Women's Legal Service

Acting Research Director
Legal Affairs and Community Safety
Committee
Parliament House
Georg Street Brisbane Qld 4000

23rd December 2016

Via email: lacsc@parliament.qld.gov.au

Dear Sir/ Madam,

WOMEN'S LEGAL SERVICE QLD (WLSQ) SUBMISSION ON THE VICTIMS OF CRIME ASSISTANCE AND OTHER LEGISLATION AMENDMENT BILL 2016

The Women's Legal Service Queensland (WLSQ) is a community legal centre that provides Queensland wide specialist legal information, advice and representation to women in matters involving domestic violence, family law and child protection. We also employ allied domestic violence social workers who assist clients to obtain a holistic response from our service. We offer a range of services including domestic violence duty lawyer services at Holland Park, Caboolture and Ipswich, family law advice at two family relationships centres at Logan and Mt Gravatt and outreach to the Brisbane Women's Correctional Centre. We also employ a specialist rural, regional and remote lawyer who operates a RRR telephone line one day per week. Additionally, we have recently commenced the operation of specialist domestic violence units in Brisbane and the Gold Coast and a health justice partnership with the Logan Hospital. WLSQ was established in 1984 and has an extensive history of working with vulnerable women. In 2016, after significant service redesign we are on track to assist over 10 000 women.

In addition to these services, we also provide community legal education on topics including domestic violence and family law to community workers in metropolitan Brisbane and, with the assistance of corporate grants and charitable trusts, to workers in rural and regional Queensland. In 2016, WLSQ will provide education forums and client clinics in Miles, Chinchilla, Dalby and Toowoomba.

WLSQ is substantially in support of the *Victims of Crime Assistance and Other Legislation Amendment Bill 2016*. WLSQ has been supportive of the introduction of Sexual Assault

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Counselling Privilege Legislation in Queensland for well over a decade. We are in favour of an absolute privilege to eliminate the burden on victims of sexual assault from worry and concern about their private counselling notes being used in court but accept the Government has adopted a different approach. An absolute privilege exists in Tasmania.

The introduction of provisions relating to a sexual assault counselling privilege will bring Queensland into line with all other States and Territories in Australia. New South Wales has had legislation in this area since 1996.

We are also supportive of other aspects of the bill including the extension of coverage of the Victims of Crime legislation to cover all victims of domestic violence and making it automatic that sexual assault victims obtain special witness protections.

We provide the following comments on the bill:

1. **Sexual assault counselling notes privilege**

Unrepresented parties and inadvertent disclosures

The legislation has been drafted on the assumption that both parties are legally represented or that there will be defence lawyers and prosecution lawyers. We note the qualified privilege also relates to domestic violence proceedings (Section 14E).

In domestic violence matters, it is quite common for there to be unrepresented parties. This issue needs careful consideration in the legislation and the protocols and processes that should be developed to support the operation of the legislation. There could be significant harm inflicted on victims if self-represented parties who are perpetrators are able to have access to a victim's personal counselling records, which may detail the impact of his abuse on them.

We would recommend that the legislation makes it clear that unrepresented parties should not be entitled to see or inspect counselling notes.

Consideration also needs to be given about how the court will be alerted to inadvertent disclosures of information that may be covered by the privilege in subpoenaed materials. The processes or protocols should require the court registry to be very proactive in the management of subpoenaed materials, especially in situations involving unrepresented parties.

Inadvertent disclosures may occur when a subpoena is issued to a generalist agency eg. Centrelink and within their files they have notes from a social worker that detail a sexual assault or rape. So, the subpoenaed party in this instance it is not an obvious counselling agency dealing with sexual assault but protected records are contained within the bulk of other documents. This is a problem that has been identified in New South Wales. Leave can be granted for legal practitioners or parties to inspect the documents (eg. The Centrelink records) without it being obvious that the privilege may cover some of the materials. Although there is a level of protection against privilege materials being used in the court when there are legal practitioners as they have an obligation to comply with the law and have a duty to the court, the behaviour of unrepresented parties are not curtailed by professional ethics and professional standards of behaviour.

Recommendation 1

That the legislation not allow unrepresented parties the right to see or inspect counselling notes.

Recommendation 2

That court policies and processes be immediately developed to support the operation of the legislation and specifically to deal with unrepresented parties and prevent as much as possible inadvertent disclosures. For example that such court policies/ practice notes provide:

- ***That the court registry provide leave (permission) to issue subpoenas when there are unrepresented parties and the registry for example, should inspect all records themselves, prior to allowing leave to inspect/ copy when there are unrepresented parties.***

- ***A pamphlet be developed providing information about the existence of the privilege and the subpoenaed agencies' obligation under the legislation and that this pamphlet be served with each subpoena.***

Section 14 (2) – the privilege does not cover health practitioners during physical forensic examination

The bill does not extend the privilege to health professionals conducting physical forensic examination of sexual assault/ rape victims. We do not support this provision and believe that but for this provision the health professional's notes (that were not strictly medical or forensic) should be covered and protected by the legislation. Women undergoing such an examination are often traumatised and in shock and in need of immediate crisis counselling intervention. Any statements made and written down by the health professional, in the context of counselling should be protected.

Recommendation 3

That the privilege extend to and cover all statements made by victims to health practitioners that satisfy the legislative definition of 'counselling' during a physical forensic examination.

Subdivision 2 – The absolute privilege

We support the absolute privilege being applied for committal and bail but believe that the absolute privilege should also cover sentencing. We note it is proposed that sentencing be covered by a qualified privilege (Section 14 E (a)).

Recently a sexual assault service contacted us in the context of obtaining some legal advice about their notes being subpoenaed for a sentencing hearing. We do not think it is just for the perpetrator's legal team to have the right to potentially view her counselling records at the time of sentence. We think that the best approach is for there to be an absolute privilege at the time of sentencing but with the ability for this to be waived, by the victim. Such an approach would provide the victim with automatic protection but the ability to allow their counselling records to be viewed, if they consent.

Think about the impact on the victim of receiving a subpoena at this time. She has been the victim of traumatic sexual violence, has reported the incident to the police, had the matter prosecuted and a successful trial or guilty plea and the perpetrator still has the potential of access to her personal counselling records for the purpose of reducing his sentence on the basis of arguing that she was not as traumatised as she says she was by the violent incident. It is little wonder that victims of violence lose confidence in the criminal justice system.

Recommendation 4

That the absolute privilege be extended to cover sentencing hearings but that victims at the time of sentence, be able to waive the privilege.

14F – What are the consequences for non-compliance?

We believe there should be consequences in the legislation for a failure to comply with the legislative provisions. This would send a very clear message that compliance is not only encouraged but required. Presently there is no clear process or approach for a breach of Section 14F. In our discussions with practitioners in New South Wales, the lack of consequences for noncompliance were identified as a shortcoming.

Recommendation 5

That consequences for non-compliance in particular with section 14F be included in the legislation.

Section 14 G(7) - Consent to waive the privilege- the need for legal advice

These are extremely vulnerable clients. We recommend that it be a requirement that the client obtain independent legal advice before waiving the privilege and written evidence of this be provided to the court.

Recommendation 6

That when waiving the privilege that clients be required to obtain independent legal advice and a legal adviser's certificate is signed by the legal adviser as evidence of this.

That section 14K (2) be altered to read that the court is satisfied the person is aware of the relevant provisions of this division and has received legal advice.

The need for regulations and practice directions to support the privilege legislation

As discussed above, the legislation needs to be supported by regulations/practice directions and these should include time limits to encourage compliance and consequences for non-compliance.

Section 14 (G)6(c)(i)

WLSQ believes "exceptional circumstances" should explicitly exclude as a reason that the trial is to commence within a few days of the application for leave.

Recommendation 7

That exceptional circumstances explicitly exclude that a trial is to commence shortly or within a few days of the application.

Section 14 H (3) – consideration of written/oral statement from the victim about harm

There should be a mandatory consideration of a victim's statement by the court about harm.

Recommendation 8

There should be mandatory consideration by the court of a victim's statement about harm and accordingly section 14 H(3) should be amended by changing the court may consider to the court must consider a written or oral statement made to the court.

Legal assistance

We note there has been a budgetary allocation for the establishment of a sexual assault counselling notes legal service. We fully support this. It is absolutely essential victims to have legal representation to enable them to assert their rights to protection.

Education

There needs to be comprehensive education across the State for the police, specialised domestic violence and sexual assault counsellors, counselling agencies, lawyers, Registry staff, Magistrates and the judiciary.

Recommendation 9

That this legislation be supported by a comprehensive state-wide education campaign for professionals including the police, specialised domestic violence and sexual assault counsellors, counselling agencies, lawyers, Registry staff, Magistrates and the judiciary.

2. **Automatic Special Witness Status for Sexual Assault Victims**

WLSQ strongly supports this amendment but that it be subject to the victim's consent and that no inference can be drawn if the victims chooses or does not choose to use the protections. For example, a woman may choose not to use the protection as she feels she wants to be able to see the perpetrator as she gives evidence. This does not mean she has not been traumatised or seriously impacted by the experience.

3. **Part 10B – Victim Impact Statements**

WLSQ generally supports the option of victims being able to provide victim impact statements in relation to criminal offences, including breaches of domestic violence orders.

We do have some concerns about victim impact statements in domestic violence breach proceedings, being used against the victim in latter court proceedings. Eg. Family law proceedings.

For example, a victim may as part of their statement advise the court that an impact of the perpetrator's behaviour is to cause a schism in their relationship with their children. Such a statement, without any context could have serious consequences for the woman in a parenting dispute in the family law courts, as it could be used by the perpetrator as evidence that the mother does not have a close relationship with the child.

We would always recommend therefore, that a victim obtain independent legal advice from a family lawyer before delivering her statement in court.

Recommendation 10

That the victim obtain independent legal advice about their victim impact statement before providing this to the court, particularly in domestic violence breach proceedings.

Section 179K (4) – prosecutor may have regard to a victim's wishes

We recommend that this be changed so that a prosecutor must have regard to a victim's wishes except for when these would be prejudicial to the victim, their proceedings or other legal proceedings.

Recommendation 11

That Section 179 (f) be amended so that the prosecution must have regard to the victim's wishes except for when this would be prejudicial to the victim, their legal proceedings or other legal proceedings.

4. **Victims of Crime Assistance Act amendments**

WLSQ supports the extension of this Act to cover all victims of domestic violence.

Perpetrators will seek compensation – Cross applications

The effectiveness of this bill will rely on good, responsive and effective policing and astute determinations by the police and magistracy about who is the most in need of protection when making an application for a protection orders and when making orders. As a tactic of abuse, perpetrators often use systems including the legal system to try to continue their power and control over their victim. It is quite common for perpetrators of violence to initiate applications for protection orders against their victims or to cross apply for an order after their victim has initiated an application.

Victims Assist, in all likelihood will find themselves in a position of making determinations about eligibility to compensation when both parties have protection orders against each other.

There should be some legislative guidelines guiding determinations in these instances. For example, will Victim Assist pay compensation to both parties on a cross application? Or will it only make a payout on one person? Or will they pay different levels of compensation dependent on the application before them that is being assessed? Will they consider the applications jointly or separately?

Will they be making determinations about who is the most need of protection? Eg. Who is most fearful, who has been most injured, and who has had their life most impacted by the violence?

Currently, the *Domestic and Family Violence Protection Act 2012* in Section 4 requires the court to identify who is in the most need of protection when there are cross applications. This can occur (generally if a lawyer is present and makes submissions) but does not always take place as a matter of course.

The effectiveness of this legislation is dependent on magistrates exercising their power under Section 4 and making these determinations and noting this on the order so that this is not left to Victim Assist. However, if Victim Assist are going to be required to make these determinations then legislative guidelines would be required. If Victim Assist fail to make these determinations well then it may be an added incentive for perpetrators of violence to cross apply for protection orders, to not consent or to seek their own orders against their victim.

Recommendation 12

That legislative guidelines be developed to assist Victim's Assists decision making in circumstances where there are domestic violence protection order cross applications.

That the Chief Magistrate be briefed on the implications of this legislation and the importance of magistrates making determinations under Section 4 of the Domestic and Family Violence Protection act 2012 and identifying the person who is in most need of protection on the face of the order.

Section 25 B - Meaning of series of related crimes and series of related acts of domestic violence.

We have particular concerns that the drafting of this section will discriminate against victims of domestic violence who often suffer many incidents of violence over an extended period of time by the same perpetrator. See the definition of 'series of related crimes' Section 25 B (1) (a).

The current drafting means that despite multiple incidents being inflicted on a domestic violence victim, these will be regarded as 'single act of violence' (Section 25B (5) (a)) therefore lowering the potential compensation the domestic violence victim might be entitled. This is simply unfair and unjust.

Recommendation 13

That Section 25 B be redrafted so as to not discriminate against victims of domestic violence vis a vis victims of other crimes.

Clause 28 – Amendment of Section 21

Section 21 establishes the parameters of eligibility for compensation under the Victim Assist Scheme.

It would be helpful, if some reference is made to the exemptions that are contained:

- in Section 81 that victims of domestic violence and sexual violence do not necessarily have to report to the police and
- Section 82 that in determining whether reasonable assistance has been given to the police – issues of domestic and sexual violence are taken into account.

Recommendation 14

That Section 21 be redrafted to make it clear there are exemptions contained later in the legislation in particular for victims of domestic and sexual violence.

Clause 73 – New Section 110A

WLSQ suggests that it be made clear on the face of the legislation an amendment exempting victims of domestic violence (or in other circumstances where there are safety concerns) from the State pursuing the recovery of the compensation from the perpetrator Pursuing payment from the perpetrator may place the victim and/or their children in danger. We understand the current practice of Victims Services is to take these matters into consideration on a case by case basis when the victim alerts the agency to their safety concerns.

However, without it clearly being stated in the legislation this is not well known, which can lead to anomalies and inconsistency of approach. Also, it can be a disincentive for victims to pursue compensation in the first place if they believe he will ultimately be pursued by the State for reimbursement and she will suffer as a result. A legislative amendment that clearly states an exemption exists in certain circumstances would address this issue, standardise current practice and promote accountability and transparency.

Recommendation 15

That Section 110A include an exemption from the State pursuing payment from the perpetrator in circumstances where the victim's or other's safety may be compromised.

Definition of domestic and family violence

That domestic and family violence have the same definition as the *Domestic and Family Violence Protection Act 2012*.

Recommendation 16

That the Victims of Crime Assistance Act 2009 have a definition of domestic and family violence that is consistent with the Domestic and Family Violence Protection Act 2012.

CLC funding

Additional resources would also be required for Women's Legal Service, North Queensland Women's Legal Service, other community legal centres and sexual assault services to meet increased demand from victims seeking information about their rights.

Recommendation 17

That community legal centre funding be increased in light of the increased demand of legal services from victims seeking information about their rights, as contained in the current bill.

Review

That these changes be reviewed after 3 years and consideration be given, in particular whether there has been any unintended consequences or impacts in the domestic violence application process eg any increase in perpetrators taking out cross applications and/or not consenting to domestic violence protection orders being taken out against them.

Recommendation 18

That the changes introduced by this bill be reviewed in 3 years in particular, considering any unintended consequences especially to the domestic violence application process.

If you have any queries or require our attendance before the parliamentary committee please do not hesitate to contact me or [redacted]

Yours faithfully

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Women's Legal Service
Acting Coordinator