

## EVIDENCE BILL 2024 EXPOSURE DRAFT – WLSWA'S RESPONSE

### Women's Legal Service Western Australia

Women's Legal Service Western Australia (**WLSWA**) is the only specialist, gender-specific community legal centre in Western Australia. For over twenty five years we have delivered state-wide specialist legal assistance to women in the areas of family law, protection and care, family and domestic violence and criminal injuries compensation. Our tailored, needs-matched legal services model ensures continuity in support and mitigates against re-traumatising clients that present with complex and multiple legal and social challenges. WLSWA prioritise women who experience intersecting disadvantages.

Through our community legal education and evidence-based advocacy on law and policy, we are working towards the redress of inequalities, promotion of human rights and legal and social change for women.

The majority of WLSWA clients have experienced sexual violence within a family and domestic violence and coercive control context and WLSWA has an insight into the experiences of women at both individual and collective levels, including experiences when reporting to police and interacting with the justice system.

### Acknowledgments

WLSWA acknowledge the Traditional Owners of the country on which we live and work, the Whadjuk people of the Noongar nation, and pay respects to their Elders past and present. We support the ongoing work of First Nations specialist women's organisations and advocates who have been working to unravel and heal the injustices imposed on First Nations women and communities since colonisation. We recognise the strength and foresight of the First Nations women who are leading the sexual violence response work.

WLSWA also recognise the strength and resilience of the women with whom we work. It is essential that any response to family, domestic and sexual violence is informed by the nuance and reality of their lived experience.

### Introduction

Thank you to the Department of Justice (the Department) for the opportunity to comment on the Exposure Draft Evidence Bill (2024) (proposed Act) which proposes to replace the Evidence Act (1906) WA (current Act), to be named the Evidence Act (2024) WA.

WLSWA strongly supports the extensive reform to evidence law in Western Australia, particularly where it further promotes the safety and wellbeing of victim survivors of family domestic and sexual violence (FDSV), and vulnerable witnesses. Overall, WLSWA is supportive of the reforms which meet the important

recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission), and which make improvements to reflect uniform legislation where this is appropriate. Further, we are supportive of the proposed general improvements to the current Act, including proposed revisions to gendered and hetero-normative language and proposed revisions that will enhance the clarity and structure of the proposed.

WLSWA broadly supports the proposed new provisions which enable the use of witness intermediaries and visually recorded statements, as well as changes to special witness definitions and judicial guidance on the context in FDSV. We maintain a high expectation that the government will undertake all necessary due diligence to ensure that any new, revised or updated provisions will not lead to unintended adverse consequences for victim-survivors.

Comments relating to key new and revised provisions, as well as responses to the consultation questions outlined in the Exposure Draft: Guidance and Feedback Paper (2024) are provided below.

Please note that throughout the response, we have referred to the term family, domestic and sexual violence (FDSV) rather than family and domestic violence. We do this in recognition that ongoing sexual violence occurs in family and domestic relationships, and includes the same tactics by a perpetrator of coercion, control, intimidation, threats and violence to perpetrate ongoing sexual violence against victim-survivors.

### **Part 1: Preliminary Structure**

WLSWA is supportive of the proposed revisions to the current Act which removes any remaining gendered and hetero-normative language, clarifies key terms and improves the organisation and navigation of the proposed Act.

### **Part 2: Adducing evidence Structure**

#### *Compellability of spouses*

WLSWA does not fully support the proposed amendments relating to the compellability of spouses, specifically where it relates to offences relating to FDSV. Where a victim-survivor of FDSV is compelled to give evidence in a hearing relating to violence against them by their spouse or other relative, they are potentially at risk of further violence, threats or other controlling sanctions by that person. Additionally, they can be at risk of perjuring themselves should they give false evidence in fear of further violence.

We acknowledge that provisions are included in the proposed Act to support a person to object to being compelled as a witness. However, we believe that the wording of the clauses as proposed places too high of an onus on a spouse to make this objection, particularly as they are not supported by a lawyer who is supporting their own particular interests (as opposed to the prosecution or defence lawyers).

We strongly recommend that the Department consider establishing additional procedures and/or supports to protect spouses and family members who are victims of FDSV from further violence as a consequence of the criminal proceedings.

*Ability of former spouses to object to being compelled as witness*

In addition, we recognise that former spouses can potentially be subject to further violence, intimidations or threats as a consequence of the criminal proceedings. Consequently, we strongly advocate that former spouses are included in the list of persons who can object to being compelled as a witness, where the matter relates to FDSV.

*Use of notes by police and witnesses*

WLSWA agrees with the comments previously made by the Standing Committee on Uniform Legislation and Intergovernmental Agreements (1996) and others that police officers who are able to refer to their notes may appear to a jury as more certain compared to a witness who is not allowed to refer to their notes in forming their recollection of events. We also acknowledge that where police have multiple incidents to recall, that notes would be necessary, and that without them, they may seem more certain in their testimony.

We suggest that the Department consider revising the wording of the clauses of the proposed Act to enable witnesses to also refer to their notes during a court hearing. This is after balancing the following considerations:

- the usual long length of time from incident to trial, which is neither the fault of the witness nor the police officer;
- the high likelihood that a witness or a police officer could study and memorise their own notes or recordings immediately prior to a trial;
- the likely inclusion of police notes and witness statements as evidence; and
- the need for a trauma-informed approach to supporting witnesses to give evidence.

**Part 3: Admissibility of evidence Structure**

Overall, WLSWA supports a clear, consistent and comprehensive judicial direction which focuses on the wider context surrounding FDSV. We strongly believe that this will improve court outcomes by educating juries, but also by reinforcing the understanding of both judicial officers and lawyers of the complex issues that surround a victim-survivor's experience of FDSV and the consequences of that violence.

*Application in the Family Court of WA*

We agree that there is significant value in ensuring that judicial directions regarding the contextual information, and the definitions of FDSV are consistent across all court jurisdictions in WA. For this reason, we broadly support similar provisions being implemented in the Family Court of WA and in Civil Courts. Frequently WLSWA clients can have concurrent Family Court, protection and care, criminal injuries compensation and restraining order matters, as well as being a complainant in a criminal matter, all for the exact same circumstance or event. In many situations the outcome or decisions within one matter will directly impact the outcome or pathway of another matter. It becomes vitally important then that definitions and judicial directions are consistent, so as not to inadvertently lead to inconsistent outcomes across these matters, or to enable a perpetrator to use Court processes to perpetrate further violence.

However, we do have a significant concern that the proposed judicial directions do not include the impact of FDSV on parenting. While this is less likely to be relevant in criminal matters, it becomes highly relevant in restraining orders, Family Court and protection and care matters. We strongly recommend that the judicial directions be expanded to more carefully address the fact that FDSV impacts on the ability and capacity of a victim-survivor to successfully parent their children in the way they would prefer, irrespective of whether the directions are extended to other court jurisdictions.

Notwithstanding the above, care should be taken to ensure that any directions do not conflict with existing directions and definitions in the Family Court Act (WA) the Restraining Orders Act WA or the Children and Community Services Act WA.

#### **Part 4: Privileges Structure**

WLSWA notes that the proposed Act contains a significant alteration in relation to legal and other privilege. Due to time and resource constraints and our focus on victim-survivor issues, we have not reviewed this in depth. In general, we are supportive of changes which move towards uniform laws between State and Commonwealth. We assume that other legal professional bodies have commented in more detail on this this specific Part of the proposed Act. If this is not the case, we would be grateful for a further opportunity to review this Part in depth, or to discuss the details with a policy or drafting officer.

We are supportive of the Government's ongoing efforts to replace the term 'unsound mind' in WA statutes for the reasons outlined in the Exposure Draft: Guidance and Feedback Paper (2024). We agree that the use of term 'mental impairment' may potentially limit the capacity of some individuals from accessing relevant supports during court processes. However, it is our view that the term 'incapable adult' could also be seen to be derogatory, judgemental and stigmatising. We would prefer that a broader approach be taken, which enables the statutes to be more easily adaptable to changes in terminology, as language evolves within the community.

However, we acknowledge that an appropriate clear, kind and consistent definition is particularly challenging to achieve in this context. On balance, it is our view that the proposed definition which is consistent across other WA statutes is workable at this time.

#### **Part 5: Exclusion of evidence Structure**

WLSWA supports the proposed amendments in relation to sexual experience to the extent that it limits the inclusion of evidence that is part of the "res gestae" of the crime, but is otherwise irrelevant to the commission of the offence.

Presently, evidence of sexual experience is admissible, without leave of the court, if it is part of the "res gestate" (typically being conduct or statements made spontaneously during or immediately after the event subject to the charge).

In cases where leave is required to include evidence of sexual experience, there needs to be recognition that there are legitimate circumstances in which a complainant who has experienced non-consensual sexual intercourse has then shortly thereafter had sexual intercourse, whether that be consensual or, for example, because of family and domestic violence.

The view that a person who has experienced non-consensual sex would be unlikely, within a short period of time, to have sex again, perpetuates rape myths and the idea that all victims and survivors of sexual violence respond to their experience in the same way.

In the event the sexual experience of a witness is said to have substantial probative value which outweighs any distress, humiliation or embarrassment that may be caused to them, the presiding officer should be required to make jury directions which seek to provide context as to that sexual experience.

### **Part 6: Special arrangements for taking evidence Structure**

WLSWA is supportive of decision to retain the clauses contained this Part based on the current Act.

### **Part 7: Vulnerable witnesses Structure**

#### *Special witnesses*

In general, WLSWA supports the addition of a subclause that enables a wider range of persons to be able to be considered a special witness. However we suggest that the wording and/or implementation of this proposed clause should take into account ensuring the following:

- that the witness or victim is enabled to provide fully informed consent to be a special witness, as this may not be their preference;
- that the choices and personal autonomy of the witness are not impacted by this process;
- a witness or victim is able to object to their qualification or determination as a special witness, and that this process is clear to them and easy for them to undertake;
- that a witness or victim is able to request that the court consider they be determined as a special witness, and that this process is clear to them and easy for them to undertake;
- that the process of declaring a person as a special witness does not unduly place a burden on the victim or witness, such that it becomes a disincentive for them to give evidence;
- that the process of declaring a person as a special witness includes appropriate considerations and processes which do not further traumatise, stigmatise, or otherwise undermine a victim or witness;
- that the full range of options for safe, fair, low-traumatising participation in court hearings remain available as choices for the witness or victim, irrespective of their status as a special witness.

#### *Victim-Survivors of Family, Domestic or Sexual Violence as Special Witnesses*

WLSWA supports the changes to the definitions of special witnesses in the proposed Act. In particular, we support the inclusion of victims of FDSV as special witnesses.

We hope that the procedures which support special witnesses will go some way to resolve the concerns we have in relation to the compellability of spouses (see other section).

### *Elder abuse*

We support a broader definition of special witnesses that specifically includes elder abuse. There are a number of circumstances whereby elder abuse could take place in a situation which might not otherwise be characterised as FDSV. For example, a person may be a victim of elder abuse where the perpetrator was not a family member, but instead a carer, neighbour, friend or potentially a support professional. So as not to make assumptions regarding the vulnerability of a person due to their age alone, we suggest that the definition should include a consideration of the type of relationship between the perpetrator and victim, and whether that relationship is characterised as a family relationship or another type which involves a power imbalance.

### *Visually recorded statements*

Overall, WLSWA is supportive of the proposed enhancements which enable visually recorded statements to be used as evidence in court, where that is appropriate and in the best interests of the safety and wellbeing of the victim or witness.

However, for this to be effective, fair and appropriate, we propose that a number of key considerations should be made during the implementation:

- When being facilitated to make a visually recorded statement, victims or witnesses should be filmed being provided with and showing that they understood clear instructions about the purpose and potential uses of the recording and the risks of including statements which would potentially incriminate them in other ways (e.g. admitting to drug use, which could have the consequence of a drug charge, or a consequence in a Family Court or protection and care matter);
- The directions given by police should be consistent and appropriate, and based on standardised instructions developed in consultation with victim support services;
- As outlined in the proposed Act, visually recorded statements should be taken only by specially trained/qualified, and appropriately ranked police officers;
- Victims or witnesses should be allowed and encouraged to make their own concurrent recording at the time of the interview for their own records;
- Victims or witnesses should be given the opportunity to have a lawyer present, or be able to speak with a lawyer on the phone through an appropriate service prior to giving the statement;
- Victims or witnesses and their lawyers, or the witness intermediary service (if applicable), should be able to receive a copy of the relevant recording as soon as practicable after it is made, including sufficient time for issues to be resolved;
- Clear processes need to be in place to provide additional consent at the time of the court hearing, or during a voir dire hearing to ensure that irrelevant sections are not included in the recording played at court .

### *Disclosure of visually recorded statements*

WLSWA does not support in full the provisions in respect of disclosure of visually recorded statements. WLSWA suggest that the Department consider some amendments to the proposed Act to enable a complainant or witness to apply to the court to prevent the accused from viewing the visually recorded statement. It would be more suitable to provide a transcript only to the accused, and allow defence

lawyer to view the visually recorded statement. This could alleviate some safety concerns in some instances, and also reduce the likelihood of a witness withdrawing their statement due to feeling intimidated by the idea of the accused viewing their statement. In our view, this is a more trauma-informed approach, which ensures the victim-survivor is not adversely impacted by not being fully aware the accused will have access to the visually recorded statement before court proceedings commence.

*Inclusion of the term 'intimidation'*

WLSWA supports the use of the term intimidation in this proposed clause. Intimidation is a common component of FDSV and the term accurately reflects many of the tactics that a perpetrator will use towards victim-survivors. For example, intimidation is inherent in behaviour such as: trespassing; phone calls; electronic communication; or sending third parties to threaten victim/survivors. These actions are designed to control and cause fear for victim-survivors.

We also support the assertion by the Centre for Women's Safety and Wellbeing (CWSW) that coercive control be included in the clause, as this reflects a more modern understanding of FDSV.

Notwithstanding, it is important that the definition of FDV within the proposed Evidence Act is consistent with the Restraining Orders Act and others as applicable. The Government may wish to consider an amendment to the Restraining Orders Act to reflect this change to language.

*Definition of visually recorded statement*

WLSWA agrees that the various terms currently being used can cause some confusion. However, it is our view that the term 'visual recording' can also be misinterpreted, particularly when vision is not included in the recording. WLSWA supports a change to definition that is clearly defined, consistent with other jurisdiction and consistent across WA statutes.

We suggest that the Department consider whether regulations regarding the recording of a statement could potentially require that police include a description of the setting and circumstances, as well as a list of persons present, and their relationship to the situation. We believe this may assist in interpretation of the statement and reduce the possibility of confusion, or intimidation by others, especially when a recording does not effectively record visual components.

*Witness intermediary service*

WLSWA strongly supports provisions to develop a witness intermediary service, as this will significantly improve the experience of vulnerable witnesses in court hearings.

*Qualifications of witness intermediaries*

In general, WLSWA supports the proposed provisions that stipulate that witness intermediaries:

- are professionally accredited by a relevant body;
- have relevant tertiary qualifications and additional relevant training;
- are subject to ongoing professional developments to ensure the knowledge and skills of witness intermediaries are current; and
- are subject to ongoing assessment of their professional skills and knowledge.

WLSWA recommends that the associated regulations ensure that witness intermediaries are:

- an accredited, qualified professional, who is -
- qualified and trained in both –
  - specialist communication skills, including an in-depth knowledge and skills relating to trauma-informed services, FDSV, alcohol and other drugs, mental health, disability, Aboriginal and Torres Strait Islander cultures and the needs of culturally, ethnically and linguistically diverse communities, and
  - legal skills and knowledge relating to providing evidence, including knowledge and skills relating to the wider impacts of interactions with the justice system as a witness.

Training in FDSV is crucial for witness intermediaries as this ensures they are working in a trauma-informed manner; understand the nuances of FDSV; will better support victim-survivors to provide evidence; and assists in preventing further trauma or re-traumatisation.

We suggest that a witness intermediary be qualified as either:

- a social worker, psychologist, health professional but with additional training and qualifications relating to legal services; or
- a lawyer with additional qualification relating to advanced communication skills.

Regulations need to allow for the independent professional responsibilities and accreditations that a witness intermediary may also be subject to, should they be, for example, a qualified lawyer, an accredited psychologist, an accredited social worker, or other.

Notwithstanding the need for both advanced counselling and legal knowledge described above, WLSWA is supportive of a system which encourages a large pool of witness intermediaries to be available, as this increases the likelihood that victims of crime will have access to appropriate supports when giving evidence.

#### *Eligibility for witness intermediary service*

WLSWA strongly encourages the Department to consider increasing the age limit proposed in section 293 (2) of the proposed Act to allow for young people up to 16 years old to be automatically provided with an assessment for a witness intermediary service for proceedings other than for sexual offences. Although our preference would be that all children are offered this service for all types of matters, we acknowledge that this service may be subject to resource constraints.

Therefore we strongly suggest that at a minimum this is offered for any matters relating to offences that include violence against the person, especially where the child witness is the victim. We support CWSW's assertion that children and young people are especially vulnerable and are at a higher risk of mental health issues and wellbeing concerns when they have experienced or witnessed sexual violence and are at a higher risk of experiencing trauma and being re-traumatised by giving evidence in court.

WLSWA endorses CWSW's view that older children being provided the option of a witness intermediary is trauma-informed and empowering and allows them to have a say in who should support them in court. This is especially pertinent when children and young people have had little say in what happens to them, for example when they were previously in the protection and care system, or have parenting orders.



*Service design and resourcing*

WLSWA also share CWSW's concerns that due to resource constraints in the witness intermediary scheme, there may be limitations to the service, which may potentially cause confusion or disappointment when a witness intermediary is not ultimately made available. WLSWA encourages the Department to consider developing procedures which enable a fully transparent view of the ongoing capacity of the service. For example, up-to-date publishing of the number of people on waitlists, recent average waiting times, number of intermediaries available, and other data will significantly assist support services, as well as clients in their decision-making. This kind of transparency and accountability is increasingly common in other government services, for example the publication of hospital emergency department waiting times.

*SALSWA Pilot Project*

The Department will be aware that WLSWA is currently commencing a pilot Sexual Assault Legal Service for Western Australia (SALSWA). We believe that SALSWA may potentially intersect with the witness intermediary service to the extent that it will have some similar functions and an overlapping client group. We would anticipate that lessons learned from the implementation of the SALSWA pilot may be of use to the Department in developing the new witness intermediary service, and the governing regulations. We anticipate that once the SALSWA pilot is further established, we will be able to provide detailed advice on 'what works', which may inform the proposed regulations and the function of the proposed witness intermediary service.

We request that the Department consider the impact or intersection of the SALSWA service (or similar services) in the drafting of regulations relating to the witness intermediary service.

*Communication directions*

WLSWA broadly supports the proposed amendments which support communication directions in criminal and child protection proceedings via ground rules hearings or via witness intermediary or via agreement for certain types of witnesses.

However, WLSWA do not believe that the proposed Act is sufficiently clear regarding the eligibility of witnesses for whom a communication direction is applicable. Nor is the eligibility of witnesses for witness intermediary service sufficiently clear. We urge the Department to consider providing further clarification in subsequent drafts of this Bill.

**Part 8: Proof Structure**

*Unreliable evidence warning*

WLSWA is not aware of instances where this kind of warning occurs in court proceedings, particularly as WLSWA lawyers do not represent clients in criminal matters. In general, we support the proposal that there should not be a jury direction relating to potential limitations of certain witnesses.

We suggest that the Department consider consulting with other specialist agencies regarding whether an alternative jury direction should be implemented which reiterates that a person who is potentially affected by age, disability, mental health or other is NOT necessarily an unreliable witness, or whether

the act of doing this, or even the absence of doing this, might create doubt where there would not otherwise be.

#### *Direction regarding delays*

WLSWA supports adding a subclause to encompass circumstances where there are delays in reporting incidents, charges being laid, prosecution proceeding or opportunities to give evidence. A clause as proposed will ensure the state is aligned with the Recommendations of the Royal Commission.

WLSWA is highly aware that reports of FDSV are not always made immediately after the incident. This can be due to a range of circumstances, including ill health and severe physical injuries, or situations where the victim-survivor or their children are experiencing high levels of trauma; are fearful; have been threatened with death or severe harm; or do not have the means to leave the house and report violence. Mitigating factors such as these prevent or delay victim-survivors from disclosing acts of violence. However, this does not diminish the severity and gravity of such acts of violence.

The addition of the clause as suggested will ensure the information provided to the jury and other court staff will provide relevant information and education regarding the nuances of FDSV. We experience regular occurrences where Court staff and members of the jury hold outdated or incorrect views or unconscious bias surrounding FDSV and these views can impact court proceedings, further traumatise victim-survivors, and prevent victim-survivors from seeking justice. We believe such a clause will reduce barriers faced by victim-survivors when seeking justice and will broadly impact address community-held misconceptions and bias about FDSV.

#### **Part 9: Judicial notice and facilitation of proof Structure**

WLSWA has not considered these amendments in detail due to time and resource constraints. WLSWA is generally supportive of amendments which improve justice procedures and which facilitate uniform evidence legislation, while retaining existing components of the current Act where this constitutes better practice.

#### **Part 10: Miscellaneous Structure**

WLSWA has no comment regarding this Part.

#### **Summary and conclusion**

WLSWA strongly supports the extensive reform to evidence law in Western Australia, particularly where it reduces the further traumatising and inconvenience of victim survivors of family, domestic and sexual violence, and vulnerable witnesses in court processes and promotes their safety and wellbeing.

WLSWA welcomes and supports the reforms proposed by the Government in clarifying and updating the current Act, implementing recommendations from the Royal Commission, and its considered approach to implementing uniform legislation. Further, we are supportive of the proposed general improvements to the current Act, including proposed revisions to gendered and hetero-normative language and proposed revisions that will enhance the clarity and structure of the proposed.

WLSWA broadly supports the proposed new provisions which enable the use of witness intermediaries and visually recorded statements, as well as changes to special witness definitions and judicial guidance on the context in FDSV.

WLSWA endorses the view of CWSW that inherent in prioritising the safety and reduction in trauma of victim-survivors, is the ongoing and in-depth training of judicial officers, lawyers, and other legal and court professionals such that they are FDSV informed; trauma-informed; culturally safe; and child-centred and respect the rights of children and young people.

Notwithstanding our overall support for the proposed Act, we ask that the Department particularly consider the following adjustments to some of the suggested clauses in the proposed Act (as outlined in detail above):

- Improve the ease for spouses or other family members to object to being compelled to give evidence against their spouse in situations of FDSV;
- Include former spouses in the group of people able to object to being compelled to give evidence against their former spouse, where there was previously or is currently ongoing FDSV;
- Enable witnesses to refer to notes during court proceedings, similar to police;
- Include a reference to the impact of FDSV on parenting within the judicial directions regarding FDSV;
- In formulating judicial directions, consider the high likelihood that a victim-survivor of FDSV who is currently a witness in a criminal matter, is also concurrently involved in matters in other courts, including Family Court, Protection and Care, Restraining Orders, Migration, Criminal Injuries Compensation, Tenancy and Fines Enforcement, as well as liaising with service providers relating to debt, child and health issues, and that the outcome or decisions made within one matter may impact other matters;
- Ensure a witness or victim is able to object to their qualification or determination as a special witness, or to request that they be considered a special witness, and that this process is clear to them and easy for them to undertake and does not unduly place a burden on the victim or witness, such that it becomes a disincentive for them to give evidence;
- Include elder abuse as an additional category of special witness, not otherwise subsumed by family and domestic violence;
- Ensure language and processes around the inclusion of visually recorded statements are clear and accountable;
- Ensure witness intermediaries are qualified in both advanced communication and relevant legal skills;
- Increase the age of automatic inclusion in the witness intermediary service to age 16;
- Ensure a high level of transparency and accountability in the witness intermediary service;
- Ensure consideration of the SALSWA or similar project in the design and associated regulations of the witness intermediary service; and

- Improve the clarity of the proposed legislation regarding the eligibility for witnesses subject to communication directions, including via ground rules hearings.

We maintain a high expectation that the Department will undertake all necessary due diligence to ensure that any new, revised or updated provisions will not lead to unintended adverse consequences for victim-survivors.

Thank you again for this opportunity and please do not hesitate to contact us if you require additional information.

Kind regards

A handwritten signature in black ink, appearing to read 'Jennie Gray', written in a cursive style.

Dr Jennie Gray  
Chief Executive Officer  
28 March, 2024