18 August 2017

Senator the Honourable George Brandis QC
Commonwealth Attorney-General
Parliament House
3-5 National Circuit
Barton ACT 2600

Family Violence Taskforce
By email: familylawunit@ag.gov.au

Dear George,

Re: *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 (Cth)*

Thank you for the opportunity to provide feedback on the exposure draft of the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017* (Cth) ('the draft Bill'), which seeks to amend the *Family Law Act 1975* (Cth) ('the Act') to, *inter alia,* ban self-represented litigants from personally cross-examining witnesses. [1] We note the draft Bill has been listed in the Spring Sittings even before the consultation phase has closed; nevertheless, we trust our concerns will be given attention and the draft Bill be re- considered.

Whilst the Bar Association of Queensland ('the Association') supports appropriate measures to protect vulnerable witnesses and procedural fairness for all, the Association is opposed to the draft Bill, as it will relegate self-represented litigants to second class litigants, deny them with the rights to which the common law has conferred for centuries, and provide them with a mere illusion of procedural fairness and access to justice.

Indeed, the Association is concerned that the draft Bill does a significant disservice and injustice to all whom it purports to protect. Further, the draft Bill, in reality, is weighed in favour of the alleged perpetrator, because if evidence is not tested (or not properly tested), a finding of domestic and family violence ('D&FV') cannot be made.

Fact-finding

1. Trials are about examining the evidence so that the judge may determine contested allegations of fact to arrive at a determination as to whether acts of D&FV have been committed. That judicial function involves an examination of the totality of the relevant evidence and, where necessary, assessment of credit. Conversely, if the allegations are not examined (i.e. tested) or only examined in a piecemeal fashion, then findings of D&FV are unlikely to be made.

[1] *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2017* (Cth) s 102NA(l) provides a legislative ban if there are *'allegations of family violence between the examining party and the witness party'*, and either a conviction or charge of an offence involving violence, a family violence order, or an injunction exists between the parties.

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3. Plainly, the process of questioning is one that is pivotal to the findings which a judge can or cannot make. For this subject matter, proper questioning will often be the difference between the making of a finding that D&FV occurred, or not. Needless to say, the consequences of the findings are far reaching.

4. The draft Bill envisages that the 'the person appointed by the Court' ('the proposed person') will have no particular questioning skills and there is no suggestion that their questions will be developed by reference to the totality of the evidence available.

5. Thus, the draft Bill in so far as it applies to cross-examination by either the alleged victim or the alleged perpetrator, is probably weighted in favour of the alleged perpetrator and will see findings that D&FV did not occur (contrary to the reality) simply because the government-created questioning process is inadequate.

6. It is no answer to rationalise - because self-represented litigants cannot themselves ask relevant questions and may not understand how to introduce inculpatory or exculpatory evidence (a generalisation with which we do not agree) - that such problems be replicated by a government sponsored process. To do this is to legislate for the creation of second class litigants with no real access to justice and constitute a deprivation of procedural fairness. Further, and as already stated, the draft Bill is probably weighted in favour of the alleged perpetrator because the fact-finding process proposed is simply inadequate for testing the evidence.

7. We illuminate by way of example wherein the 'examining party' is for the alleged victim, and the 'witness party' is the alleged perpetrator; a scenario which the draft Bill clearly envisages.[2]

8. If the 'examining party' asks a question, *"you hit her, didn't you?"*, the answer from the 'witness party' is likely to be *"no."*. When answered, *"no"* and without any follow up drawing upon other evidence and context, the Court will be unable to find, to the appropriate standard, D&FV occurred.

9. However, the following kind of exchange is more likely to have a different outcome:

> Do you recall your wife's birthday party last year? -yes
> She cooked dinner? -yes
> And you didn't like it? – it was OK
> And you have consumed at least 5 beers? -yes
> After dinner, you recall she was doing the dishes? -kind of
> Your two argued? -maybe
> And you hit her in the face, didn't you? -no
> [subpoenaed documents are called for}
> Have a look at this document from the local hospital? -ok
> You see it is a record of your wife attending emergency on the night of her birthday last year? -OK
> And you see she is recorded as having a cut above her eye which was bleeding? -yep
> And you see she told the triage nurse that "my husband hit me". You see that? -yes

[2] *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017* (Cth) s 102NA, Note 1.

And that is because you did? -no, I didn't
Have a look at this document from her GP the next day; you see that? — yep
And you see she tells her GP you hit her the night before? -she's lying
And she said that because, in fact, you did? -she's lying
Sir, the GP then reported the matter to DOCs and look at this document in which she says the same thing; you see that? — she's making it up for payback

9. The first exchange introduced no corroborative evidence whereas the second exchange did. Thus, the first is unlikely to result in a finding of D&FV (even though it may have actually occurred) whilst the second likely will.

10. The draft Bill however contemplates providing the first exchange, and thus creates a safe-haven for those who have committed acts of D&FV but are not brought to task because of the inadequacy of the proposed process.

11. The example of the 'examining party' as for the alleged victim, and the 'witness party' as the alleged perpetrator has been utilised to demonstrate that there are significant consequences for the alleged victim of D&FV where evidence is not tested, or is not properly tested. That is, a finding of D&FV is unlikely to be made in such circumstances.

The proposed person

12. There is no suggestion in the draft Bill that the proposed person will owe any duties or obligations to the Court, or have any training or skills to provide valuable assistance to the self-represented litigant/s and the Court when asking questions. The proposal is not one suggestive of a McKenzie friend because that person is not an active participant in the proceeding but sits and helps the party with finding paper work and notetaking.

13. Instead, the questions accompanying the Bill suggest the proposed person could be family or a friend, or even a person from the Court. As to the latter, the Association cannot see it is in any way appropriate for Court staff to be seen to be involved in the partisan, adversarial ligation process. To do so would be seen to offend the fair trial requirements of impartiality and independence.

14. Further there is no recognition of any cultural considerations in appointing the proposed person or issues relevant to indigenous matters.

15. As to family or friends, they are usually aligned to one party or the other. Thus, a family member or friend asking questions of the other party is unlikely to be any less traumatic to the vulnerable person. This process might also mean that the Court must have a hearing to determine whether the proposed family member or friend is appropriate or not -and this then adds yet another layer of litigation to already resource-poor Courts.

16. Equally, the idea of appointing a family member or a friend to ask questions assumes that the other party can articulate why they oppose that person. This itself could be traumatic to the other party, especially if the proposed person has, in fact, aided and abetted in the abuse (be that by act or omission). Itis also difficult to see

that questioning by a family member or a friend about intimate matters would be any less traumatic to the vulnerable party.

17. As to the ability of the Court to appoint an appropriate person, by analogy, the Association notes that the *Family Law Rules 2004* (Cth) have long provided for the Attorney-General to appoint a litigation guardian on request from the Courts.[3] In our members' very long memories, they cannot recall such appointments being made. Thus, if the Attorney-General cannot identify an appropriate person to become a litigation guardian, we wonder how the Courts could possibly identify an appropriate person to also become involved in the litigation.

18. By comparison, legal practitioners, both solicitors[4] and barristers,[5] are prohibited from acting merely as the mouthpiece of their client and owe an overriding duty to the Court to *'act with independence in the interests of the administration of justice'*.[6] The duty to the Court prevails over the duty to a client, and the interests of justice must be prioritised over the interests of an individual litigant.

19. These duties and obligations do not simply pay lip service to abstract notions of justice and fairness. They underpin the functions of the judicial system, and ensure the protection of the rule of law on behalf of society as a whole. It appears that the draft Bill does not envisage that the proposed person will owe any such obligations or duties, but will merely act as a 'mouthpiece' on behalf of the self-represented litigant.

20. The Association cannot support a mouthpiece proposal for the injustices it will visit upon the litigants, the fact-finding process, and the integrity of the Courts.

21. Further, legal practitioners are duty-bound to advance their client's best interests, within the confines of their duty to the Court. This duty requires legal practitioners to have full knowledge and understanding of the facts and circumstances of the proceeding(s) as well as the documents and evidence which have been collected. There appears to be no equivalent duty for the proposed person.

22. It is repugnant to all notions of justice and fairness if it be thought that self-represented litigants were only capable of asking irrelevant questions, and therefore only need or deserve a 'mouthpiece' to ask equally irrelevant questions lacking probative value and with no regard to the totality of the evidence.

23. The draft Bill provides that a self-represented 'examining party' may only personally cross-examine a 'witness party' if the Court grants leave.[7] The Court must not grant leave unless, *inter alia*, both parties consent to the cross-examination occurring.[8] However, if the 'witness party' does not consent to same and the Court is unable to identify an appropriate person to perform the questioning on behalf of a self-represented 'examining party', the cross-examination cannot occur. Without the cross-examination, it would be impossible for the Court to make any determination of fact relating to D&FV to the required standard because the

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[3] *Family Law Rules 2004* (Cth) r 6.11.
[4] Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) Rule 17.1.
[5] Bar Association of Queensland, *Barristers' Conduct Rules* (at 26 August 2016) Rule 41.
[6] Bar Association of Queensland, *Barristers' Conduct Rules* (at 26 August 2016) Rules 25-36. See also Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) Rule 3.1.
[7] *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017* (Cth) s 102NA(2).
[8] *Family Law Amendment (Family Violence and Cross-examinatto11 of Parties) Bill 2017* (Cth) s 102NA(3)(a).

24. very evidence upon which a finding of D&FV can be made is not tested before the Court. This would constitute a denial of procedural fairness and access to justice.

Funding

25. The Association cannot discern if this proposed person will be funded, and if so, how. To the contrary, the silence suggests the proposed person will not be funded.

26. However, the answer to protecting vulnerable witnesses, the alleged perpetrator and the integrity of the Court process is not met by a lay person asking simple questions for a party, but by funding Legal Aid. As such, the Association remains concerned about the lack of funding allocated to legal representation.

Application

27. First, the Association notes the lack of clarity on the meaning of *'an offence involving violence, or a threat of violence'* in section 102NA(l)(c)(i) of the draft Bill, and the absence of a definition of same.

28. Second, the Association notes that the operative provisions of the draft Bill are proposed to be inserted after section 69ZX(2) of the Act,[9] thus forming part of *Part VII – Children, Division l2A – Principles for conducting child-related proceedings.* This placement appears to limit the application of the draft Bill to child-related proceedings. [10] Itis not clear whether this was the intention of the draft Bill.

29. Regardless of whether the operative provisions are intended to apply to only Part VII proceedings or all proceedings envisioned by the Act, the Association is concerned that the draft Bill underestimates the complexity of all family law proceedings.

30. It is the unified experience of the Association's members practising in family law that family violence cannot be considered in a vacuum, and cannot be thought of as single discrete issue as is often the case in criminal trials. For example:

    a. In deciding whether to make a particular parenting order, the Court must regard the best interests of the child as the 'paramount consideration'.[11] Section 60CC provides the matters which the Court must consider when determining what is in a child's best interests. Although the Court must consider *'the need to protect the child from ... family violence* ',[12] this is not the sole consideration. Family violence permeates other considerations which must be made by the Court; for example, the other primary consideration being the promotion of meaningful relations, [13] along with the additional considerations such as the nature of the relationship of the child with the parent(s),[14] the extent to which the parent(s) have failed to fulfil their obligations, [15] and the capacity of the parent(s) to provide for the

[9] *Family Law Amendment (Family Violence and Cross-examination of Parties) Btll 2017* (Cth) s 1.
[10] *Family Law Act 1975* (Cth) *s* 69ZM(4).
[11] *Family Law Act 1975* (Cth) *s* 60CA.
[12] *Family Law Act 1975* (Cth) *s* 60CC(2)(b).
[13] *Family Law Act 1975* (Cth) s 60CC(2)(a).
[14] *Family Law Act 1975* (Cth) s 60CC(3)(b).
[15] *Family Law Act 1975* (Cth) s 60CC(3)(ca).

needs of the child.[16] These examples are not exhaustive. It is naive to assume that the proposed person could cross-examine and extract evidence in relation to each of these considerations, particularly if they are not legally trained and are not briefed with all material.

b. The Court may take into account family violence when considering what order (if any) should be made[17] to alter the property interests of the parties pursuant to section 79 of the Act.[18] In *Kennon v Kennon*,[19] the Family Court of Australia commented *'... our view is that where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s79'*.[20] In the experience of the Association's members, this is a high threshold for a litigant to satisfy. The litigant must first satisfy the Court of the presence of family violence, and then more onerously, satisfy the Court that the proven incidences of family violence caused an adverse impact on their contributions to the marriage.[21] These two 'elements' cannot be divorced from one another, and a self-represented litigant will be disadvantaged if they do not have a representative who is able to elicit evidence which goes to both of these 'elements'.

c. When determining whether to exercise its discretion in section 79A to set aside or vary a section 79 alteration of property interests order, the Court may consider whether there was duress or suppression of material evidence in the proceeding.[22]

d. When determining what order (if any) should be made in relation to spousal maintenance pursuant to section 75,[23] the Court may consider *'any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account'*.[24] It is conceivable that the justice of the case may require family violence to be taken into account where it *'may have a bearing upon the victim's present and future financial needs'*,[25] for example, an inability to work due to health issues caused by
the previous instances of family violence. Once again, simple questions without regard to the totality of the evidence will impede the fact-finding process.

e. Family violence may also be relevant to a consideration of whether the Court may make an order to set aside a financial agreement, if, for example, a party to the agreement engaged in conduct that was

[16] *Family Law Act 1975* (Cth) s 60CC(3)(f).
[17] *Family Law Act 1975* (Cth) s 79(4).
[18] *Family Law Act 1975* (Cth) s 79(l)(a).
[19] *Kennon v Kennon* (1997) 22 Fam LR 1.
[20] *Kennon v Kennon* (1997) 22 Fam LR I at 24.
[21] Sarah Middleton, 'The Verdict on Kennon: Failings of a contribution-based approach to domestic violence in Family Court property proceedings' (2005) 30(5) *Alternative Law Journal* 237.
[22] *Family Law Act 1975* (Cth) s 79A(l)(a).
[23] *Family Law Act 1975* (Cth) s 74(1), 75(1).
[24] *Family Law Act 1975* (Cth) s 75(2)(0).
[25] Sarah Middleton, 'The Verdict on Kennon: Failings of a contribution-based approach to domestic violence in Family Court property proceedings' (2005) 30(5) *Alternative Law Journal* 237.

unconscionable at the time of making the agreement.[26] Given that these agreements are made out of Court and behind closed doors by both parties 'agreeing' perhaps to both a property division and maintenance arrangement, unconscionable conduct on the part of a perpetrator of family violence can become an important evidential consideration for the Court in later determining whether the financial agreement ought be set aside. If the questioner does not know, for example, the content of the file of the solicitors who acted for the party seeking to set it aside, then justice will miscarry.

Impact on the judicial systems

31. The Law Council of Australia's *Consultation Paper on People Experiencing Economic Disadvantage* released on 2 August 2017 highlights the financial strain under which the Family and Federal Circuit Courts, as well as the Magistrates Courts across most states, currently operate.[27]

32. In light of this recognised financial strain, the Association holds concerns that the proposed Bill, if enacted, may increase the number of applications for domestic and family violence orders ('D&FVOs') in the local State Courts, and also increase the number of appeals in the Family Court after the trial process fails a party.

33. The existence of a D&FVO is one of the proposed pre-conditions of the legislative ban on cross-examination of self-represented litigants under the draft Bill.[28] There is a risk that the number of D&FVOs sought may increase with the incentive of litigants invoking the legislative ban on cross-examination for their opponent, placing a strain on the already stretched resources of local Courts that hear these applications.

34. In addition, there has been a recognised increase in the number of appeals lodged by self-represented litigants in the Family Court.[29] The Association is concerned about the numerous points of appeal potentially arising from cross-examination performed by the proposed person, which may then lead to errors in findings of fact,[30] or the failure to take account of relevant considerations, or a failure of the proposed person to ask a follow up question due to lack of brief. The additional opportunities for appeal caused by the proposed person's incompetence (as understood at law) would place a strain on the already stretched resources of the Family Law Courts in considering and deciding appeals.

35. Again, it is anathema to notions of justice to propose a system such as this, on the flawed rationale that self-represented litigants do not do a good job, thus they can have a person to ask questions who will do an equally poor job in assisting the fact-finding process.

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[26] *Family Law Act 1975* (Cth) s 90K(l)(e).
[27] Law Council of Australia, *People Experiencing Economic Disadvantage: Consultation Paper* (August 2011) Law Council of Australia <Mps://\.\ww.lawcouncil.asn,J1.JJ!files/wcb: pdllJ11sticeo62QProject/Consultation%20PapcrsfPeople%20Experiendng%20Economic%20Disadvantage.pdf>19.
[28] *Family Law Amendment (Family Violence and Cross-examination of Parties) Bi/12017* (Cth) s 102NA(c)(ii).
[29] Family Court of Australia, *15l16 Annual Report* (26 August 2016) Family Court of Australia <btm://'Y ifillii.00;ourt.gov alJ(\11stwcm/com1cc1f fl c4f8cd-35<l0-4474:. 4.fil!i.80bl.'Pc057l!J... 'oA AR 2O16 WEB.pdf?MOD=ATPERES&CVlD> *S,* 78.
[30] Richard Maurice, *A quick guide to Family Law Appeals* (March 2014) Richard Maurice <htm://www.richardmaurice.com/affc.pdf>.

Conclusion

36. Our members act for both alleged victims and alleged perpetrators in the realms of domestic violence. Both (and vulnerable witnesses) deserve the protection of the law.

37. Legislating for unqualified and untrained persons to perform a role which is essential to upholding the rule of law, the fact-finding process and the administration of justice is opposed by our Association.

37. The Association commends the Government for turning its attention to protecting both vulnerable witnesses and alleged perpetrators in family law proceedings. However, the Association urges the Government to implement measures which would protect both the aggrieved and the alleged perpetrator, and would also promote the integrity of the Court's fact-finding process.

38. The draft Bill does not achieve this. Instead, it likely tips the evidential basis in favour of the 'alleged perpetrator' and creates second class litigants who are being provided with only an illusion of justice.

The Association would be pleased to provide further feedback, or answer any queries you may have.

Yours faithfully

Christopher Hughes QC
President