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

*(Consultation closes **COB 25 AUGUST 2017**). Please send electronic submissions to familylawunit@ag.gov.au)*

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- a witness in the proceedings.

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Your submission

Insert your text here and send the completed submission to the Attorney-General's Department at familylawunit@ag.gov.au.

Please be advised that the following submission from Women's Legal Services Australia (WLSA) has been endorsed by the following organisations:

- National Association of Community Legal Centres
- National Family Violence Prevention and Legal Services
- People with Disability Australia
- WESNET
- Australian National Research Organisation for Women's Safety
- Women's Health NSW
- No to Violence Men's Referral Service
- Northern Rivers Community Legal Centre
- Illawarra Legal Centre
- Immigrant Women's Speakout Association of NSW
- Women's Legal Service NSW
- Women's Legal Centre ACT and Region
- Domestic Violence NSW
- Inner City Legal Centre
- North Queensland Women's Legal Service
- Federation of Community Legal Centres Victoria
- Elizabeth Evatt Community Legal Centre
- South West Community Legal Centre

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

To ensure procedural fairness and protect victims of family violence, Women's Legal Services Australia (WLSA) supports the introduction of a broader prohibition on direct cross-examination than is envisaged in the exposure draft. This should be underpinned by early risk assessment processes in the Court to appropriately identify matters where risks and evidence of family violence arise.

Experience of women in the family law system

In a period of about three months over 2015-2016, WLSA asked women to respond to a survey about their experiences of the family law system in relation to direct cross examination. Of the 338 survey participants, 147 women said they had experienced direct cross-examination by their abuser in the family law courts, and shared their experience. Many women described feeling frightened, unsafe, re-traumatised, and intimidated. Some also expressed having physical symptoms of stress leading up to and following the event, including panic attacks, weight and hair loss, "being physically sick", sleeplessness and post-traumatic stress disorder (PTSD). A number of participants described the process as "court sanctioned abuse" - systems abuse, in other words.

In addition, 77 participants responded that their family law dispute had settled by way of consent orders. Of that smaller group, 44 women said that the "prospect/fear of personal cross-examination by [their] ex-partner" was a factor in their decision to settle, and 33 said "other". These "other" reasons included fears which related to the fear of cross-examination:

"The judge pointed out that cross examining me may lead to further decline of my mental condition which could halt proceeding"

"I couldn't go back in that room and face him"

Participants were also asked how significant the prospect or fear of direct cross-examination by their ex-partner was on their decision to settle prior to trial. Of the 60 women who responded to this question, 41 women (68.3%) said that it was very significant, 6 women (10%) said it was of medium significance, and 13 women (21.7%) said it was one of many factors.

These findings indicate that the fear of direct cross-examination can directly impact the decision of women to finalise family law matters prior to hearing where family violence is involved. Procedural fairness in legal proceedings should require the court to put in place measures to ensure that witnesses can provide their evidence without fear or intimidation. Prevention of direct cross-examination of a victim of violence is one such process.

For Aboriginal and Torres Strait Islander victims/survivors of family violence – the majority of whom are women – these issues are compounded by multiple, additional and complex barriers to proceeding to a final family law hearing, and indeed accessing the family law system at all. As outlined by the National Family Violence Prevention and Legal Service (NFVPLS) in its submission to the Commonwealth Parliamentary Inquiry into A Better Family Law System to Support and Protect Those Affected by Family Violence:[1]

[1] NFVPLS, *Submission to Parliamentary Inquiry into A Better Family Law System to Support and Protect Those Affected by Family Violence*, 2017, pp 3 and 9-10, available at: www.nationalfvpls.org/images/files/NFVPLS_submission_family_law_parl_inquiry_-_final.pdf

"For many Aboriginal and Torres Strait Islander communities there is a perception that the family law system is culturally insensitive and fear of child removal and child protection intervention acts as a major barrier to Aboriginal victims/survivors accessing the family law system
…

Aboriginal and Torres Strait Islander victims/survivors of family violence face a wide array of complex and compounding barriers to reporting family violence, accessing the family law system and accessing culturally safe support. These barriers include:

- *Inter-generational trauma from the legacy of Australia's colonial history, including oppression through legal and government systems, the Stolen Generations and policies of forced assimilation leading to a profound mistrust in police and the legal system;*
- *Fear of child protection notifications and child removal initiated by family law proceedings;*
- *Lack of understanding of legal rights and options concerning family law and how to access supports;*
- *Poor police responses and discriminatory practices within police in relation to the enforcement of family violence orders leading to a lack of faith in the capacity of court orders to provide protection and compliance;*
- *Mistrust of mainstream legal and support services to understand and respect the needs, autonomy and wishes of Aboriginal and Torres Strait Islander victims/survivors;*
- *Risk of renewed or escalating violence and threats by the perpetrator (and/or his supporters) to re-exert control over the victim/survivor;*
- *Community pressure or backlash for 'breaking up the family' and/or utilising the Western legal system which, for many, is intrinsically linked with the over-policing and over-incarceration of Aboriginal and Torres Strait Islander peoples and the removal and cultural dislocation of Aboriginal and Torres Strait Islander children from their families and communities;*
- *Poverty and social isolation;*
- *Lack of cultural competency and indirect discrimination across the support sector, including for example discriminatory practices within police and child protection agencies, lack of culturally appropriate housing options, alienating and deterrent communication and client/patient approaches by medical, legal, community services and other professionals."*

For many Aboriginal and Torres Strait Islander people accessing the family law system is, in itself, a potentially re-traumatising process; the prospect of facing direct-cross examination by one's abuser at the end of over-coming all of these hurdles may be insurmountable.

Early risk assessment

As highlighted by the responses of women set out above, the threat of direct cross-examination by a perpetrator can act as a deterrent to proceeding to hearing in family law matters. It is important that this threat is removed in as many circumstances as possible, to ensure the family law system is accessible and fair for all parties.

Whilst we understand the need to manage the application of the automatic ban in family law matters through clear legislative direction as to when the automatic ban applies, in our view the automatic ban needs to be available more broadly than envisaged under the exposure draft. Specific examples of the implications of limiting the availability of the ban to those circumstances currently envisaged under s 102NA are highlighted below in response to question 2.

In our view determining when it is appropriate for the ban to apply is best managed through the introduction of early risk assessment and risk identification processes throughout the family law system. Ideally such risk assessment processes would be undertaken in relation to every matter filed with the Court. At a minimum however, these risk assessment processes should be enlivened in circumstances where family violence is identified by a party in a Notice of Risk or Notice of Child Abuse, Family Violence or Risk of Family Violence, or where violence arises during the proceedings.

We note however that there are different rules in relation to the use of these forms between the Family Court of Australia and the Federal Circuit Court (Notices of Risk are mandatory in all proceedings seeking parenting orders in the FCC, but not in the FCA).[2] In our view, in the absence of blanket risk assessment processes being in place, these forms should be mandatory in both the Family Court and the Federal Circuit Court in both parenting and property matters, and used as a preliminary mechanism to enliven further risk assessment being conducted with a view to the ban applying. As highlighted by WLSA in our submission to the Parliamentary Inquiry into a better family law system to support and protect those affected by family violence ('Parliamentary Inquiry'), there is a clear ethical and economic imperative to support families in the family law system to reduce family violence and other safety risks. The presence of family violence increases the likelihood a family will need to use the family law system, and a more intensive and lengthy use of that system. Unsurprisingly, parents who report a history of family violence or the presence of ongoing safety concerns take longer to sort out their arrangements.[3]

The early identification of risks associated with family violence and other safety concerns is the first step toward supporting families to reduce or at least manage these risks, and could assist the court to put in place measures to ensure that the legal process is conducted as safely as possible. These processes must be comprehensive and designed to be inclusive of diverse and unique experiences of family violence, meaning they must be trauma informed, disability aware, and culturally competent (recognising the diverse experiences of Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds and LGBTIQ communities).

We envisage that such risk assessment could be conducted by a family consultant with specified family violence expertise who is embedded in the family court and federal circuit court registries, and apply ideally to all matters, but at a minimum to all matters where parties have alleged violence or family violence arises during proceedings. As part of this process a recommendation would be made by the family consultant about whether the ban on direct cross-examination should apply in relation to that particular matter, and on this basis a Registrar with family violence training would decide whether the ban would, or would not, apply.

The ability for parties to otherwise apply for a ban on direct cross-examination, and the Court's discretion to make such an order (as envisaged under s 102NB), would also be retained in the legislation to situations where such a recommendation is not made, but one or both of the parties do not want to be directly cross-examined.

Consideration also needs to be given as to who could conduct this risk assessment if a matter is filed in a local court.

In our view the person conducting the risk assessment would need expertise in relation to family violence, trauma-informed practice, disability awareness and cultural competency (including in relation to working with Aboriginal and Torres Strait Islander people and communities, people from culturally and linguistically diverse backgrounds,

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[2] FCA notice here: http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/forms-and-fees/court-forms/form-topics/Family+Violence/form-nchild-abuse
FCC notice here: http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/court-forms/form-topics/family+law/notice-risk

[3] Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, and Lixia Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies, Melbourne, 2009 p 65, 77-8.

and LGBTIQ communities, with an understanding of the different ways in which family violence might manifest for these groups).

For Aboriginal and Torres Strait Islander parties, risk assessment processes must be culturally competent and alternative mechanisms should be developed to ensure this. We support the NFVPLS's recent recommendations[4] for the (re)introduction of Indigenous Family Consultants and Indigenous Liaison Officers within family law courts as a critical component towards improving the family law courts' cultural competence and accessibility for Aboriginal and Torres Strait Islander people. With appropriate family violence training and support, Indigenous Family Consultants would be best placed to conduct culturally safe and relevant risk assessment for Aboriginal and Torres Strait Islander families. In addition, due to the many barriers faced by Aboriginal and Torres Strait Islander women and Aboriginal and Torres Strait Islander victims/survivors of family violence, as outlined above, access to appropriately resourced, culturally safe, holistic and specialist legal advice and representation is vital to managing risk and supporting Aboriginal and Torres Strait Islander victims/survivors and their children through the family law system. This must involve Aboriginal and Torres Strait Islander victims/survivors being afforded the choice of accessing legal (and other) support from Aboriginal Community-Controlled Organisations.

We note that over the years there have been numerous recommendations made by academics, law reform bodies and parliamentary committees, that the family law system build into its process a national and consistent risk assessment framework. We direct you to section 1 of our submission to the Parliamentary Inquiry for a detailed overview of these recommendations.[5] We also note the announcement of the Family Court of Australia and the Federal Circuit Court in June 2016 that they would be implementing a 'new screening approach for family violence cases' in some cases.[6] Whilst no comprehensive information has been made available in relation to how and when this new approach will be applied, it indicates that work may already be in train within the Courts which, with additional funding, could provide a mechanism to facilitate the early identification of matters where the automatic ban should apply.

In our view, this approach also addresses any concerns that a broader prohibition could result in false and vexatious allegations of violence being made. In such circumstances the application of the ban would be underpinned by an independent and informed assessment of risk. Should concerns still arise in relation to this issue then in our view protections against such an abuse of process currently operate pursuant to s 117 of the *Family Law Act 1975* ('the Act') which provides discretion for the court to make costs orders where the court is of the opinion that there are circumstances that justify it doing so. The Act specifically provides that the court must have regard to the conduct of the parties in making this decision. In our view this discretion, along with general prohibition on giving false evidence in court, provides sufficient deterrence and response to such abuse of process.

If early risk assessment processes are not implemented however, to ensure the automatic ban is available to all victim/survivors, it is our view that the automatic ban should extend to all matters where family violence is alleged by a party in a Notice of Risk/Notice of Child Abuse, Family Violence or Risk of Family Violence (and that these forms be mandatory filing requirements in both courts, and in both property and parenting matters); or where it is identified by the Court during proceedings.

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[4] See for example: NFVPLS, *Submission to Parliamentary Inquiry into A Better Family Law System to Support and Protect Those Affected by Family Violence*, 2017, recommendation 15, available at: NFVPLS, Submission to Parliamentary Inquiry into A Better Family Law System to Support and Protect Those Affected by Family Violence

[5] See from p. 13 to p. 17 of the Submission.

[6] Federal Circuit Court of Australia (20 June 2016), *Media Release - Family law system needs more resources to deal with an increasing number of cases involving family violence*. Available online at: http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/news/mr200616

Discretion to grant leave for direct cross-examination

We support the inclusion of discretion for the Court to grant leave for cross-examination to be done directly, as currently envisaged under s 102NA(2) of the exposure draft bill, and the considerations for the Court in making a decision about whether leave should be granted as set out at s 102NA(3).

As discussed below in more detail, the informed consent of the applicant (i.e. the alleged victim) must be obtained before leave is granted. It is important that for this purpose appropriate decision-making supports and/or communication supports are available where needed to ensure that all people who have experienced violence are able to have input and provide informed consent. With respect to Aboriginal and Torres Strait Islander victims/survivors of family violence, the importance of ensuring purported consent is fully informed and free from intimidation and duress is especially important given the range of barriers outlined above. Access to culturally safe and specialist legal advice and representation is essential in this regard.[7]

This approach enables all victims of violence to have a say in how their matter is treated, whilst also providing the Court with the discretion to prohibit direct cross-examination where, despite the parties' wishes, doing so may adversely affect the ability of one or both parties to give evidence or conduct cross-examination.

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

As discussed above, in our view that the automatic ban should apply in all circumstances where family violence is identified and following a risk assessment it is recommended that application of the ban is appropriate.

Subsection 102NA(1)(c) restricts the automatic application of the prohibition on direct cross-examination to situations where:

- one party has been charged or convicted of an offence involving violence in relation to the other party;
- a final family violence order is in place; or
- there is an injunction in place in relation to the parties under the *Family Law Act 1975* (Cth) s 68B or s114.

Whilst we agree with the automatic ban on direct cross-examination in the above circumstances, our view is that the automatic ban should apply more broadly, and be supported by the implementation of early risk assessment procedures as outlined above.

The Family Law Council (FLC) stated in its 2016 final report on *Families with Complex Needs and the Intersection of Family Law and Child Protection* ('FLC Report) that over 50% of children's matters in the family law courts involve family violence and other safety concerns for children.[8] However, not all of these cases will have had a final family violence order (FVO) made, nor will there be criminal charges or convictions in all of them.

Family violence often occurs 'behind closed doors', and separation (and the commencement of family law proceedings) is often the first time violence is disclosed to third parties, or voiced in a forum where such evidence can be tested. In this way, the approach of s 102NA operates to further exclude people who

[7] See recommendation 16, above n 3, for further detail.

[8] FLC Final Report at 22, referring to: R. Kaspiew, R. Carson, J. Dunstan, L. Qu, B. Horsfall, J. De Maio, S. Moore, L. Moloney, M. Coulson and S. Tayton, *Evaluation of the 2012 family violence amendments: Synthesis report* (Australian Institute of Family Studies: 2015), 16- 17.

already face significant barriers to accessing formal legal responses, many of whom the evidence tell us are also more likely to experience family violence. This may be especially so for Aboriginal and Torres Strait Islander victims as evidence indicates as much as 90% of family violence against Aboriginal and Torres Strait Islander people goes unreported.[9] Victims with a disability, who research shows as being disproportionately affected by family violence and who may also face significant barriers to reporting, may also be disproportionately excluded under the current approach.[10]

These victim/survivors will instead have to seek exercise of the Court's discretion to apply the ban on direct cross-examination, pursuant to s 102NB of the proposed amendments.

The difficulties faced by victims in disclosing and giving evidence in relation to family violence has been recognised in research and policy. In their 2010 report Family Violence: A National Legal Response, the Australian and NSW Law Reform Commissions highlighted the difficulties in victims disclosing violence and giving evidence about violence to courts –

"*Stakeholders set out a range of reasons why people who have experienced family violence may not readily disclose it. A victim of family violence may hide the abuse due to feelings of shame, low self esteem or a sense that he or she, as the victim, is responsible for the violence. A victim may feel that he or she will not be believed. A victim may hope that the violence will stop, or might believe that violence is a normal part of relationships. Because of the family violence, a victim may feel powerless and unable to trust others, or fear further violence if caught disclosing it*."[11]

Restricting the automatic application of the prohibition to the above circumstances causes a range of issues including:

- Separation, and the commencement of family law proceedings, may be the first time a person discloses family violence. In these circumstances the above criteria will not be met, irrespective of the level of risk identified by parties.
- It fails to account for a history of violence, except where previous violence has led to a charge or conviction. The existence of previous FVOs, or the acceptance of evidence of family violence in previous family law proceedings does not give rise to automatic protection. This is especially relevant now when family law proceedings can be protracted and take place over many years or can take many years to reach final hearing, meaning even where FVOs may have been in place at the beginning of proceedings they may have lapsed by the time the final hearing occurs.
- It does not apply where interim FVOs have been issued. Whilst Interim FVOs are usually acquired without a state/territory court making finding of facts about a case, they are issued based on an assessment of risk made either by police or a court.
- Where family law proceedings coincide with FVO proceedings and/or criminal investigations such that final FVO or charges or convictions have not occurred before the matter proceeds to hearing in the family law courts, the victim would not have automatic protection, even where there are clear and serious concerns.
- It may disadvantage family violence victims subject to non-physical forms of violence such as emotional abuse and economic abuse. Despite legislative changes to improve understanding of and recognise non-physical forms of violence, it remains difficult to obtain a legal response such as

[9] The Australian Productivity Commission, *Overcoming Indigenous Disadvantage - Key Indicators 2014* (2014) 4.91 available at: Productivity Commission, Overcoming Indigenous Disadvantage - Key Indicators 2014 and Matthew Willis, 'Non-disclosure of violence in Australian Indigenous communities', *Trends & issues in crime and criminal justice No. 405* (2011) Australian Institute of Criminology available at http://www.aic.gov.au/publications/current%20series/tandi/401- 420/tandi405.html

[10] Law Council of Australia, *People with Disability*, Consultation Paper for The Justice Project (2017), available at: Law Council of Australia, People with Disability, Consultation Paper

[11] ALRC, *Family Violence - A National Legal Response (ALRC Report 114)*, 2010, available at ALRC, Family Violence - A National Legal Response

a criminal conviction or final restraining order for non-physical abuse alone.

- It may also disadvantage groups of victims who may be less likely to obtain a formal legal response to family violence due to cultural and/or language barriers, such as Aboriginal and Torres Strait Islander victims and victims from culturally and linguistically diverse backgrounds. For example, it may act to inadvertently discriminate against Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault who are less likely to disclose violence and/or receive an appropriate response from police for a range of complex reasons.[12]

We are concerned about the proposal to restrict the automatic ban to those circumstances set out at Subsection 102NA(1)(c) and supports an approach which is underpinned by early risk assessment and risk identification by the Court as outlined above.

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.

As outlined in our response to Question 1 above, we support an approach where the application of the prohibition on direct cross-examination is informed by early risk assessment undertaken by appropriately trained court staff. These procedures would ideally apply to all court applications, however at a minimum should apply where family violence is identified by one or both parties through their Notices of Risk/Notice of Child Abuse, Family Violence or Risk of Family Violence (which would become a mandatory filing requirement in all matters in both courts and in both property and parenting matters), or where family violence is identified during proceedings. This is discussed in more detail above. Further information about early risk assessment in the family law system is also outlined in our submission to the Parliamentary Inquiry.

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?

In our view the ban on direct cross-examination should apply to both parties in the proceedings asking questions of each other.

The survey conducted by WLSA in 2015-16, referred to above, also found that personally cross-examining their perpetrator had a negative impact on victims of violence. Thirty eight of the survey participants stated they had had to personally cross-examine their abuser. Themes which emerged in their descriptions of this experience included fear to fully challenge the other party's evidence, and fear of retribution for doing so:

"*I was afraid to really question him and I felt when I tried the Judge continually silenced me*"

"*I was so scared because he has a look in his eye that still intimidates me, and I had the future safety of my child in jeopardy. I just wanted to get down on my knees and BEG the judge to allow me to protect my daughter. It's so hard to appear calm and collected on the inside when you have so much hatred for the person who has hurt you and your child, and so much fear for what lies ahead. And also fear that he might show up at your house later and become violence because he's mad at you standing up to him."*

[12] See pages 3 above. For further detail regarding poor police responses towards Aboriginal and Torres Strait Islander victims/survivors of family violence see NFVPLS, Submission concerning Amendments to the Family Law Act to Respond to Family Violence, 2017, pp 14-15 , available at www.nationalfvpls.org/images/files/National_FVPLS_Forum_Family_Law_Act_Submission.pdf. See also FVPLS Victoria, Submission to the Royal Commission into Family Violence, 2015, pp 46-53, available at www.fvpls.org/images/files/FVPLS%20%Victoria%20Submission%20to%20%Royal%20Commission%20-%20FINAL%20-%20-%2015July15.pdf

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?

In WLSA's view the Court's discretion to lift the ban, where it applies automatically (i.e. to let direct cross-examination occur where it would otherwise be automatically banned under the proposed provisions), should only be exercised on application by the victim.

Women who have experienced violence who choose not to access the protection from direct cross-examination should be empowered and supported to exercise their agency in this regard. We are however supportive of the considerations set out at s102NA(3)(b)(i) – (iii) which sets out considerations for the Court in deciding whether to grant leave for direct cross-examination to occur.

We would also recommend that some legislative guidance be included which precludes the Court from making a decision preventing direct cross-examination in instances where it is sought by the victim solely on the basis of the severity of the violence, its impact on the victim and the victim's level of fear. The WLSA survey showed that a small minority of respondents found that, with the right support, the process of direct cross-examination could be empowering, and also highlights that a woman may choose to be cross examined by the perpetrator, despite their fear, as a way of revealing the "true character" of the perpetrator to the court:

"*In my first case I was very well supported in my case by an awesome legal team, independent children's lawyers and barrister who were also supportive so I felt fine, and the experience was somewhat empowering to be able to have things thrown at me that I would have previously reacted to….in my second separate case where I had no legal representation, it was terrifying and felt like a repeat of having to live everything that I had left.*"

"...*I found it empowering being able to answer him in the safety of the court. A lawyer may have been more successful at being brutal towards me*"

"…*I remember being so frightened about not using the correct terminology in Court but the Judge was very understanding. After the cross-examination I felt so exhausted but also empowered that I had achieved so much*…"

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.**

In our view the issue of direct cross-examination could be dealt with most effectively by increasing access to on-going legal advice and representation to all parties involved in family law matters where the family has been impacted by family violence. The difficulties for many parties in accessing appropriate and affordable legal representation in matters involving family violence raises serious questions given family violence is a priority area of the National Partnership Agreement. We also draw your attention to recommendations 6 and 9 in NFVPLS' submission to the Parliamentary Inquiry which proposed a requirement for all Aboriginal and Torres Strait Islander People who have experienced family violence to be legally represented in family law proceedings, and emphasised the importance of access to culturally safe and specialist legal assistance services.[13]

Where full representation is not possible, we urge the Government to implement an appropriate and effective model which is designed with the needs of victims at its centre. We note that our research indicates that a range of models are being used across the world to minimise the impact of victims giving evidence, and being cross-examined, in family and other legal proceedings where violence is a factor. A summary of this research is **attached** to this submission for your information and reference.

In our view, any model that is implemented will require appropriate funding to ensure adequately trained professionals are available to participate in proceedings to remove the need for a self-represented litigant to directly cross-examine another party, or witness, where there are allegations of violence in relation to that party or witness. In our view a separate funding stream needs to be created to ensure that the availability of legal assistance is not negatively impacted by the introduction of such a scheme.

WLSA considers the person appointed by the Court should be:

- **Independent and with a duty to the court, not the parties.**
- **Legally trained and professional** with an ability to determine the reasonableness and relevance of questions and rework questions to make them appropriate, relevant and understandable to the witness**.**
- **Trained in trauma-informed practice and the impact and nature of domestic and family violence** including the specific impacts, unique needs and barriers faced by particular cohorts such as Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women, women with a disability, LGBTIQ communities, women in regional, rural and remote areas, older women and younger women**.** Appropriate training may also include training in working with men who use violence, for example the No To Violence program.
- **Culturally competent and disability aware** with an understanding of the needs and impacts of violence on diverse groups including Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, people with a disability and LGBTIQ communities**.**

We note that the Prisons and Court Bill 2017 (UK) which included provisions relating to a ban on direct cross-examination in family law proceedings also included provisions (proposed s31W) relating to the costs of legal representatives appointed for the purpose of cross examination which is to be funded "*out of central funds*".[14] The Ministry of Justice in the UK recently undertook research into the cross-examination of vulnerable and intimidated witnesses. The main solution put forward by judicial officers, lawyers and court

[13] NFVPLS, *Submission to Parliamentary Inquiry into A Better Family Law System to Support and Protect Those Affected by Family Violence*, 2017, available at: NFVPLS, Submission to Parliamentary Inquiry into A Better Family Law System to Support and Protect Those Affected by Family Violence

[14] Prisons and Courts Bill (HC Bill 170) available at: https://publications.parliament.uk/pa/bills/cbill/2016-2017/0170/cbill_2016-20170170_en_1.htm

support workers was "*the provision of publicly funded advocates to be appointed for the purposes of cross-examination*".[15]

We note that this issue highlights the need for greater family law reform to address the challenges of self-represented litigants in complex matters involving allegations of family violence. As highlighted by the Family Law Council in its 2016 report into families with complex needs, increasingly the traditional adversarial approach appears incongruent to achieving the objects of the family law system –

"*Council also notes the growing recognition within the judiciary of the limitations of the adversarial method for resolving family disputes particularly in systems where significant numbers of self-represented litigants make up large numbers of the users of that system*."[16]

The potential for a more inquisitorial approach in family law proceedings was also explored in the research undertaken by the Ministry of Justice in the UK.

Who should <u>not</u> be appointed in this role?

We strongly oppose any approach which would see lay people connected with the parties, be it family members, friends, religious leaders or community leaders, being appointed to cross-examine on behalf of the self-represented person. This is because such an approach carries with it a range of difficulties including:

- It is unlikely that any such person would be able to take an independent and objective approach to the task of cross-examination in these circumstances.
- It is unlikely such a person would be able to make a determination of the reasonableness of a question and they could become a mere mouthpiece of abuse of the perpetrator.
- They are unlikely (unless legally trained) to have the skills and knowledge of how to conduct cross-examination appropriately and in accordance with the requirements of the law and the Court.
- They are unlikely to be able to make a determination of the relevance of a question and it is difficult to determine relevance without having listened to all the evidence presented in the trial.
- A person asked to act in this role may be placed at risk if the outcome of the cross-examination is not as the perpetrator desired or if they do not conduct it in the way in which the perpetrator thinks it should have been conducted.
- A witness may feel pressured to respond in a particular way, or feel intimidated and harassed, by the involvement of friends and family, or even religious or cultural leaders asking questions. Indeed victim/survivors may experience being questioned by religious or cultural leaders as carrying a threat (express or implied) of being disowned or abandoned by their religion, culture or community; and
- Playing such a role may have an adverse impact on the relationship between the witness and the person cross-examining them, even where all parties have consented to that person taking on this role in the proceedings.

Nor does WLSA support the use of support workers or domestic violence workers, or interpreters, to cross-examine on behalf of the self-represented party. Feedback from non-legal staff from our member services is that professionals from non-legal backgrounds may not feel equipped to play such a role, nor would it be

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[15] 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,* 2017, Ministry of Justice UK at 44, available at: http://www.familylaw.co.uk/system/froala_assets/documents/1506/moj-research-alleged-perpetrators-of-abuse-as-litigants-in-person.PDF

[16] Family Law Council, interim report to the Attorney-General, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, Pg 22. Available at: https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Families-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems%E2%80%93Interim-Report-Terms-1-and-2.pdf

appropriate for them to take on this role.

Were support workers for the victim to be the ones to cross-examine, this may give rise to concerns of bias on the part of the self-represented party, and/or negatively impact on the relationship between the support worker and the victim going forward. This proposal may also create safety risks for support workers. Some perpetrators are highly dangerous not only to their victims but other individuals and support workers who help the victims. Adopting a role of cross examiner could make a support worker a target of future abuse or they may be intimidated from asking the right and relevant questions as they themselves are fearful of repercussions from the perpetrator.

We further note that domestic violence support agencies across the country are already stretched to, and beyond, capacity and are not funded to provide such services.

Potential models

We acknowledge the detail of determining who should be appointed for the purpose of cross-examination in these circumstances is complex and requires serious consideration. We have determined some **preliminary** options as set out below, but note that we are still undertaking consultation with our members to determine which of these models is most appropriate to meet the needs of victims and the Court.

a. An independent legally-trained person is appointed for cross-examination only

This option, as we proposes it, would provide for a lawyer or barrister to participate in final hearings for the purposes of cross-examination only where one or both parties are self-represented.

The role of this person would be to conduct cross-examination only, and not give legal advice to the self-represented party. This approach is similar to the approach under s 70 of the *Family Violence Protection Act 2008* (VIC) and to the approach in NSW sexual assault criminal proceedings. In Victoria this system is administered by Legal Aid Victoria, and funding is provided for legal practitioners to take up this role.

We acknowledge that the complexity of family law matters, may make it more complicated for someone to act in this role as compared to family violence order proceedings for example. Were this model to be implemented, a separate stream of funding would need to be available for this purpose and the Government would need to consider providing legislative protection for these practitioners against liability, such as s294A(9) of the *Criminal Procedure Act 1986 (NSW)*.

b. Counsel Assist model

A model used in royal commissions, boards of inquiry and coronial inquests, this approach was proposed in the Family Law Council's report on Families with Complex Needs in 2016. Noting that if introduced into family law proceedings the role of counsel assist would differ from other proceedings where it currently operates, the Council described this role as follows: "*While it is clear that it can be adapted according to the needs of the particular kind of inquiry, it is generally agreed that counsel assisting perform two key functions in inquisitorial*

proceedings: identifying and collating relevant evidence and presenting it to the commission of inquiry (the inquisitor) in a coherent and efficient way."[17]

The Council went on to indicate that the following benefits of the model included that the role would also be to assist the judge, with the judge and counsel "having a common aim of furthering the necessary inquiry"; assisting self-represented litigants to narrow the issues, and conducting cross-examination where one or both parties were self-represented in matters involving allegations of violence.[18]

For the purposes of cross-examination, WLSA sees the benefit of this model as providing an independent third party, with appropriate training and obligations to the Court, who participates throughout the proceeding and knows the issues in dispute and the context of the matter. As it would be a new role in the family law system, were it to be introduced presumably a system of appropriate training and accreditation could be built into the implementation of this process.

In the context of under-funded legal assistance services, limited/strict legal aid grants, and high numbers of people being forced to self-represent because they cannot afford a lawyer, concerns have also been raised by our members that creating a new role like this could act as a resource drain, or direct funds away from more appropriate legal representation services. We reiterate our view that any model implemented to deal with the ban on direct-cross examination would require a separate funding stream which did not draw funds away from legal assistance services.

c. Expanded Independent Children's Lawyer (ICL) role

Similar to the Counsel assist model, expanding the ICL role to incorporate asking questions for the self-represented party, would provide for an independent person who has duties to the court and training and expertise in dealing with complex family law matters.

Where this is not currently occurring, the ICL could ask their questions first with a view to potentially limiting the need for extensive questions from the self-represented party in relation to the same issues. They could then take a list of questions from the self-represented party and ask any further questions as needed in a form that was appropriate.

This approach raises a range of issues about the limitations on the role of the ICL, some of which were highlighted in the Family Law Council's 2016 report into families with complex needs:

"*The Independent Children's Lawyer acting on the child's best interests is not responsible for advocating for appropriate protections to be put in place during examination of a party who has experienced family violence where the other party is unrepresented. Nor is it within the scope of the Independent Children's Lawyer's role for them to implement safety plans for vulnerable self-represented parties. In addition, whilst the Independent Children's Lawyer in the course of a hearing might lead off the questioning process or try to ensure that a party is cross-examined from all angles to reduce potential power imbalances and ensure appropriate perspectives on the evidence are put before the court, an Independent Children's Lawyer is not tasked with advocating for the position of both parties.*"[19]

[17] Ibid, 67.
[18] Ibid.
[19] Ibid, 134.

We echo concerns that such a role is outside the scope of the ICL role currently, noting that this approach is inherently limited as ICL's can only be involved in parenting matters. We note that such a role could create or exacerbate real or perceived power imbalances between parties and the ICL, and risk generating perceptions of bias in relation to the ICL.

d. Judge asks the questions

Another approach would be for the judge to ask questions in these circumstances. We note that s101 of the Act already provides the judicial officer with powers to protect witnesses. Additional protections are provided in s69ZX(2)(h) and (2)(i) of the Act. This could act as an extension of those existing power.

There is precedent for this approach in other jurisdictions namely Western Australia and the United Kingdom.

i. Western Australia - Under s 44C the *Restraining Orders Act 1997* (WA) an unrepresented respondent puts cross-examination questions to the judicial officer or a person approved by the Court and that person is '*to repeat the question accurately to the person to be examined'*.[20] This requirement does not apply where the person to be examined requests the order not to be made and the Court considers it appropriate; and where the court is of the opinion it is not just or desirable to make such an order.[21]

ii. United Kingdom - Practice Direction 12J FPR 2010 in the UK currently allows the judge or lay justices to "*conduct the questioning of the witnesses on behalf of the parties, focusing on the key issues in the case*" in a fact finding hearing.[22] The revised Practice Direction 12J proposes this extend to "other hearing[s] and stipulates a ban on direct cross-examination.[23] A copy of this draft practice direction is provided with this submission. The recent research undertaken by the Ministry for Justice in the UK includes a discussion about the judge's use of these powers.

We note however that the experience of our members is that judges are currently using existing powers which enable them to protect witnesses in an inconsistent way depending on their approach to family violence and the evidence before them. This highlights the need for further training and support for judicial officers to increase their understanding of family violence and trauma informed practice. Any approach which created a role of the judge in asking questions on behalf of the self-represented party would need to be underpinned by a commitment and implementation of such training. In our view it should also provide that the judge had discretion to rework and amend questions to make them relevant and suitable.

Concerns which arise from this approach may also include perceptions of bias by parties and lead to more appeals, which is undesirable for the system and parties. However, arguably similar risks arise if a vulnerable witness is unable to provide their 'best evidence' because of fear or intimidation. We must also question if such an approach would actually lead to more appeals or not especially as it is already in place in some jurisdictions. Any change may result in the law being tested and may ultimately settle down as the law and practice becomes more settled.

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[20] *Restraining Orders Act 1997* (WA) s44C.

[21] Ibid.

[22] *Practice Direction 12J FPR 2010* (UK) paragraph 28.

[23] Ibid, revised paragraph 28.

e. Registrar asks the questions

Another option would be for a member of court staff, for example a registrar or deputy registrar to conduct cross-examination for the self-represented party. This approach would be similar to the approach set out in the *Family Violence Act 2016* (ACT) in family violence order matters where the respondent is self-represented. The benefit of this approach would again be that it provides an independent, legally trained person, with professional skills and abilities to enable them to conduct cross-examination on behalf of a self-represented litigant in a way that ensures that the relevant evidence is put before the Court and the impact on victims is minimised. Unfortunately as the ACT approach is new, there is limited information available as to the success or otherwise of such an approach. Such an approach is not resource neutral and would require investment in court staff and personnel.

In any of these models where a person is appointed by the Court it would be imperative that the person has received appropriate training in trauma-informed practice, cultural competency (including in relation to the needs of diverse people and families including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people and people from the LGBTIQ community), disability awareness, and in the nature and impact of family violence.

We understand that the Government, through the Attorney-General's Department, has commissioned the Australia Institute of Family Studies to conduct research into the prevalence of direct cross examination in recent final hearings before the Federal Circuit Court and Family Courts. We presume that this research will inform the Government's decision as to what model to implement to facilitate the ban on direct cross-examination.

WLSA invites the Government to share this research with the sector, and welcomes further opportunities to provide feedback to the Government about the best model following release of this research.

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

In order to ensure that the model which is implemented both minimises trauma to the victim of violence, and results in the best evidence being put before the Court, our view is that any court-appointed person would need the following qualifications:

1. **Legal training** – anyone conducting cross-examination on behalf of a self-represented party would need to have the skills and expertise necessary to make assessments of the relevance and appropriateness of proposed questions and the forensic and professional ability to reframe questions
2. **Independence and professionalism** – with duties to the Court and not the parties
3. **Trauma-informed practice**
4. **Cultural competency and disability awareness**
5. **Understanding of the nature and impact of family violence** including the specific impacts, unique needs and barriers faced by particular cohorts such as Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women, women with a disability, LGBTIQ communities, women in regional, rural and remote areas, older women and younger women.

More than just a mouthpiece

WLSA submits that anyone acting in this role should not be merely a 'mouthpiece' for the self-represented party. A model which provides for a third party to ask verbatim whatever questions are posed by the self-represented party does not provide either for procedural fairness nor for the protection of the victim from re-traumatisation. Instead it is our view that the person appointed to conduct cross-examination where a party, or parties, is/are self-represented, and where there are allegations of family violence, needs to have the professional and forensic experience to make an assessment of the questions, and the ability to recast questions proposed by the self-represented party to ensure the evidence can be tested whilst also adhering to Court practice and minimising the impact on the victim. WLSA does not however envisage that it would be the role of this person to provide legal advice to the parties.

Training and accreditation

One approach which could assist the Court and the Government to ensure a person is appropriately trained to be appointed in this role is to create a training process, similar to that which is required for ICLs. Accreditation for this role could also be introduced to people appointed in this role are of an agreed high-standard, and appropriately trained.

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

Yes, in our view rules and guidelines as to who can be appointed to this role should be incorporated into the Act. What should be included will depend on the model ultimately decided upon by Government. We welcome any opportunity to provide further feedback in this regard as the model develops.

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 level of detail to be included in the legislation will be guided by the model the Government decides to implement. We are happy to provide further feedback to the Government on what else should be included in the Act as the model develops more fully.

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

As outlined above, the person appointed by the Court to ask questions on behalf of the self-represented person must be independent and therefore in our view the self-represented person should not be permitted to nominate the person appointed.

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

As outlined above, we recognise that there are complexities in determining the best model to address the issue of direct cross-examination in family law matters involving family violence allegations. Our concerns and the key considerations we have identified as needing to be addressed by the model chosen are outlined above.

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?

As set out above, we are of the view that the consent of the victim is the key issue in relation to this. It will be important here that the Court is guided by legislative criteria which enable it to ascertain that informed consent is obtained. This could be provided for by including legislative requirements that provide for the judicial officer to explain what cross-examination is, and how the process will occur should leave be granted, or even a requirement that the alleged victim obtain independent advice prior to giving consent, as outlined below.

It is important that information is provided to parties in an accessible way, and parties should be supported to make informed decisions in relation to these issues, including through appropriate and accessible materials provided in a format that parties can take away and refer back to if necessary, and through victims having access to appropriate legal services to obtain advice in relation to this issue.

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?

As outlined above, there are some circumstances where victims of violence may want to be cross examined by the perpetrator. WLSA supports victims of violence retaining their agency to make such decisions where they have the appropriate information, advice and support to make an informed decision about this. If the Court takes the view in these circumstances that despite the victim's position that direct cross-examination may have a harmful impact, it may be appropriate to require that a victim obtain independent legal advice on this issue before the Court makes an order. In these circumstances the applicant could then provide a certificate to the court that such advice has been provided and they still want to proceed with the direct cross examination.

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 set out above the focus of the exercise of such discretion should be on the victim giving informed consent for direct-cross examination to occur. A victim could obtain a certificate as evidence that the victim has received independent legal advice about the issue and all considerations.

WLSA would also emphasise the importance of victim/survivors having access to safe, appropriate and specialist legal advice and assistance from expert services in this context, including specialist women's legal services, and Family Violence Prevention and Legal Services (FVPLS). Aboriginal and Torres Strait Islander victims/survivors must be offered the choice of accessing appropriately specialised legal assistance from an Aboriginal Community Controlled legal service provider, in accordance with Aboriginal and Torres Strait Islander peoples' right to self-determination.

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

We have no further comments in this regard at this time.

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?

Yes, in our view the amendments should apply to proceedings started before the law comes into effect.

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

We have no further comments in this regard at this time.

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?

In our view it is difficult to make comment on this given a model has not been set for who the court-appointed person will be, and the extent of their role in the proceedings. WLSA would welcome opportunities to provide further feedback in this regard as the model is developed by Government.

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

We have no further comments in this regard at this time.

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?

Discretion to prohibit direct cross-examination where ban does not automatically apply

Section 102NB of the proposed amendments provides the Court with discretion to prohibit cross-examination in circumstances where the ban does not automatically apply. The current drafting of the provisions provides that where the Court "…thinks it is appropriate to do so" the ban on cross-examination can be applied. No further legislative guidance is provided to guide the exercise of discretion in this regard.

WLSA supports the Court having discretion to prohibit direct cross-examination in circumstances where the automatic ban does not apply. We are concerned however that the current drafting of s 102NB is insufficient. We recommend that some further guidance on the exercise of this discretion under s 102NB is included in the legislation. In our view this should include at a minimum similar considerations to those set out at s102NA of the exposure draft, being:

- Whether direct cross-examination would adversely affect the ability of the witness to testify;
- Whether direct cross-examination would adversely affect the ability of the examining party to conduct cross-examination;
- Whether direct cross-examination will have a harmful impact on the party who is the alleged victim of the family violence.
- Whether the victim of violence has consented to the cross examination taking place and has obtained independent legal advice about all options available to them.

Application of the ban to witnesses other than parties to the proceedings

WLSA notes and supports the intention to extend the ban on direct cross-examination to intervening parties where the intervening party is involved in the allegation of family violence, either as an alleged perpetrator or as the alleged victim (as set out at s102NA, Note 2). The experience of our members indicates however that this ban should be extended to non-party witnesses in the same circumstances. For example, where family violence is alleged to have been perpetrated by one party against their first partner, the first partner may be asked by the second partner to provide supporting evidence in the second partner's family law matter against the same alleged perpetrator. In our view the objects of the ban on direct cross-examination (minimisation of trauma to the witness and improved evidence for the Court) would also be relevant such that the application of the ban in these circumstances is also warranted.

We therefore urge the Government to consider extending application of the ban on direct cross-examination to witnesses in a proceeding where the witness is involved in the allegation of family violence, either as an alleged perpetrator or as the alleged victim.

21. Any general comments.

As indicated above, this submission details only our preliminary views on this issue. As further details become available as to the model the Government proposes, and the research from AIFS is released, WLSA would welcome the opportunity to provide further feedback on this issue.