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Dear Sir/Madam

Re – Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017—Public Consultation on Cross-examination Amendment.

We thank the Attorney-General's Department for allowing us to present our submission to your Inquiry into the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017.*

We strongly object to your proposed Bill.

The Family Court has previously indicated that 30 to 40 per cent of the matters involve litigants who are self represented at some point.

(Reference: Family Court of Australia, Self-represented litigants: A challenge: Project Report December 2000–December 2002, FCoA, Canberra, 2003. Preface at page iv)

Whilst this reference is somewhat dated, it can be still assumed that the current percentage of self-represented litigants in the Family Court is quite significant.

One of the tactics often employed in Family Court matters is to wear down the other party financially. These tactics are particularly employed by custodial parents, who can readily gain access to free legal aid.

Therefore should the draft Bill, as it now stands, be successful in being passed by Parliament, it will no doubt put more pressure on the non-custodial parents to use legal representation. This would be normally at their cost. This is because legal aid is not normally available to non-custodial parents.

As a result, the passing of this draft Bill into law would provide a huge and unfair financial advantage to custodial parents and similarly huge and unfair financial disadvantage to non-custodial parents, in family law proceedings.

At the same time, there would be further other negative effects.

For example, there would an unnecessary financial windfall to the lawyers who would be unnecessarily required in increased numbers, as a result of this draft Bill being passed into law.

Also, court cases would be extended for much longer periods. This is due to the increased involvement of lawyers, who are paid by the amount of time that they spent on each case. As a result, the existing family court system would be even further clogged up.

These are our replies to your twenty one (21) questions.

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

   Reply

   No.

   Direct cross-examination should not be automatically banned in specific circumstances.

   Natural justice should be available to all parties in the Family Court.

   If this proposed cross-examination bill is passed by Parliament, then there will be a further denial of natural justice for the self-represented examining party. This is in the self-represented examining party not being to able personally challenge, through cross-examination, unfounded allegations of family violence.

   The stringent requirements of section 117AB in the *Family Law Act 1975,* where it used to be available to penalise a person, who had knowingly given false evidence, no longer exits.

   Section 117AB was added by a previous Liberal-National Party Government as part of the changes made by the *Family Law Amendment (Shared Parental Responsibility) Act 2006 (No. 46, 2006).*

   Unfortunately this section 117AB was then later repealed by a Labor Government in the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (No. 189, 2011).*

   It is now open for the witness party to make whatever false allegations that they may wish to make in the Family Court. This is without the fear of possibly receiving any penalty for doing so.

   It is now feared that the witness party will make even more false allegations. This is by knowing that the witness party could not be personally cross-examined by the self-represented examining party.

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

   Reply

   No.

   There are three (3) paragraphs to sub-section 102NA(1)(c). Comments are provided below on each of these three (3) paragraphs.

   (a). Paragraph102NA(1)(c)(i)
   Paragraph 102NA(1)(c)(i) refers to someone who has been charged with family violence or has made a threat of violence.

Charging someone with family violence does not necessarily result in a conviction. One should be proven guilty before it used in a court proceedings.

At the same time, what constitutes a threat of violence has not been defined in the draft Bill.

For example, the alleged victim may unreasonably perceive a threat. This could be in the mere tone of another person's voice. It should be then inappropriate to use that perception in these court proceedings.

As such, this proposed paragraph is too loosely worded.

(b). Paragraph 102NA(1)(c)(ii)
Paragraph 102NA(1)(c)(ii) refers to final family violence orders. Final (and interim) family violence orders are all too easily obtained in the local and magistrates courts of the various states and territories.

This is because the current family violence legislation in these states and territories says that the aggrieved party, normally the custodial parent, only has to utter the words that they have a reasonable fear of the other person. The magistrate is then normally mandatory obliged to issue the interim orders in the first instance and then the final orders at a later hearing.

It is submitted that the circumstance of a final violence order, as provided in paragraph 102NA(1)(c)(ii), does not provide for a suitable circumstance.

(c). Paragraph 102NA(1)(c)(iii)

Paragraph 102NA(1)(c)(iii) refers to injunctions made under section 68B and 114 of the *Family Law Act 1975*. Injunctions can be issued for all sorts of reasons. These reasons are often not related to family violence e.g. property, superannuation and child support issues.

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.

Reply

No.

The adding of these additional circumstances would only create a further denial of natural justice.

This is both where the examining party is the alleged perpetrator and where the witness party is the alleged perpetrator (as described in Note1).

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?**

   Reply

   No.

   Notwithstanding our position that direct cross-examination should not be banned, it can be said that if the alleged victim can ask questions of the alleged perpetrator, then it only stands to reason that the alleged perpetrator should be able to similarly ask 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?**

   Reply

   No.

   We again note that we believe that direct cross-examination should not be banned.

   All parties should be allowed to personally cross-examine the other party. They should not be restricted by the other party (or the court) making such an application to restrict direct cross-examination.

   This is because it would be not be in the interests of natural justice to be able to so restrict direct cross-examination.

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.**

   Reply

   Court-appointed people should not be the preferred option.

   Court-appointed people would not usually be as knowledgeable about the relevant issues, as the examining party.

   Justice has to be seen to be done as well as being done.

   For example, there is a perception in the community that the current Family Court-appointed family counsellor or the psychologist has to provide a report that would suit the court's agenda. Otherwise it is perceived that the counsellor or the psychologist would not get work in the future.

The same comments regarding this perceived bias could be equally applied to the use of the court-appointed person who would be required to act for the self-represented examining party. It could be perceived the court-appointed person would be still acting to suit the family court's agenda.

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

   Reply

   No particular qualifications would be required.

   Court-appointed persons should be seen as being similar as to the "McKenzie friend" that can be now used in the Family Court and also in other courts.

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

   Reply

   No.

   As noted above in the reply to question 7, the court-appointed persons would be seen as being similar to the "McKenzie friend" that can be used in the Family Court.

   The term "McKenzie friend" is not mentioned in any of the acts, the rules or the regulations. However it is an unofficial term that is commonly recognised in the various court systems, including the Family Court.

   The details about the requirement of a "McKenzie friend" can be often found in the judgments where self-represented litigants have been used.

   For example, one requirement is that a "McKenzie friend" cannot be a previously declared vexatious litigant. This requirement is not found in any act, rule or regulation. However this requirement can be readily found in the judgements concerning the appointment of a "McKenzie friend". The presiding judge will simply ask that person if they have ever been declared to be a vexatious litigant. Obviously if that person has been previously been declared to be a vexatious litigant, then they cannot act as a "McKenzie friend".

   The same broad type of requirements should apply to any court-appointed person.

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.**

Reply

No.

Court-appointed persons should not be required.

However if they are required then they could act in the same way as a "McKenzie friend" now acts in the Family Court. The "McKenzie friend" has been used in the Family Court since the early 1980's. However, as noted in the reply to question 8, the role of the "McKenzie friend" has not been defined in any of the acts, the rules or the regulations.

It is considered that should some (or all) of the above suggested requirements be inserted in the *Family Law Act* (or any other act or the Family Law Rules and Regulations), then there could readily be a public perception that the Family Court is simply operating like a "star chamber" in these types of family violence proceedings.

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

Reply

No.

If the self-represented person is allowed to nominate the person then why should the self-represented person not be allowed to ask questions in any case.

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

Reply

Yes.

The self-represented person would normally have more knowledge about the particular case than would the court-appointed person.

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?

Reply

No.

Justice should not only be done, it should be also seen to be done.

If both parties to the proceedings have to consent to direct cross-examination, as proposed, then it is almost certain that consent would not be provided. This is particularly by the witness party.

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?

Reply

This question as it now stands does not make sense.

We have assumed that the word "not" should be inserted in the above question.

This is so that question 13 would now be read as follows:

> Should the court only grant leave for direct cross-examination to occur if it has considered whether the cross-examination will not have a harmful impact on the party that is the alleged victim of the family violence? (underlining added)

Our reply is no.

Sub-section 102NA (3) creates an anomaly. The sub-section states that the court would have to consider the adverse effect of the cross-examination.

However how can the adverse effect of the cross-examination be determined when the witness party has yet to be cross-examined?

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?

Reply

As in the above question 13, it is assumed that the word “not” should be inserted in the above question.

Question 14 would now read as follows:

> Should the court only grant leave for direct cross-examination to occur if it has considered whether the cross-examination will not 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? (underlining added)

Our reply is no.

This is the same answer to question 13 above. That is, how can the adverse effect of the cross-examination or the ability of the party conducting the cross-examination be determined when the witness party has yet to be cross-examined?

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

Reply

No.

We believe that direct cross-examination should not be automatically banned in the first instance.

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?

Reply

No.

It is considered that any new legislation should not be made retrospective.

It is noted that the Family Court has indicated that 30 to 40 per cent of the matters involve litigants who are self represented at some point.

(Reference: *Family Court of Australia, Self represented litigants A challenge: Project Report December 2000–December 2002,FCoA, Canberra, 2003. Preface at page iv).*

This is a significant number of the overall number of litigants.

The passing of this proposed bill, as it now stands, would no doubt force a significant number of self-represented litigants to obtain legal representation.

It is noted that this would be the same situation that applies in the High Court of Australia. Self-represented litigants have been effectively excluded from the High Court process by the application of Rule 41.10.5 of the High Court Rules 2004.

In any case, very often the self-represented litigant cannot afford a legal representative in Family Court proceedings. This is particularly so if the self-represented litigant is a non-custodial parent, who would not normally be granted free legal aid.

The result may cause the self-represented litigant to be placed in significant financial hardship. Alternatively it may force the self-represented litigant to abandon their application or not contest a matter where they are the respondent.

Therefore to make the new legislation retrospective would make it unfair for those self-represented litigants, who have pending court cases. This is particularly so in the case of the self-represented litigant being a non-custodial parent.

Also, as noted to our replies at questions 8 and 9, the court-appointed model is not a satisfactory solution.

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

Reply

No.

This draft Bill will not accord fairness to the parties.

It is envisaged that making of any amendments would also not change that situation.

The only way for all parties to have a fair hearing is not to proceed with the amendments (and the draft Bill), in the first instance.

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?

Reply

No.

This draft Bill will not accord procedural fairness to the parties

As noted in our reply to question 17, it is envisaged that making of any amendments would not change that situation

Direct cross-examination should not be automatically banned for self-represented litigants.

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

Reply

No.

As noted in our replies to questions 17 and 18, direct cross-examination should not be automatically banned.

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?

Reply

A great many allegations of family violence, made in the Family Court, are unfounded.

They have simply been made for the purpose of obtaining a financial gain by the alleged victims.

For example, by reducing contact through these unfounded allegations of family violence, there is a corresponding reduction of contact with the children by the non-custodial parent. At the same time, this results in increased child support payments and the gaining of increased percentages of the property and superannuation asset pools.

The draft bill will make it much harder for the self-represented examining party to challenge these unfounded allegations of family violence.

Unfortunately, rather than having unintended consequences for the alleged victims of family violence; this draft bill, including any proposed amendments, will simply assist in a cover-up of the unfounded allegations.

21. Any general comments.

We believe that the issue of family violence has been over emphasised.

This is often for the alleged victim to obtain a financial advantage over the other party in the family court proceedings. It is also simply for the purpose of the alleged victim to obtain their form of revenge.

In the support of this comment regarding over-emphasis, we would like to make two (2) further comments:

1. The Australian Human Rights Commission report "Change the course: National Report on Sexual Harassment at Australian Universities 2017".

The Australian Human Rights Commission released their report "*Change the course: National Report on Sexual Harassment at Australian Universities 2017*" on 1 August 2017.

We believe that the report was a media beat-up of this particular aspect of family violence.

The AHRC report stated in the Executive Summary and the media release that "*the National Survey measured the experiences of over 30,000 students across all 39 Australian Universities*". On the face of it, this statement is significant.

However one has to go to page 22 of the AHRC report, which is located deep in the report to find that the sample was actually 319,252 students. That is, less than 10 per cent of the sample responded to the survey.

At page 26 of the report, there is a rider that states "*the survey data has been derived from a sample of the target population who were motivated to respond*". And it is stated that "*it may not be representative of the entire university student population*"

However none of this additional information was mentioned in either the Executive Summary or the media release.

Most people would either just read just the Executive Summary or the media release. They would not go into the bulk of the report to ascertain the facts behind the report.

Furthermore it should be also pointed out that, at page 37 of the AHRC report, it was stated that the most common form of sexual harassment was "inappropriate staring or leering (14 per cent)"

Again, this important information was found deep in the report. It is not provided in either the Executive Summary or the media release.

In summary, less that 10 per cent of the sample replied. At the same time, the most common complaint was a relatively insignificant issue.

2. Over-emphasis of Family Violence in various programmes

Daily Telegraph columnist, Miranda Devine in her article "*Domestic violence: Stop demonising our little boys*" on 12 April 2017 quoted comments made by Senator David Leyonhjelm. The Senator had cross-examined the public servants responsible for the
"*Let's Stop It at the Start*" campaign at a recent Senate Estimates hearing held on 2 March 2017.

Miranda Devine reported that Senator Leyonhjelm had stated that it should be "victims of domestic violence, full stop".

Furthermore we note that Senator Leyonhjelm later made the following comments on the same issue at a Senate Estimates Hearing held on 1 June 2017:

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> *I am not suggesting that violence against women is acceptable or desirable or anything other than something to be avoided. What I am questioning is the commitment of taxpayers' funds to a program where, as I raised last estimates, the fundamental assumption is that there is a clear link between violence towards women and attitudes of disrespect and gender inequality.*

This indicates that this programme (and by inference other such programmes) may be over-emphasised.

3. Conclusion.

If family violence is over-emphasised, as seems to be as indicated above, we would further question the need for these proposed unfair and draconian legislative changes as formulated by the Family Law Unit of the Attorney-General's Department in the draft cross-examination Bill.

Yours faithfully,

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