actlawsociety

8 September 2017
By email: familylawunit@ag.gov .au

Dear Sir/Madam,

RE: Proposed amendments to the *Family Law Act 1975* (Cth) to address direct cross- examination of parties in family law proceedings involving family violence

Preliminary observations

The Law Society of the Australian Capital Territory ("the ACT Law Society") welcomes the opportunity to provide comment on proposed amendments to the *Family Law Act 1975* and matters raised in the Consultation Paper.[1]

The prevalence of family violence and its contribution to the breakdown of relationships has long been a feature of Australian society and evident in the matters conducted before the Family and Federal Circuit Courts of Australia ("the Family Law Courts"). Increasingly there has been a greater emphasis in addressing structural, economic and legal disadvantage experienced by those parties and children who are victims of family violence, and come before the courts. The profession supports ongoing efforts to protect those vulnerable members of our community from being subjected to further incidences of family violence when operating within the institutional setting necessary for the conduct of family law matters.

At the outset, the ACT Law Society notes that generally, the legal practitioners operating in the area of family violence, do so with a sound understanding of the prevalence of family violence and the insidious and destructive influence it has on individuals, families and our wider society. Many practitioners will be aware the range of responses, supports and protections available to individual parties, legal practitioners and the Family Law Courts in managing the conduct of the matters that come before the Courts in which family violence allegations are made.

The Family Law Courts' *Family Violence Best Practice Principles ("the BPP")* provide a comprehensive guide for practitioners, Judges and self-represented parties about family violence and how matters involving allegations of family violence might best be presented in court and the victims of this violence, properly supported.

There are opportunities for further and wider education about the underlying principles that have informed the BPP and the Law Society of the ACT would welcome and support initiatives that assist in the continuing education of court personnel (including, as required, Judicial officers) and legal practitioners so that we may continue to properly engage with and support people who are victims of family violence in the event they must have engagement with the family law system.

The Law Society of the ACT would encourage some further reflection upon and assessment of the extent to which final contested hearings are occurring, in the Family Law Courts, where a victim of family violence is cross-examined by the un-represented alleged perpetrator of that violence. The benefit of empirical research as to the prevalence of this occurrence (which is recognised as being traumatising and distressing for the victim) will better inform the extent to which resources ought to be applied to create further opportunities to shield victims of family violence from this occurrence.

The Law Society of the ACT has had the benefit of reading and supports the submissions of the Law Council of

[1] Consultation Paper - Addressing direct cross examination of parties in family law proceedings involving family violence, July 2017

Australia ("the Law Council") to the Parliamentary inquiry into a better family law system to support and protect those affected by family violence.[2] That submission contains a brief summary of the role of cross-examination in the adversarial trial[3] and balancing the desire to shield a vulnerable witness while ensuring the process of elucidating relevant evidence in the hearing, to support a judgment, is not undermined.

The model apparently being contemplated in the Consultation Paper (a ban on direct cross-examination and a court appointed person to ask questions), while appearing to offer protections to a vulnerable witness, may create a range of undesirable and serious adverse consequences, the repercussions of which, with respect, may not have been fully considered.

It is the recommendation of the Law Society of the ACT, that the resources necessary to implement the proposed amendments, would be more efficiently directed to ensuring the existing protections for vulnerable witnesses were more widely known, identified and available for use in all registries. These protections include those provided in the *Evidence Act 1995* (Cth) (including protection from improper questions), within the Family Law Act (including Division 12A and the management of child related proceedings) and the broad power of a judge to manage the conduct of the proceedings, as he or she sees fit. The BPP make explicit many of the additional powers available to the Family Law Courts in hearing matters where allegations of family violence have been made, including ensuring that vulnerable parties are not unnecessarily exposed to the perpetrator of the violence and ensuring witnesses may give their evidence remotely, among other things. Not all registries have equivalent facilities (noting the significant resource challenges at smaller and regional Registries in particular).

It is the respectful view of the Law Society of the ACT that the model being contemplated in the Consultation Paper is founded on a fundamental misunderstanding of the role of cross examination in the adversarial process, which is as important in family law proceedings, as any other. It is this mis- characterisation of cross examination that has lead to the misplaced expectation that one part of the adversarial proceedings can be conducted in a particular fashion, with the partial or temporary intervention of a third party (court appointed person) to undertake an hybrid or abridged questioning, that will ultimately, offer little assistance to the Court.

The Law Society of the ACT adopts the recommendations of the Law Council - that if the presently available protections for vulnerable witnesses are considered by a judge to be insufficient protection for a vulnerable witness, in that instance, National Legal Aid or the state or Territory legal aid bodies, should be directed to appoint a lawyer to act for the unrepresented party (and both parties if the victim of family violence is also unrepresented) for the conduct of the trial. It is recognised that this will have funding implications for legal aid bodies and Commonwealth resources will consequentially be required. However, given the gravamen of the issues being explored and ills to be remedied, a serious commitment to funding *the best possible alternative* is required. Any other solution (including the court appointed person) creates a deficiency in the trial process that will undermine the utility of any evidence obtained and leave the Judge with deficiencies in evidence that may undermine her or his ability to rule in the matter. The risk of deficient Judgments will accordingly increase, with consequential burdens upon the appellate process, hearing time frames, resourcing for the courts more generally and further burdens for all users of the courts.

The Law Society of the ACT recommends that if the court appointed model is adopted (rather than full representation for the self represented party or parties as is suggested, above) the person so appointed should be a legal practitioner, with certain parameters to that role, as detailed further below.

Responses to questions posed in the Consultation Paper

1. Should direct cross-examination only be automatically banned in specific circumstances?

[2] Submission number 85, 27 May 2017

[3] Ibid, p24 - 25

2. Should direct cross-examination be banned in each of the specific circumstances set out in the new proposed subsection 102NA(1)?

The Law Society of the ACT recommends that the discretion of judicial officers to conduct proceedings in their courts should not be fettered and the Judge must be at liberty to determine if the current protections available to protect a vulnerable witness are sufficient. If the judge determines that the witness cannot be adequately protected, then the appointment of a legal representative for the unrepresented party (or both parties, if the victim is also unrepresented) should occur.

Necessary funding increases to National Legal Aid would be required to assist in the implementation of this response. It is also anticipated that some parties to which the referral for a grant of aid and representation in these circumstances, may not satisfy the usual grant criteria set by the relevant legal aid bodies; this is especially so in property and financial matters where there may not be parenting issues before the court, but where serious family violence allegations are made - the party in that instance might normally not receive a grant of aid under the current funding criteria. Particular funding allowances and exceptions may need to be agreed to address these challenges - this is a new response to a continuing and serious problem and building, funding and supporting the institutional responses will be an essential part of the model.

The Law Society of the ACT recommends that the circumstances identified in questions 1 and 2 of the consultation paper act as triggers for the Court to consider if additional protections ought to be implemented to shield a vulnerable witness - which matters might be usefully set out in the Rules and in Practice Guidelines for litigants.

However, there are risks in building a response which is dependent upon the existence of certain orders, made or protections put in place, in family violence proceedings in state or Territory courts. There are a number of risks arising from this. In many cases before the Family Law Courts, allegations of family violence are made and there may not be orders made under state family violence legislation. Where there are family violence proceedings in a state court, it is possible that by the time of the trial in the Family Law Courts, the state matters have not proceeded to a final hearing (and so no findings have at that stage been made).

On the other hand, there are many instances where allegations relating to family violence are resolved in the state courts by the making of undertakings, or orders by consent, without admissions as to liability. Again, while the allegations of family violence may be serious, in that outcome, the court will be unable to have regard to findings made in another court. Caution needs to be exercised before these (consensual) outcomes are deemed to indicate a less serious allegation or risk of family violence
- in many instances, the prospect of direct cross examination of that person, by the alleged perpetrator, would be terrible.

It is the process of engagement with, exposure to and cross-examination by the alleged perpetrator that creates risk of re-traumatisation of the alleged victim. The process itself therefore, of a trial, where the alleged victim is in close proximity to the alleged perpetrator, not just the asking of a particular series of questions, in cross examination, that is offensive and potentially harmful.

The protections already available to the courts go some considerable way to creating opportunities for proceedings to be conducted in a way that shields the victim from exposure to the alleged perpetrator. If the court considers that those protections are insufficient, then the appointment of a lawyer to represent one of the parties (or a lawyer for each if both are unrepresented) is required, as described previously.

The consultation paper contemplates a ban upon cross examination also occurring if injunctions under the Family Law Act are in place. This may have unexpected consequences: an injunction under section 68B or 114 may not

relate to a family violence offence or allegation [ss (1)(c)(iii)], however the existence of such an injunction (for example to prevent a sale of property), together with an allegation of family violence [ss (1)(b)], would be sufficient to prevent a self-represented party from being able to cross-examine the witness party.

Again, the circumstances under which such injunctions may be made are broad and are not confined to matters where family violence is alleged or established. Caution should be exercised therefore in applying an express list of qualifying circumstances, which may have the unintended consequence of capturing matters in which family violence is not a key element.

The ACT Law Society recommends preserving the discretion of the courts to manage their processes and offer case specific remedies and protections.

The existing rules of Court, the *Evidence Act* and the *Best Practice Principles* provide an existing framework against which protection of victims of family violence can be achieved. Efforts directed to greater adoption of existing measures by members of the judiciary and legal profession, including through use of closed circuit evidence, procedural directions to limit the issues warranting cross- examination at trial, legal aid funding and ongoing professional development can produce a more cohesive family law system that continues to promote the interests of children and provide protections to victims (children and parties) of family violence.

3. **Should direct cross-examination be banned in any additional circumstances not referred to in the new proposed subsection 102NA(1)? For example, in the courts' Notice of Risk/ Notice of Child Abuse, Family Violence or Risk of Family Violence.**

Similarly, the filing of Notices of Risk in which allegations of family violence are identified may be a useful trigger for consideration of what protections, if any, might be required in a particular matter, but there are risks in using the existence of such allegations as a trigger for the automatic happening of certain responses. While the triage process created by the filing of Notices of Risk ensures the courts receive, at an early stage, information about a family's involvement with welfare authorities, such does not necessarily mean that the allegations are well founded, or will be found in time to have occurred.

The Law Society of the ACT recommends that detailed guidelines are established setting out the circumstances in which the court may consider the implementation of a range of responses to better support vulnerable witnesses - the inclusion of allegations of family violence in Notices of Risk could be included.

4. **Should any ban on direct cross-examination apply to both parties to the proceedings asking questions of each other, or only to the alleged perpetrator of the family violence asking questions of the alleged victim?**
5. **Should the discretionary power only be exercised on application by the alleged victim, or by the courts' own motion, or should the alleged perpetrator also be able to make an application to prevent direct cross-examination?**

The Law Society of the ACT suggest that it is not appropriate to make assumptions about the benefits or otherwise, to an alleged victim in being able to ask questions directly to an alleged perpetrator of family violence. Clearly, there will be some cases in which that process is not desired or preferred by the alleged victim - however, there will be other cases where it is essential, to the alleged victim, that he or she is able to exercise the right to question the other party - taking back some control of their shared narrative and as a manifestation of their own power or independence.

These are complex issues and the Law Society of the ACT would welcome further investigation and report around these issues to avoid generalised assumptions informing outcome for all alleged victims, as if their experiences and preferences will always be the same.

The court should determine the application of any necessary and appropriate safeguards to better protect and support vulnerable witnesses in family law proceedings. Those supports would include tailored education programs for judicial officers and relevant court staff and the legal profession about the impacts of family violence and the ways in which engagement between an alleged victim and alleged perpetrator can be distressing and re-traumatising. However, the Law Society of the ACT cautions against formalising a general position for all parties where family violence is an issue, in preference for supporting the discretion of the Court to respond on a case by case basis.

The Court should be at liberty to manage the proceedings at large, including to apply all powers including relating to protections around cross-examination and should not require an application being made by a party.

6. **Which people would be most appropriate to be appointed by the court to ask questions on behalf of a self-represented person? For example, a court employee not involved in the proceedings, other professionals, lay people.**
7. **What qualifications, if any, should the court-appointed person have?**

In the event the court appointed model is adopted, the Law Society of the ACT recommends that a lawyer should be appointed to this role. There are unique obligations and responsibilities exercised by lawyers, to the court, which will ensure the court is best served by the appointment. However, this is still not a straightforward process. If the person so appointed is a legal practitioner they have duties to the Court, to the client (if that relationship is not otherwise defined and limited) and pursuant to legal professional codes.

If the court appointed model is adopted and the person so appointed is tasked with a limited and curtailed role only (that is, not acting as a lawyer in the full sense for the party) then clear guidelines and protections would need to be incorporated into the legislation to shield that legal practitioner from claims of breach of their professional obligations to the client and against claims of negligence in the performance of the (limited) role in the court room.

There are real risks that the obligations and responsibilities of the lawyer to the client and to the court may come into conflict.

The real limitation in the court appointed person model however, lies in the curtailed role anticipated and the underlying misunderstanding of cross examination and how it is effectively used in final proceedings. It is the respectful view of the Law Society of the ACT that the central limitation will regrettably occur, no matter who is appointed to the role.

The Law Society of the ACT has particular concerns about the manner of appointment, role, training, remuneration and selection of court appointed persons. In addition to the comments above an additional burden will fall upon judicial officers to ensure that the conduct of the court appointed person does not give rise to any risk of a miscarriage of justice and/or appeal. It is anticipated a significant suite of policies and guidelines would be required to regulate and provide a framework for the conduct of court appointed persons.

The appointment of a court appointed person, against the objection of a party and the consequent failure of part of or all of that party's case before the court, may lead a disgruntled litigant to determine that an appeal is warranted (regardless of the merits of that process). There is a real risk that the appellate courts will experience a further increase in applications made by disgruntled self represented parties.

8. **Should any requirements regarding who the court can appoint and their qualifications be included in the Family Law Act?**

Yes, the Act should be amended to include these requirements.

9. **Should any further information about the scope of the role of the court-appointed person be**

included in the Family Law Act? For example:

- **how the court-appointed person obtains questions from a self-represented party**
- **the level of engagement the court-appointed person should have with a self-represented party on whose behalf they are asking the questions**
- **whether the court-appointed person should be present in court for the whole of the proceedings or just during cross-examination**
- **what discretion the court-appointed person can exercise (if any) in relation to asking the questions they have been provided by a self-represented party**
- **whether the court-appointed person can ask any questions of their own (not provided by the self-represented party) during cross-examination**
- **whether they are under a duty to cooperate with other parties to the proceedings such as an Independent Children's Lawyer appointed in a case, and**
- **the intersection between the court-appointed person's role and that of the judicial officer.**

Despite significant reservations about the court appointed person model, as expressed previously in this document, the Law Society of the ACT makes the following additional comments about the questions posed in question 9:

i. Whilst it can be accepted that the asking of a question by a person other than an alleged offender may be less offensive than if the offender themselves asked the question, this arguably does not address the ill the amendment is directed to curing. The risk of re-traumatising victims remains, and in some cases, may be exacerbated, because another person is asking questions.

ii. The additional difficulties with the provisions as drafted (102NA and 102NB) include:

   a. The terms of ss (2)(b) suggest the court appointed person asks the (same) question that the examining party would like to ask.

   b. The funding for the court appointed person is unknown. This will likely have a direct impact of the qualifications, quality and assistance that such a person could provide to the Court and the parties (both alleged victim and alleged perpetrator).

   c. What controls would exist to limit or define the nature of the questions to be asked by the court appointed person? While Judges routinely and properly limit and rule on questions in the trial, to expand that role such that a Judge must approve a prior list of questions will create further risks in the management of the trial and in the provision of natural justice and procedural fairness to both parties.

iii. It is anticipated the court would be required to place greater emphasis on making case specific orders and directions in relation to the scope and content upon which the court appointed person may cross-examine the other party.

iv. If the model proposes a list of questions is provided to the court appointed person and those questions are then asked of the vulnerable witness, it is likely that process will elicit evidence of limited utility and there may be a real disconnect between that process and the case narrative more generally. Cross examination is more than asking a list of questions. To define and limit the process in this fashion will have significant and deleterious impacts upon the utility of the process and upon the evidence ultimately before the court. That is likely to have an adverse impact upon the court's ability to make sound orders to conclude the matter.

v. The process of obtaining questions from the self-represented party by the court appointed person would need to include an opportunity for the court appointed person to speak with the party and to obtain an understanding of what the questions were directed to achieve. Some parties may have literacy difficulties so oral directions may be required. There are additional challenges for culturally and linguistically diverse parties and the provision of interpreter services will routinely be required.

vi. The model being contemplated (of a court appointed person stepping into the trial to perform an isolated task) will impact the utility of the exercise. A list of questions asked by a person who has no knowledge of the balance of the evidence before the court (including in affidavits and in documents produced subpoena to the court) will seriously impact the prospects of questions being asked which are related to and take into account other evidence.

vii. If the court appointed model is adopted and that person receives a set of questions from the party, which

have not otherwise been vetted by the court, it is expect the court will rule if a question is objectionable, offensive or otherwise objectionable.

viii. If this limited role is to be created for the court appointed person, and that person is only present to ask the set questions, that person should not be permitted to ask additional questions (of their own volition). That person should have a strictly limited and delineated role and be expected to act with courtesy and co-operate with directions from the court, but not to otherwise engage in the matter before the court. The deficiencies in this model are clear and the Law Society of the ACT continues to recommend that instead, a lawyer is appointed to act for a party (or a lawyer for each party if both are not represented) to ensure that the vulnerable witness is protected and that the trial integrity is not undermined.

While the source and extent of any Commonwealth funding to implement the court appointed model is not known, the Law Society of the ACT suggests that additional funding might usefully be directed to:

i. Additional training of judicial officers and legal professionals in addressing and identifying family violence and utilising existing measures to protect the victims of family violence;

ii. Additional legal aid funding, including specifically for trial matters, and where it is in the interests of justice that a party be legally represented to ensure that victims of family violence are not subjected to further incidences of violence or re-traumatisation;

iii. Where proceedings also involve children/parenting, additional legal aid funding to enable the appointment of Independent Children's Lawyers ("ICLs"). ICLs already have a central role in child related proceedings in ensuring appropriate evidence is before the Court, even more so where one or more parties are self-represented. Together with the Court's inherent power to manage its own proceedings, those matters requiring determination by the Court, can be addressed.

10. Should a self-represented person be allowed to nominate the person who is appointed by the court to ask questions on their behalf?

11. Do you have any concerns about the court-appointed person model?

The court appointed person should not be a person nominated by a party. There are obvious risks that the person so nominated will be aligned with the party and there may be complex relationship dynamics, which make that person a source of distress or anxiety for the vulnerable witness. The court appointed person (if this limited model is adopted) should be appointed by the court and be entirely independent of the parties and the proceedings.

The Law Society of the ACT has significant concerns about the creation and implementation of the court appointed person model, as set out previously.

12. Should the court only grant leave for direct cross-examination to occur if both parties to the proceedings consent? i.e. where an alleged victim consents to being directly cross-examined or consents to conducting direct cross-examination, should the alleged perpetrator's consent also be required?

13. Should the court only grant leave for direct cross-examination to occur if it has considered whether the cross-examination will have a harmful impact on the party that is the alleged victim of the family violence?

14. Should the court only grant leave for direct cross-examination to occur if it has considered whether the cross-examination will adversely affect the ability of the party being cross-examined to testify under the cross-examination, and the ability of the party conducting the cross-examination to conduct that cross-examination?

15. Are there any other issues the court should be required to consider before granting leave for direct cross-examination to occur?

The consultation paper suggests that *"The grounds for granting leave are intended to limit judicial discretion and ensure a consistent approach to the courts granting leave."* The Law Society of the ACT resists any amendment, which is intended to limit judicial discretion, in circumstances where it has not been established that the full exercise of judicial discretion as failed to protect or shield vulnerable witnesses. It would appear, with respect, that

certain assumptions have informed the questions being posed and remedies suggested in the consultation paper. The Law Society of the ACT would welcome further research being undertaken into these important issues, to better direct what remedies, if any are required to better assist victims of family violence within the family law system. The Law Society of the ACT notes that the Australian Law Reform Commission has been instructed to undertake a comprehensive review of the Family Law Act 1975 and it would appear sensible and prudent to await the recommendations of that body before embarking upon other significant change.

The judge should retain full discretion to manage the process within the court. The possibility of direct cross-examination, should remain at the discretion of the court. That process should not require the consent of both parties, but *the consent of either or both parties,* would be factors relevant to the consideration of the issue by the court.

The questions expressed above relate to the matters that a court might consider before making a determination about whether direct cross examination should be permitted. Those considerations might be expressed within the Act or in guidelines to ensure that the court and the parties are aware of the range of considerations that may inform the decision making by the court about this issue. The considerations should not be expressed as limiting the discretion of the court. In the particular facts and circumstances of the case, the discretion of the court should remain at large.

16. **Should the amendments apply to proceedings started before the law comes into effect, or should they only apply to proceedings started after the law comes into effect?**

There are risks in seeking to have changes to legislation apply retrospectively, especially if, as has been contemplated in the Bill and consultation paper, the existence of family violence orders or restraining orders may be relied upon to support the operation of the anticipated new provisions within the Family Law Act. Real injustices may occur where a party has consented to or not vigorously opposed an outcome in one set of proceedings, at that time not knowing that the existence of the order may later be used as the foundation for limiting their ability to cross examination a party in other proceedings. The deficiencies of that approach are clear.

17. **Should any changes be made to the proposed amendments to ensure that all parties receive a fair hearing?**
18. **Should any changes be made to the proposed amendments to ensure that the courts can be satisfied that any cross-examination of the parties that occurs through a court-appointed person will enable the judicial officer to accord procedural fairness to the parties?**
19. **Should any changes be made to the proposed amendments to ensure that the courts are able to make informed decisions?**
20. **Should any changes be made to the proposed amendments to ensure that they do not have any unintended consequences for victims of family violence?**
21. **Any general comments.**

The Law Society of the ACT suggests that the protections presently available to vulnerable parties in family law proceedings are sufficient to ensure the protection of those witnesses. It is recognised that there may be instances where those protections are not made available to the vulnerable party, due to a lack of awareness by the court, the party or others involved in the matter (including legal practitioners) about the ability to utilise those protections. These challenges would be assisted by further, directed, education of judges and court personnel and legal practitioners about these options. In addition, an audit of the ability of different registries of the Family Law Courts to support and protect vulnerable parties ought to occur - it is quite clear that the services and facilities that are available in certain registries will not be available in others.

A review should also be undertaken about the extent of any circumstances in which vulnerable parties have been directly cross-examined in family law proceedings. While the Law Society of the ACT agrees that such a process would be distressing and potentially re-traumatising for a victim of family violence, having an understanding of how frequently this occurs and in what circumstances, would better direct consideration of the application of appropriate resources to address this need.

The adversarial trial process requires cross examination of witnesses to occur in a way that is intended to ensure that evidence is challenged, the credibility of witnesses may be assessed and so that the fundamental aspects of the case of one party are "put" to the other (the rule in *Browne v Dunn5).* To seek to create a hybrid questioning process, undertaken by a person not otherwise involved in and not aware of the evidence in the case, will seriously undermine the efficacy of the trial. It is likely that the evidence obtained in that process will be of limited utility to the court and may lead to the ultimate judgment being challenged (or appellate challenges to the *process* imposed upon a party occurring more frequently).

Absent clear data to support the contention that such a fundamental and adverse change ought to occur, the Law Society of the ACT respectfully suggests that the current powers available to the courts to manage the proceedings and protect vulnerable witnesses are sufficient.

Yours sincerely,

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