family law work inevitably involves significant contact with traumatic material, vicarious trauma represents a work, health and safety risk for family law professionals and judicial officers.
- 6.3. Although the risks of vicarious trauma cannot be altogether eliminated, research suggests that vicarious trauma impacts can be ameliorated if proactively addressed at an institutional level.
- 6.4. In our recent submission to the Australian Law Reform Commission review of the family law system, R&DVSA made extensive comments about the need to develop a vicarious trauma management program for all family law professionals. We argued that this program should incorporate education, risk reduction, monitoring, early intervention and offsetting symptom strategies. We refer the Committee to our submission in this regard.

Recommendation 5: All court staff, family law professionals and judicial officers should have access to a vicarious trauma management program which incorporates education, risk reduction, monitoring, early intervention and offsetting symptom strategies.

Thank you for the opportunity to comment.

Yours faithfully,

Karen Willis

Executive Officer

Rape & Domestic Violence Services Australia