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25 August 2017

The Attorney-General
c/- Committee Secretary
Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade
PO Box 6021
Parliament House
Canberra ACT 2600

By email: jscfadt@aph.gov.au
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Dear Attorney-General,

Submission on the Exposure Draft of the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017*—Public Consultation on Cross-examination Amendment

Australian Lawyers for Human Rights (ALHR) thanks the Attorney-General for the opportunity to make this submission on the Exposure Draft of the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017*—Public Consultation on Cross-examination Amendment.

Please find attached our submission.

If you would like to discuss any aspect of this submission, please contact Benedict Coyne, President of ALHR, by email at president@alhr.org.au

Yours faithfully,

Benedict Coyne
President
Australian Lawyers for Human Rights



Submission to the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017*— Public Consultation on Cross-examination Amendment

Your details

Name/organization (if you are providing a submission on behalf of an organisation, please provide the name of a contact person)

Australian Lawyers for Human Rights (ALHR)

Contact: Dr Rita Shackel & Anna Kerr

Co-Chairs, Women & Girls' Subcommittee

Contact details (*one or all of the following: postal address, email address or phone number*)

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1. About ALHR

ALHR was established in 1993 and is a national network of over 800 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees as well as specialist national thematic committees.

ALHR seeks to utilise its extensive experience and expertise in the principles and practice of international human rights law in Australia in order to advocate for greater Australian compliance with international human rights standards at a domestic and international level and promote and support lawyers' practice of human rights law in Australia.

2. Executive Summary

1. Reform of family law is urgent as the human rights of women and children are being routinely infringed and constraints on the provision of legal aid are leaving many individuals exposed to ongoing family violence, including through abuse of legal process.
2. Access to justice is a particular problem in this jurisdiction which is unnecessarily formal, procedurally onerous and excessively expensive.
3. For the court to make informed decisions, particularly in the context of self represented litigants, judicial officers (of whom there should ideally be more than one presiding) must be empowered to conduct their own questioning of the parties.
4. It is not satisfactory to have non-lawyers speak for self represented litigants for a number of reasons.

5. Cross-examination and the adversarial system are generally inappropriate for resolution of family law disputes and should be replaced with an inquisitorial approach for the reasons outlined in the article written almost 20 years ago by Justice Ian Coleman on “Unrepresented Litigants and the Family Court” as published by the *Australian Law Reform Commission Reform Journal* [1998] ALRCRefJI 27.
6. ALHR therefore submits that the proposed Cross-examination Amendment contained in the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017* should not be adopted in its present form.

3. The desirability of using a human rights framework

- 3.1 ALHR strongly believes that Australian legislation should adhere to international human rights law and standards.
- 3.2 We endorse the views of the Parliamentary Joint Committee on Human Rights (PJCHR) expressed in Guidance Note 1 of December 2014¹ as to the nature of Australia’s human, civil and political rights obligations, and agree that the inclusion of human rights ‘safeguards’ in Commonwealth legislation is directly relevant to Australia’s compliance with those obligations.
- 3.3 Human rights entail both rights and obligations. In so far as we are ourselves entitled to the protection of human rights, we must also respect the human rights of others.² Generally, where legislative protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others. Conversely, where legislation penalises behaviour it is relevant to what extent the offender’s behaviour impacts upon the human rights of others.
- 3.4 In general terms, there is no hierarchy of human rights – all are equally valuable (the principle of indivisibility) and all should be protected together (the principle of interdependence). Some rights are expressed as absolutes: the right to be free from slavery, torture, cruel or inhuman or degrading punishment or treatment, or arbitrary deprivation of life, and the right to recognition as a person in law.
- 3.5 Subject to those absolutes, all rights must be **balanced** where they conflict and provide **reasonable accommodation** to other rights.³ This is commonly understood in international law and in jurisdictions where human rights are enshrined in national constitutions, such as Canada and all European countries. In Australia, being alone amongst first world countries in not having constitutionally protected human rights, there is not a common understanding of this well-established point.
- 3.6 We submit that a human rights framework will assist in analysing the issues here.

4. Domestic violence and human rights

- 4.1 This Public Consultation concerns the issue of cross examination within a Family Court situation in the context of domestic violence.

¹ Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility*, December 2014, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources> accessed 16 January 2015, see also previous *Practice Note 1* which was replaced by the Guidance Note, available at <<https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>>, accessed 16 January 2015.

² See generally, United Nations Human Rights Office of the High Commissioner, “What are Human Rights?” available at <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>>, accessed 9 February 2017.

³ Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief* (2015) A/HRC/31/18 pursuant to the UN Human Rights Council Resolution 22/20 (cited as Bielefeldt (2015)) par 19ff.

- 4.2 Freedom from violence (whether sexual, mental, emotional, financial or physical) is a fundamental human right.⁴ The right to protection from violence and to security and liberty of person is recognised in the major human rights agreements including the:
- International Covenant on Civil and Political Rights
 - Convention on the Rights of the Child
 - Convention on the Elimination of all Forms of Discrimination against Women
 - Convention on the Elimination of All Forms of Racial Discrimination
 - Convention on the Rights of Persons with Disabilities
 - Declaration on the Rights of Indigenous Peoples.
- 4.3 Domestic and family violence can violate a wide range of human rights including:
- The right to life
 - The highest attainable standard of physical and mental health
 - The right to decent work
 - Freedom of expression and the right to hold opinions without interference
 - A child or young person's right to leisure and play
 - The right to education
 - The right to be free from torture and other cruel, inhuman or degrading treatment or punishment.
- 4.4 In the context of a Family Court situation, the violation of various human rights through domestic violence must be viewed in the context of the human rights to:
- the protection of the rule of law;⁵
 - equal protection of the law without discrimination;⁶
 - a fair and public hearing by an independent and impartial tribunal, in the determination of one's rights and obligations;⁷
 - equal rights as to marriage, during marriage and at its dissolution.⁸
- 4.5 As Justice Ian Coleman says in "Unrepresented Litigants and the Family Court (op cit), where one or both parties in a Family Court proceeding are unrepresented, there are numerous difficulties facing the court in achieving justice (and, implicitly, equal protection of the law and rights on the dissolution of the marriage, particularly where family violence is involved) in an adversarial system. It is for this reason that he recommends that Family Court proceedings no longer be conducted in accordance with an adversarial system.
- 4.6 These difficulties are compounded when one of the parties has been involved in violence against the other and/or their children because of the resulting inequality in emotional resilience between the two parties. Indeed it has been said in the United

⁴ See generally Australian Human Rights Commission, "Why is domestic violence a human rights issue?" at <https://www.humanrights.gov.au/our-work/family-and-domestic-violence/why-domestic-violence-human-rights-issue>, accessed 23 August 2017, citing UDHR, 1948, art 5; ICCPR, 1966, art ; CRC, 1989, art, 19; Committee on the Elimination of All forms of Discrimination Against Women, Violence Against Women, General Recommendation No. 12 eighth session, (1989) notes that violence directed against a woman because she is a woman or violence that affects women disproportionately is discrimination.

⁵ UDHR 1948 Preamble

⁶ UDHR 1948 article 7.

⁷ UDHR 1948 article 10.

⁸ UDHR 1948 article 16.

Kingdom that the family courts are being used in such contexts to undermine the criminal justice process:

“Women feel bullied by the court and they are terrified of their restraining orders being altered because they know it will put them at risk, so they agree to everything the family court says. It is shocking.”⁹

- 4.7 Other jurisdictions recognise the multiplicity of issues that may arise in such contexts, indeed in 2015 the United Kingdom enacted a new offence of controlling or coercive behaviour in intimate or familial relationships (section 76 of the *Serious Crime Act 2015*)¹⁰. The UK has also acted to end the presumption that a father must necessarily be given contact with their child where there is a history of domestic abuse, following the deaths of a number of children.¹¹

Our submission

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

Cross-examination and the adversarial system are generally inappropriate for resolution of family law disputes and should be replaced with an inquisitorial approach for the reasons outlined in the article by Justice Ian Coleman on “Unrepresented Litigants and the Family Court” as published by the Australian Law Reform Commission **[1998] ALRCRefJI 27.**

These reasons include the fact that there is a high level of unrepresented litigants in the Family Court. Between 2011 and 2016, the proportion of finalised cases in which both parties had representation remained consistent, dropping from 78% to 77%; however, at the trial stage, this figure has fallen from 67% to 63%, with the percentage of cases in which neither party had representation present rising from 5% to 11%.¹² At the appellate level, the proportion of unrepresented litigants also rose, from 39% to 44% between 2014-15 and 2015-16.¹³ Furthermore, as Justice Coleman and others have noted, “very few unrepresented litigants can be expected to cross-examine to advantage given that they are not trained to cross-examine and have a large emotional investment in the proceedings.”¹⁴

Moreover cross-examination by unrepresented litigants can cause harm and “in some circumstances, cross-examination of a victim by an unrepresented violent partner can

⁹ Claire Waxman, of Voice4Victims, quoted in Sandra Laville, “Revealed: how family courts allow abusers to torment their victims”, *Guardian online*, 22 December 2016, available at <https://www.theguardian.com/society/2016/dec/22/revealed-how-family-courts-allow-abusers-to-torment-their-victims>, accessed 23 August 2017. See also Sandra Laville, “‘Constantly terrified’: women on facing their abusers in family courts”, *Guardian online*, 22 December 2016 at <https://www.theguardian.com/society/2016/dec/22/constantly-terrified-women-on-facing-their-abusers-in-family-courts>, accessed 23 August 2017.

¹⁰ See the Home Office’s publication: *Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework* (December 2015) in relation to this offence, accessed 23 August 2017, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf

¹¹ Sandra Laville, “UK Judges change court rules on child contact for violent fathers”, *Guardian online* at <https://www.theguardian.com/society/2017/jan/20/uk-judges-change-court-rules-on-child-contact-for-violent-fathers-domestic-abuse>, accessed 23 August 2017.

¹² Family Court of Australia, *Annual Report 2015–16* (2006), 56.

¹³ Family Court of Australia, *Annual Report 2015–16* (2006), 77–8.

Ian Coleman, ‘Unrepresented litigants and the Family Court’, (1998) 73 *Australian Law Reform Commission Reform Journal* 41, 44.

be experienced as a continuation of the violence.”¹⁵ The party opposing a self-represented litigant, or a witness for that party, may experience re-traumatisation as a result of cross-examination by the self-represented litigant.¹⁶ As Chief Justice Diana Bryant has noted:

“One effect of particular concern is the consequence of cross examination by an unrepresented litigant of a former partner, or of witnesses, who may include relations and in-laws, on the relationship thereafter. Not only is this a traumatic experience, particularly where there are allegations of abuse, but it is not conducive to a productive, co-operative relationship in the future. In family law, particularly where children are involved, it is important not to cause or exacerbate further rifts in the family. Witnesses, including parents, a new partner, adult children and relatives may all be subject to cross-examination and relationships may become polarised as a result.”¹⁷

Cross-examination by perpetrators of alleged victims has long been identified as a significant complex issue for family courts.¹⁸

In the UK context it has been noted:

“...that if a survivor of domestic abuse is a litigant in person, it is far from unusual for them to be cross-examined by their perpetrator or in turn have to cross-examine their abuser. Women’s Aid’s 2015 survey of survivors of domestic abuse found that a quarter of women had been directly questioned by the perpetrator. This practice is unheard of in the criminal courts and as already noted, family court cases involving child contact can be used by the perpetrator as an opportunity to continue persistent, coercive and controlling behaviour - so it is wholly inappropriate in the family courts too.”¹⁹

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

See above response. Piecemeal reforms of this type chip away at the integrity of the adversarial system and are likely to undermine procedural fairness while still failing to provide any substantive protection to victims of family violence. The impact of these reforms would be to further complicate proceedings involving unrepresented litigants.

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.

See above response. Notices of Risk are now a compulsory document to be filed in family law children’s matters, so the filing of this document should not affect anything, as to legislate otherwise would undermine the proposed amendment completely. We

¹⁵ Richard Chisolm, *Family Courts Violence Review: Report* (27 November 2009) 168–9.

¹⁶ Elizabeth Richardson, Tania Sourdin and Nerida Wallace, ‘Self-Represented Litigants: Literature Review’ (Australian Centre for Justice Innovation, 2012) 32; Natalie Elizabeth Corbett and Amy Summerfield, ‘Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross-Examination of Vulnerable and Intimidated Witnesses’ (Report, Ministry of Justice, Parliament of the UK, 2017) 4–5.

¹⁷ Family Law Council, *Litigants in Person: A Report to the Attorney-General* (Canberra, 2000) 36.

¹⁸ Chief Justice Diana Bryant, ‘The Family Courts and Family Violence’ (Paper presented at the Judicial Conference of Australia Colloquium, 9–11 October 2015) 4.

¹⁹ All-Party Parliamentary Group on Domestic Violence, *Domestic Abuse, Child Contact and the Family Courts* (Parliamentary Briefing, Parliament of the UK, 2016) 14.

reiterate that cross-examination generally is inappropriate for disputes involving family violence, and that these proposed reforms are inadequate for the purpose of providing the necessary protection to victims.

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?

Since the goal is to protect the victim, not impede their capacity to conduct legal proceedings, there is no reason why victims should be banned from directly cross-examining their perpetrator. However, these provisions would naturally have the potential to be manipulated by individuals falsely identifying as victims and using legal proceedings as an extension of family violence.

This potential for abuse is recognised in guidelines for barristers and solicitors, on dealing with self-represented litigants in family law settings:

- NSW Bar Association, *Guidelines for Barristers' on Dealing with Self-Represented Litigants* (2011)—“A barrister will usually be conscious of the reactions of her or his own client to the self-represented litigant, particularly where (as in the family law or domestic relationships jurisdictions) the proceedings may be seen as ‘the continuation of war by other means’. Commonly that reaction is one of frustration and anger, particularly when the self-represented litigant seeks to cross-examine the barrister’s client using knowledge gained over the years of the marriage or relationship which has honed the ability to ‘press the buttons’ of their former spouse or partner.” (p. 4)
- NSW Law Society, *Guidelines for solicitors dealing with self-represented parties in civil proceedings* (2016) – “Situations frequently arise, particularly in the family law or domestic relationships jurisdictions, where self-represented parties use the court proceedings as an opportunity to embarrass or harass their former spouse or partner. This may not be deliberate. However, regardless of the intention of the self-represented party, the cross examination of the spouse or partner by the self-represented party may have this effect.” (p. 5)

Moreover as has been noted:

“There are other issues that can arise with SRLs and make it difficult for a ‘fair’ hearing to be conducted. For example, a party opposing an SRL or a witness for that party may be required to undergo cross-examination by an SRL, which may be traumatic in some instances. In addition, the party opposing the SRL may expend or incur more legal costs as a result of delays or time taken at trial by the SRL, and may be more likely to feel a sense of injustice and may be left feeling aggrieved with the court process because of the assistance provided to the SRL. These issues may be magnified where obsessive or difficult behaviour is present and where the SRL is using the hearing process as a means to cause harm to the other party and potentially causing additional cost with limited court supervision.”²⁰

Family Violence allegations are often met by defensive Family Violence allegations by the perpetrator as a strategic move in the context of Family Law children’s matters. It is often difficult therefore for the court to assess who is the victim/perpetrator without other extrinsic evidence.

²⁰ Tania Sourdin and Nerida Wallace, ‘The Dilemmas Posed by Self-Represented Litigants – The Dark Side’ (Paper 32, Access to Justice, Australian Centre for Justice Innovation) 11.

Under the provisions currently proposed it is likely that there will be occasions when it will be the victim who is unrepresented and thereby precluded from effectively cross-examining the perpetrator, but nevertheless still subject to hostile cross-examination by the perpetrator's advocate. Dispensing with cross-examination generally would be the only sure way to stop these kinds of abuse of process. An inquisitorial system would ensure the risk of an abuse of process is minimised.

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?

As above. If the discretionary power is only exercised on application by the alleged victim, rather than as a matter of course, it is likely that many individuals will not know or may hesitate to make this application for a range of reasons. Perpetrators are more likely to be aggressive litigants and therefore such a provision is susceptible to abuse by them. In English family law trials, interviewed judges spoke about observing aggressive behaviours by self-represented alleged perpetrators of family violence. These behaviours weren't limited to aggression in cross-examination, but also intimidation in public areas of the court, and even in bringing weapons into the courtroom.²¹

This could result in a situation where the victim may be cross-examined by the perpetrator while being effectively precluded from themselves undertaking cross examination of the other person (the perpetrator).

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.

The suggestion that persons other than lawyers should represent a person without a lawyer to represent them is an unworkable solution, beset with practical and ethical difficulties. It would be far more appropriate to ensure that legal aid funding is adequate to ensure all individuals are fully represented.

We would argue that as a matter of efficiency and equity, and in particular if parties are to be self represented on a regular basis, the adversarial system should be replaced by an inquisitorial process with less formal procedural requirements and designed specifically to be navigated by those without legal training.

The temptation will otherwise be for social workers and others without appropriate Family Violence and legal training to advocate. Advocates will need to be legally trained, as any evidence may impact other issues of the case (eg. parental capacity).

7. What qualifications, if any, should the court-appointed person have?

Any court-appointed person would have to be a fully qualified, experienced and competent lawyer who has had the opportunity to take full instructions, carry out appropriate preparations and who has been present throughout the proceedings and gained a comprehensive understanding of the issues as well as having knowledge of the procedural and evidentiary requirements of the court.

Any court appointed person would need adequate opportunity to familiarise themselves with the particulars of any case, and the evidence relied upon, and need adequate opportunity to explore the evidence, rather than to simply be an advocate for unsubstantiated allegations.

²¹ Natalie Elizabeth Corbett and Amy Summerfield, 'Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross-Examination of Vulnerable and Intimidated Witnesses' (Report, Ministry of Justice, Parliament of the UK, 2017) 26.

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

The entire concept of having representation by non-lawyers – which seems to be what is being suggested -undermines the integrity of the adversarial process and will operate to further undermine the justice delivered to either or both of the parties to family law proceedings – regardless of how it is implemented.

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.

The role of the court appointed person would at least have to be the same as the role of a legal aid solicitor. They will need to be in court for the whole of the proceedings and would necessarily have to have discretion in asking questions if they are going to be able to carry out an effective cross-examination. Any intersection with other parties necessarily could introduce conflicts of interest or at least the perception thereof. For that and the reasons mentioned in our previous responses we strongly believe that in an adversarial system persons should only ever be represented by lawyers.

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

If they are not involved in the nomination of this person, there is a likelihood that the self-represented person may feel aggrieved if the cross-examination was not conducted to their satisfaction. On the other hand, if the self-represented person is allowed to nominate the person to be appointed, this may allow them to appoint a layperson, with no particular duty to the court, who could engage in inappropriate cross-examination on their behalf. Such a result would be to the detriment of all parties involved, work against the interests of justice, and potentially harm the interests of any children involved.

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

Yes – as expressed above. At best, it seems to be a needless duplication of the legal aid system and at worst provides a second rate system for self-represented litigants which could have a wide number of unintended adverse consequences.

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?

No – consent by the parties should not be the deciding factor since it is likely that pressure will be brought to bear on the victim to consent. There is already a suggestion in the Discussion Paper that evidence of a witness may be discounted by the court if there is a perception that it has not been adequately tested by cross-examination. This places victims in a quandary if they do not want the weight of their evidence to be discounted as a result of having invoked the protection of these provisions and may result in them consenting despite their reservations.

Furthermore, vulnerable, traumatised litigants are likely to be poor self-advocates and have difficulty articulating issues that have a harmful impact upon them. A legally represented perpetrator is likely to use cross-examination to their advantage, while benefiting from a self-represented victim's restricted capacity to cross-examine, regardless of whether they conduct the cross-examination themselves or via a court appointed individual with limited legal training and/or knowledge of the case.

- 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?**

The courts to date have not demonstrated an ability to intervene to ameliorate the harmful impact of cross-examination and therefore relying on the exercise of judicial discretion in this regard is unlikely to provide the level of protection required.

The concern would be that it is difficult for the court to assess those harmful impacts. If such issues needed to be regularly decided by courts, the government should ensure adequate re-training to ensure increased judicial capacity to make any relevant decisions in this regard.

- 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?**

As above – it would be preferable if this issue were to become irrelevant through replacing the adversarial family law system – which is particularly inappropriate given that divorce in Australia does not require the proving of fault – with an inquiry-based system.

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

If this Bill is to be pursued in its present form, the court should be required to consider the gendered nature of family violence and any financial and physical disparities between the parties, the socio-cultural context, and the nature and seriousness of the family violence charges and/or allegations.

Indeed, disputed factual matters in relation to family violence should be fully resolved, prior to related questions of family law being heard and determined.

These matters should be resolved in the one specialised inquisitorial jurisdiction and should not require parties to have to negotiate multiple courts and be subjected to multiple sets of proceedings with cross-examination before a range of judicial officers, none of whom has a full grasp of the range of issues.

- 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?**

Injustice is likely to arise in both scenarios as explained above.

- 17. Should any changes be made to the proposed amendments to ensure that all parties receive a fair hearing?**

Yes – the proposed amendments will not address the many systemic injustices that characterise family law proceedings and should not be made in their present form.

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?

Only an inquisitorial approach could give assurance that procedural fairness has been accorded to all parties. In the current system, access to justice is necessarily limited by the quality of legal representation and therefore the extent of a party's financial resources.

In an adversarial system any active assistance to an unrepresented party by a judicial officer may be perceived as procedural unfairness, whereas in the absence of such assistance, injustice is often inevitable.

19. Should any changes be made to the proposed amendments to ensure that the courts are able to make informed decisions?

Yes – for the court to make informed decisions, particularly in the context of self represented litigants, judicial officers (of whom there should ideally be more than one presiding) must be empowered to conduct their own questioning of the parties. Such an inquisitorial approach necessarily constitutes a departure from the principles of our traditionally adversarial process.

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?

Yes. These proposed amendments are easily subject to manipulation by perpetrators and are likely to have unintended consequences for victims – and the children involved. There are many cases where perpetrators falsely claim to be victims of family violence and may invoke these provisions to reduce their exposure to cross-examination, while still being able to put their victims through this trauma.

21. Any general comments.

Reform of the family law is urgent as the human rights of women and children are being routinely infringed and constraints on the provision of legal aid are leaving many individuals exposed to ongoing family violence, including through abuse of legal process.

Access to justice is a particular problem in this jurisdiction which is unnecessarily formal, procedurally onerous and excessively expensive.

If you would like to discuss any aspect of this submission, please contact [contact details redacted]

Contributors: Kerry Weste, Anna Kerr, Rita Shackel, Fran Medina, Tamara Dawood