NEW SOUTH WALES BAR ASSOCIATION
SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE - FAMILY LAW AMENDMENT (FAMILY VIOLENCE AND CROSS-EXAMINATION OF PARTIES) BILL 2018

INTRODUCTION

1. The New South Wales Bar Association (**the Association**) thanks the Legal and Constitutional Affairs Legislation Committee (the **Committee**) for the invitation to make a submission to the Committee's inquiry into the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (the **Bill**).

2. In August 2017 the Association made a submission on an Exposure Draft of this Bill to assist the Department of the Attorney-General to prepare this legislation (annexed at **Annexure A**).

3. The Association welcomes the opportunity to make a further submission and is pleased to assist the Committee and the Parliament to consider this Bill, particularly in light of the Attorney-General's proposed restructure of Australia's federal courts. This proposed restructure and transitional periods will significantly impact upon the administration of, and the quality of, justice in Australia's family law system and marks a period of significant disruption and change in the family law courts. Accordingly, any legislation proposed for enactment during this period of change, including the Bill, must be carefully considered to avoid unintended consequences. Further, the Bill would be unnecessary in a properly resourced specialist court staffed by judicial officers experienced and trained in dealing with domestic violence issues.

4. The importance of family law must not be underestimated. Justice Abella of the Canadian Supreme Court famously observed that:

> no area of law matters to more people than family law. Not many people do corporate takeovers, most do not commit crimes, but absolutely everyone has a family. People may expect to change jobs and careers, but they hope they will only be part of two families – the one they came from and the one they hope to start. It is an understandable trauma when they turn out to be wrong. This is what makes the public interest in family law so intense…[1]

[1] Justice Abella, 'The Challenge of Change', (1998) Speech to the 8th National Family Law Conference, Hobart Tasmania, 25 October 1998, 1-2.

> Family law is the legal system's metaphor, the crucible where so much else in law intersects … It is also, because it is the area of law by means of which most people will come into contact with it, the area by which the legal system will be judged by most people.[2]

5. There is currently a great deal of frustration with Australia's family law system, as there was in 1998 when Justice Abella addressed the 8th National Family Law Conference in Tasmania. A primary contributor to that frustration is the fact that family law in Australia has been adversely affected by a chronic lack of resources in both the Federal Circuit Court and the Family Court of Australia (the **Family Court**) in the NSW registries, resulting from an absence of commitment by successive Governments to the proper funding of the system. An increasing migration appeal caseload continues to contribute to waiting times for family matters in the Federal Circuit Court.[3]

6. The state of family law in Australia is of critical concern. In the course of law reform, policy makers must not forget that family law is about people, especially children, who deserve to be treated with dignity by experienced judges.

7. Family violence is completely unacceptable. It is fair to say that there is consensus amongst all stakeholders that victims of family violence and children must be afforded the best protections the system can offer. Where we differ is in relation to how the system can best realise that mandate.

8. It may seem callous to speak of the importance of fair hearings for perpetrators of violence when their victims and children must endure the further trauma of testifying during the course of those hearings. Yet, it is important to understand that a fair hearing may be the best protection for victims in safeguarding judicial decisions that offer enduring protection from the perpetrators of violence, whether in parental custody or other arrangements. Victims of family violence deserve to have their issues dealt with in a focused, proper way and not have the importance of such issues diminished by a legislative response or framework that is not fit for purpose.

9. The Association has consistently argued that the future of Australia's family law system must feature a properly resourced, specialist family court. The Association maintains that this is a critical protection for victims and children to properly determine issues including whether violence has occurred and the consequences of that violence for parenting and financial determinations.

---

2 Ibid, 2-3.

3 See evidence to Senate Legal and Constitutional Affairs Legislation Committee - Estimates, Parliament of Australia, Canberra, 24 May 2018, 80-81 (Dr Stewart Fenwick, Chief Executive Officer and Principal Registrar).

10. Admittedly, the majority of family law matters are resolved outside of court. Most families manage separation without having recourse to the family law system, and of those who do, even fewer approach the Courts to resolve their dispute.[4]

11. However, there are some intractable matters that require the certainty of a court decision. Cases involving family violence and allegations of child abuse are prime examples.

12. The Federal Court of Australia Corporate Plan 2017-18 stated that:[5]

> There is a growing community awareness and focus on matters involving family violence and allegations of child abuse that impact on strategy for the Family Court of Australia and the FCC.
>
> Cases involving mental illness and substance abuse have also increased, as have cases relating to international family law (including Hague Convention abduction matters and the 1996 Protection Convention), as well as medical procedures for which court approval is required. These are complex matters that present strategic challenges for each court.

13. In some cases, Court resolution may be in the best interests of some children and arguably our society. In complex issues such as allegations of abuse, there may need to be findings of fact in a judgment which provides a secure factual foothold to build upon for future planning and assistance, including therapy and associated services.

14. Fair and robust evidential procedures during court processes are critical to achieve just outcomes, and to safeguard such outcomes from technical procedural challenges that otherwise might produce an injustice and inflict significant detriment to families and children.

15. It is crucial that for these clients, a properly resourced, fair court system exists and that clients are treated during the course of their interactions with the court with fairness and dignity throughout the evidential and judicial processes by specialist judicial officers. This issue goes to the heart of the Bill the subject of this Committee's inquiry.

16. This Bill has been proposed with the best of intentions to "ensure that appropriate protections for victims of family violence are in place during cross-examination in all family law proceedings".[6]

---

4 Australian Law Reform Commission, *Review of the Family Law System – Issues Paper 48* (2018), 52, [165].

5 Federal Court of Australia, *Corporate Plan 2017-2018* (2017) 4 <http://www.fedcourt.gov.au/__data/assets/pdf_file/0006/45366/Corporate-Plan-2017-18.pdf>.

6 Explanatory Memorandum, [1].

17. The challenge, as correctly identified by the Bill's Explanatory Memorandum, is to ensure that "any ban balances the need to protect family violence victims from being re-traumatised during their court hearings, with the need for procedural fairness for parties".[7]

18. With respect, the Association does not believe that the Bill in its present form achieves the right balance.

19. It is important to recognise that procedural fairness does not only benefit an alleged perpetrator. The administration of justice involves considerations beyond simply the length of the court proceedings. While there must be protections to ensure victims are not unnecessary traumatised in court, procedural fairness is a critical protection to ensure just outcomes are safe-guarded in the long-term and victims are protected from legal challenges on a technicality in appellate courts.

20. As the Bill's Statement of Compatibility with Human Rights noted:[8]

> When a court is making a parenting order under the Family Law Act, it is required to regard the best interests of the child as the paramount consideration.
>
> The quality of evidence available to the court impacts on its ability to determine what parenting arrangement will be in a child's best interests.

21. In response to the Exposure Draft last year, the Association expressed the view that there should be no automatic ban on cross-examination in any circumstances as an automatic ban may prejudice both the interests of victims and alleged perpetrators, while constraining the court's ability to properly determine necessary issues including a finding that family violence has occurred.

22. The Association's concern was shared by other stakeholders including the Law Council of Australia and the Bar Association of Queensland.[9]

---

7 Explanatory Memorandum, [6].

8 Statement of Compatibility with Human Rights, [19]-[20].

9 Law Council of Australia, *Submission on the Exposure Draft of the* Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 (Cth) (August 2017) 9; Bar Association of Queensland, *Submission on the Exposure Draft of the* Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 (Cth) (August 2017); available at Attorney-General's Department, <https://www.ag.gov.au/Consultations/Pages/Family-violence-cross-examination-amendments.aspx>.

23. Similarly, the then Chief Justice of the Family Court stated in the Court's response to the Exposure Draft that:[10]

> [49]… the Draft Exposure Bill does not ensure:
>
> (a) That all parties receive a fair hearing.
>
> …
>
> (c) That the courts are able to make informed decisions.
>
> (d) That they do not have any unintended consequences for victims of family violence.
>
> …
>
> [51] Whatever model is adopted, if any, to address the issues referred to in the Public Consultation Paper, there are real issues in relation to the possible restriction that any given approach might have on a court's power to manage proceedings and secure a fair trial in any given circumstance.
>
> …
>
> [53] Importantly, if a view is taken that there should be an amendment to the *Family Law Act 1975* (Cth), any proposed amendment must necessarily be weighed against the existing powers of a court exercising jurisdiction under the *Family Law Act 1975* to be satisfied that any such proposal better secures a fair trial and protects the parties to the proceedings.

24. The Association maintains that any constraint on a party's ability to challenge evidence and the means by which this may or may not occur must remain at all times a matter for the court's discretion in each proceeding.

25. Section 102NA of the Bill in its current form does not address this concern but provides for a mandatory ban on personal cross-examination, even when a court does not believe this to be appropriate for the needs of the individual parties.

26. Further, this Bill must not be considered in a vacuum. Since the release of last year's Exposure Draft, the Attorney-General has announced the Government's intention to introduce legislation in Spring to fundamentally restructure the federal courts and family law system.

---

[10] Submission By The Honourable Diana Bryant AO QC, Chief Justice of the Family Court Of Australia (August 2017) https://www.ag.gov.au/Consultations/Documents/ExposureDraftFamilyLawAmendment/The-Honourable-Diana-Bryant-AO-Submission.pdf.

27. The Association addresses four key concerns about the Bill in this submission:

    1. First, unintended consequences may arise from a mandatory ban where parties are unable to cross-examine because they are unable or unwilling to obtain private representation, and are unable to access legal aid;

    2. Second, implementation of the Bill may be significantly impacted by the Attorney-General's proposed structural reform of the federal courts and family law system;

    3. Third, the Bill must not be passed until after such time as it can be considered as part of the ongoing Australian Law Reform Commission's Inquiry into Australia's family law system to ensure no unintended consequences; and

    4. Fourth, the Bill may result in the unintended consequence of shifting the impact upon victims of family violence and the associated resource burden to state-based court systems.

28. The Association can speak with experience to the challenges facing clients and practitioners in accessing the family law system and the Courts in registries within NSW.

CONTENTS

29. This submission addresses the following:

    a. The Family Law Bar in NSW;
    b. The state of family law in NSW;
    c. The context of proposed family law reform in Australia;
    d. Remaining concerns with the drafting of the Bill;
    e. Concerns about contextual assumptions underpinning the Bill;
    f. Recommendations.

30. In drafting this submission and responding to the Bill, the Association has recognised and sought to apply:

    a. Australia's obligations under international law, including under the *UN Convention on the Rights of the Child*;[11]

[11] *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990).

b. Barristers' professional obligations, including under the *Legal Profession Uniform Law* (NSW) and the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (**Barristers' Rules**); and

c. The objectives and principles espoused in the *Family Law Act 1975*, particularly concerning the consensual and non-litigious resolution of issues involving Australian families and children where possible.

THE FAMILY LAW BAR IN NSW

31. The Association is a voluntary professional association comprised of more than 2,300 barristers with their principal place of practice in NSW.[12] Currently, 185 of our members reportedly practice in the area of family law and guardianship.[13] The Association also includes amongst its members judges, academics, and retired practitioners and judges. The Association is committed to promoting the public good in relation to legal matters and the administration of justice.[14]

32. Barristers are specialist advocates,[15] both in and outside of the courtroom.[16] Barristers owe their paramount duty to the administration of justice.[17] In addition, barristers must "promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence and do so without regard to his or her own interest or to any consequences to the barrister or to any other person".[18]

33. All barristers have a professional duty under the Barristers' Rules to inform their clients or instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, to permit the client to make decisions about the client's best interests in relation to the litigation.[19]

34. Barristers in this state are accredited as arbitrators pursuant to the *Family Law Act 1975* and also as mediators. Our members, particularly in the area of family law, participate in both arbitrations and mediations on a regular basis.

---

12 New South Wales Bar Association, *Statistics*, as at 10 July 2018 <https://www.nswbar.asn.au/the-bar-association/statistics>.

13 Ibid.

14 New South Wales Bar Association, *New South Wales Bar Association Strategic Plan* (2017) <http://inbrief.nswbar.asn.au/posts/4df95d7a2fb43495d59665ad061e3db4/attachment/strategic.pdf>.

15 *Barristers' Rules* rule 4(c).

16 See *Barristers' Rules* rule 11(c)(d).

17 *Barristers' Rules* rules 4(c), 23.

18 *Barristers' Rules* rule 35.

19 *Barristers' Rules* rule 36.

35. In 2012 the Association, together with the NSW Law Society, joined with the Federal Circuit Court in the establishment of the Family Law Settlement Service,[20] a scheme which provides the Federal Circuit Court and Family Court access to accredited practitioners to provide mediation services at a flat fee. In February 2018, as part of a regular review of the members of the Service, the Association put forward the names of around 30 barristers who volunteered to participate.

36. The barristers of NSW appear on a daily basis assisting clients in the Federal Circuit Court and the Family Court. They do so on a pro bono basis, as well as in matters funded by Legal Aid NSW and on private retainers. Barristers also contribute in many and varied ways, all in a voluntary and unpaid capacity, to the development of the law and procedure of both Courts.

37. The Association provides extensive pro bono assistance to the community of NSW in a family law context through barristers' participation in the Family Law Settlement Service and the Legal Referral Assistance Scheme. This is separate from the pro bono matters that many of our members take on of their own accord.

38. The Association's Family Law Committee is comprised of 13 appointed barristers with active practice in family law,[21] including four Senior Counsel, who volunteer their time and expertise.

39. Representatives of the Family Law Committee meet regularly with Federal Circuit Court judges and Family Court judges to provide feedback and put forward the views of the profession in relation to the conduct of hearings and the management of delays in the Courts.

40. This submission reflects the expertise, experience and concerns of the Association's members including through the above initiatives.

THE STATE OF FAMILY LAW IN NSW

41. Family law in this state has been severely affected by a lack of resources both in the Federal Circuit Court and in the Family Court in its registries within NSW. These resources include not only an insufficient number of judicial officers to deal with an expanding jurisdiction and increasing workload, but also insufficient funding to maintain counselling and assessment services previously provided by the Courts.

42. Delays in the both the Sydney and Parramatta Registries mean that a case commenced today (involving children and/or financial issues) is unlikely to be finally determined for at least three

---

[20] New South Wales Bar Association, *New South Wales Bar Association Annual Report 2011-12* (2012) 29 <https://www.nswbar.asn.au/docs/webdocs/ar121.pdf>.

[21] New South Wales Bar Association, *Appointments* (2018) < https://www.nswbar.asn.au/the-bar-association/appointments>.

years and in a significant number of cases for a greater period of time. This is unfair to families and is not sustainable.

43. The average number of cases in the docket of judges in the Federal Circuit Court is in excess of 400. This is a crushing workload and presents real work, health and safety issues for judges.

44. The Association has consistently expressed concern about the sustained underfunding of the family law system by successive governments of both political persuasions and continues to do so. The Federal Court confirmed in Senate Estimates that has been a 2.73 percent increase, or $6.724 million, in the operating appropriation provided across all federal courts (Family Court, Federal Circuit Court and the Federal Court of Australia) from 2013-14 to 2017-18.[22]

45. The Attorney-General has stated that the national median time to trial for family court matters has increased from 10.8 months to 15.2 months in the FCC (increase of 40.7%), and from 11.5 months to 17 months in the Family Court (47.8%),[23] from 2012-13 to 2016-17.[24]

46. Although there is great will amongst the NSW Family Law Bar to provide pro bono assistance to deal with some of the issues, the Association is concerned that the provision of pro bono assistance for those involved in family law proceedings simply cannot and should not be a substitute for the proper funding of the Courts and the legal aid system for those in need of family law assistance.

47. Without a properly funded family law system the rights and interests of litigants and children alike cannot properly be protected. Without proper representation, there is a real risk of uneven playing fields and unfair outcomes.

48. The Association has repeatedly called for a commitment by the Federal Government to the proper funding of the family law system and the Courts within it so as to provide a functioning and sustainable system of justice for those members of the community in need of family law assistance.

---

22 Federal Court of Australia, *Question on Notice AE18-018 - Family Court of Australia trends*, Senate Standing Committee On Legal and Constitutional Affairs, Attorney-General's Portfolio, Additional Estimates 2017-18 (February 2018).

23 Attorney-General for Australia, 'Court Reforms to help families save time and costs in family law disputes' (Media release, 30 May 2018) <https://www.attorneygeneral.gov.au/Media/Pages/Court-Reforms-to-help-families-save-time-and-costs-in-family-law-disputes.aspx>.

24 *Question Number and Title: AE18-014 - Family Court of Australia trends,* Senate Standing Committee On Legal and Constitutional Affairs, Additional Estimates 2017-18 (February 2018).

49. The NSW Bar is committed to working in a constructive manner with the Government to ensure the family law system is adequately resourced to promote access to timely and affordable justice for those family law litigants and children.

50. The NSW Bar is also committed to continuing its long association and close relationship with the Family Court and the Federal Circuit Court, in order to assist both Courts in the difficult work which their respective jurisdictions require them to undertake on a daily basis. Despite their best efforts, the judges of both Courts are simply unable to sustain the increasing workloads required of them.

THE CONTEXT OF PROPOSED LAW REFORM

51. In 2017 the Turnbull Government asked the Australian Law Reform Commission (**ALRC**) to inquire into the state of Australia's family law system and report to the Government in March 2019. The ALRC Inquiry is currently underway and represents the first comprehensive review of the *Family Law Act 1975* since the legislation commenced in 1976.

52. On 30 May 2018 the Commonwealth Attorney-General announced that, independent of any recommendations of the ALRC's ongoing inquiry into family law, the Turnbull Government would introduce legislation in Spring 2018 to restructure the federal courts. This significant structural reform includes to establish a new "Federal Circuit and Family Court of Australia" (FCFCA) and a new Family Law Appeal Division in the Federal Court of Australia to commence operation from 1 January 2019.[25]

53. The effectiveness and impact of this Bill must be assessed and understood within this context of imminent, significant and wide-ranging law reform and inevitable disruption to family law practice.

54. Amongst reasons given for this broader law reform, the Attorney-General has consistently referred to improving case resolution times to ensure clients are spending less money on lawyers.[26] The Bill is prima facie inconsistent with this intention, in that the mandatory ban on cross-examination of parties under section 102NA can only be overcome by cross-examination being conducted "by a legal practitioner acting on behalf of the examining party".[27]

---

[25] Attorney-General for Australia, 'Court Reforms to help families save time and costs in family law disputes' (Media release, 30 May 2018) < https://www.attorneygeneral.gov.au/Media/Pages/Court-Reforms-to-help-families-save-time-and-costs-in-family-law-disputes.aspx>.

[26] See, eg, ABC TV, 'Interview with the Attorney-General', *Insiders*, 10 June 2018 (Attorney-General (Cth)) <https://www.attorneygeneral.gov.au/Media/Pages/ABC-TV-Insiders-10-June-2018.aspx>.

[27] The Bill s 102NA(2)(b).

55. Importantly, the proposed structural change and transitional provisions will inevitably create new pressures and challenges for the courts in seeking to implement these changes.

56. In his second reading speech on the Bill, the Attorney-General noted that:[28]

> The Government is working with the family law courts and legal aid to determine appropriate processes and funding implications. These will be in place prior to the provisions being applied to matters before the courts.

57. The Bill features a maximum three-month commencement delay which the Attorney-General has stated will "ensure the family courts can put appropriate procedural mechanisms in place".

58. In light of the caseloads that Australia's family courts are currently confronting, and the magnitude of structural change proposed by the Attorney-General, these time periods are not adequate to obtain sufficient assurances that procedural mechanisms have been put in place.

59. The Women's Legal Service of Queensland has raised a similar concern over the environment in which this Bill will be implemented. CEO Angela Lynch stated in a media release of 28 June that:[29]

> Under the new court restructure, identification of domestic violence is a concern as we move to a generalist court model and away from family law specialisation. Specialist domestic violence training of judges and other professionals in the system is imperative.
>
> We need to ask will there be funding for community legal centres or legal aid to represent perpetrators? It's unclear what will happen if these individuals aren't able to gain legal representation as the wording precludes personal cross-examination. Many people are not eligible for legal aid, can't afford, or choose not to have a lawyer. We need to think through what happens in these circumstances.

60. The Association believes it would be prudent for Parliament not to pass this Bill until the structural changes envisaged by the Attorney-General have taken effect and the full implications of the Bill can be assessed and analysed against the new proposed legal landscape.

REMAINING CONCERNS WITH THE DRAFTING OF THE BILL

---

[28] See Attorney-General, 'Second Reading Speech – Family Law Amendment (Family Violence and Cross-examination of parties) Bill 2018', circulated 28 June 2018 Cf Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2018, (Christian Porter MP, Attorney-General) 14.

[29] Women's Legal Service Queensland, (Media Release, 28 June 2018).

61. The Attorney-General of the Commonwealth has described the Bill as imposing an "automatic ban".[30]

62. The Association does not support the enactment of section 102NA of the Bill in its current form as the Association remains of the opinion that there should be no "automatic ban" on cross-examination in any circumstances.

63. The Association maintains that any constraint on the ability of a party to challenge evidence in proceedings and the means by which this may or may not occur should remain, at all times, a matter for the discretion of the court in each individual proceeding.

64. This is because an automatic ban is inimical to the method by which courts are to determine issues in proceedings, including particularly those involving the interests of children in parenting proceedings, and would give rise to a significant risk that the evidence upon which such determinations depend is unable to be properly explored and tested in proceedings, thereby compromising the ability of courts to determine issues and to act in the interests of the children the subject of proceedings.

65. There is a risk that any automatic ban would be as likely to prejudice the interests of "victims" as those of "perpetrators", as it would necessarily constrain the ability of a court to properly determine necessary issues, including whether family violence has occurred and the consequences of that violence for parenting and financial determinations.

66. The Association maintains that the Courts have sufficient powers presently to appropriately control and manage the oral evidence of parties in proceedings, including when and what cross-examination will be permitted. Such powers are to be found in the *Evidence Act 2006* (Cth), the *Family Law Act 1975* and associated Rules, including particularly Division 12A of Part VII in parenting proceedings.

67. The Association remains concerned that the section may well, in many proceedings, result in both parties being banned from cross-examination of the other. The section presupposes that there will be only one party who falls to be characterised as the "victim" and one as the "perpetrator" but this does not accord with the experience of members of the NSW Bar appearing in such proceedings. The result is that a court may be put in a position where the section operates to prevent the cross-examination of each party by the other.

---

[30] See Attorney-General, 'Second Reading Speech – Family Law Amendment (Family Violence and Cross-examination of parties) Bill 2018', circulated 28 June 2018 Cf Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2018, (Christian Porter MP, Attorney-General) 13-14. See also Explanatory Memorandum – Notes on Clauses, [17].

68. Further, the Association is of the opinion that the section, as drafted, is too broad in its operation and goes well beyond that which could be considered as reasonably proportionate and necessary to address that which is intended. By way of limited example, sub-section (1)(b) operates in respect of "allegations of family violence" which in turn engages the definition of family violence in section 4AB of the *Family Law Act 1975*. Section 4AB incorporates within that definition many issues, including those involving the financial support of spouses, which is otherwise to be addressed pursuant to Part VIII of the *Family Law Act 1975* and is unlikely to give rise to issues to which the proposed amendments are directed.

69. The result is that the section as drafted could give rise to an automatic ban in entirely inappropriate circumstances.

70. The Association agrees that the most appropriate person to ask questions in cross-examination is a legal practitioner acting on behalf of the examining party.

71. However, on the current drafting of this Bill, issues arise when the examining party does not have legal representation, whether by choice or due to financial constraint.

72. A research project undertaken by the Family Court in 2003 found that 30-40 percent of matters involved litigants who were self-represented at some point in proceedings. [31]

73. While it is difficult to accurately determine the extent of the statistics at present, the very premise and purported need for this Bill is confirmation of the prevalence of self-represented litigants in contemporary family law.

74. We agree with the risk identified by the Bar Association of Queensland in its 2017 response to the Exposure Draft that:[32]

> 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 cannot be made.

75. The Bill's Statement of Compatibility with Human Rights states at [37] that:

---

[31] Family Court of Australia, *Self-represented Litigants a Challenge: Project Report* (2003), iv <http://www.familycourt.gov.au/wps/wcm/connect/54fe062f-3cd0-422c-9848-39b368c38fdb/SRL_A_Challenge.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-54fe062f-3cd0-422c-9848-39b368c38fdb-lh-pOue >.

[32] Bar Association of Queensland, *Submission* (August 2017) <https://www.ag.gov.au/Consultations/Documents/ExposureDraftFamilyLawAmendment/Bar-Association-of-Queensland-Submission.pdf>.

> It is intended that, where a party refuses to engage a lawyer or accept representation from legal aid, they would be prohibited from conducting a cross-examination. The consequences of such a refusal would essentially be a matter of choice for the party as to how he or she wishes to conduct his or her own case.

76. However, this decision may have broader consequences for a party that are not of their own choosing, for example the abrogation of the common law *Browne v Dunn* rule which may have consequences for the fairness of a trial.[33]

77. As noted by both the Law Council of Australia's and the Association's submission on the Exposure Draft:

> it is important to recognise that the role of cross examination is two-fold. It is to test and challenge the evidence of the other party and his/her witnesses. It is also to put the case they are facing to them in order to obtain their response. The significant aspects of a party's case to a witness must be put to satisfy the rule in *Browne v Dunn*. It is through cross-examination that the truth or otherwise of an allegation is established, by the testing of the credibility and the veracity of the witness. Effective cross-examination requires the cross-examiner to be present throughout the giving of the other party's evidence and the evidence of his/her witnesses.
>
> The reason the cross-examiner needs to be aware of all the previous evidence given in the court is expressed by Hunt J in *Allied Pastoral Holdings v FCT* [1983] 1 NSWLR 1 at 16:
>
> > It has been in my experience always been a rule of professional practice that unless notice has already clearly been given of the cross-examiner's intention to rely upon matters, it is necessary to put to an opponent's witness cross-examination on the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inference to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn.

78. The rule in *Browne v Dunne* has been explained as follows by the ALRC (footnotes omitted):[34]

> 5.143 The common law rule in *Browne v Dunn* states that where a party intends to lead evidence that will contradict or challenge the evidence of an opponent's witness, it must put that evidence to the witness in cross-examination. It is essentially a rule of fairness—that a

---

33 *Browne v Dunne* (1893) 6 R 67.

34 Australian Law Reform Commission, *Uniform Evidence Law* (ALRC Report 102) (2006) [5.143] – [5.145].

witness must not be discredited without having had a chance to comment on or counter the discrediting information. It also gives the other party notice that its witness' evidence will be contested and further corroboration may be required.

5.144 There are a number of consequences arising from a breach of the rule. The court may order that the witness be recalled to address the matters on which he or she should have been cross-examined. The court may also:

- prevent the party who breached the rule from calling evidence which contradicts or challenges that witness' evidence in chief;
- allow a party to re-open its case to lead evidence to rebut the contradictory evidence or corroborate the evidence in chief of the witness;
- comment to the jury that the cross-examiner did not challenge the witness' evidence in cross-examination, when that could have occurred; or
- comment to the jury that the evidence of a witness should be treated as a 'recent invention' because it 'raises matters that counsel for the party calling that witness could have, but did not, put in cross-examination to the opponent's witness'.

5.145 Courts have been clear, however, that while there are established remedies for a breach of the rule courts will have sufficient flexibility to respond to the particular problem before it.

79. Complementary provisions are contained in the *Uniform Evidence Acts* in sections 40-46.

80. Failure to allow a party to properly cross-examine renders any judgment ultimately made unreliable and subject to appeal. This is because the right to cross-examine is central to the adversarial trial process. It is only through cross-examination and the testing of evidence that findings may be made as to such matters as the best interests of the child or the truth of allegations of family violence.

81. This risk is of particular concern to matters involving allegations of family violence, where prolonging court processes and the appeals processes may result in children and alleged victims being exposed to alleged perpetrators to greater periods of time, may exacerbate trauma or may result in inappropriate custody or financial outcomes that are not in the best interests of children or victims.

82. Accordingly, the Bill should more clearly state how its provisions are intended to operate or co-exist with evidential principles such as the common law and statutory versions of the *Browne v Dunn* rule.

83. In addition, the Bill does not contain a mechanism to determine the way in which the automatic ban would operate when matters are set down for hearing or when a party becomes self-represented at some point after proceedings have commenced. There is a temporal question as to at what time in the life of the matter the proposed provisions should be identified and the parties required to act upon them. For example, there is a real prospect of delay where parties have a final hearing listed, prepare in good faith for that hearing (with the attendant practical, financial and emotional cost of preparation) only to have that hearing be unable to proceed because one party cannot or has not complied with the proposed mandatory provisions, or is unaware that they will require the assistance of a qualified legal practitioner to "cross examine".

CONCERNS ABOUT CONTEXTUAL ASSUMPTIONS UNDERPINNING THE BILL

84. The success of this Bill turns on the availability of Legal Aid to parties who cannot afford legal representation. The Bill's Explanatory Memorandum states that:[35]

> It is intended that a party would obtain their own legal representation where possible, and that legal aid would be available where a party is unable to obtain private representation.

85. There are four primary problems with this assumption.

86. First, Australia's legal aid resources are highly sought after and already over-stretched. As it is, there are a significant number of self-represented litigants in the family law system, many of whom may be ineligible for legal aid.

87. Last year, the House of Representatives Standing Committee on Social Policy and Legal Affairs acknowledged that (citations omitted):[36]

> the cost of accessing the family law system is prohibitive for most families. Many families simply cannot afford legal representation, and the legal aid system 'has never been funded at a level that would allow a lawyer appointed for every person who cannot afford one.

88. Second, there is no common law right to be provided with a lawyer at the Government's expense. The ALRC's Interim Report on *Traditional Rights and Freedoms Encroachments by Commonwealth Laws* stated that (footnotes omitted) that:[37]

---

35 Explanatory Memorandum, [3].

36 Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence* (House of Representatives, 2017) [4.154], citing Queensland Law Society, *Submission to the Standing Committee 38*, 4; Victorian Southern Metropolitan Region Integrated Family Violence Executive, *Submission to the Standing Committee 52*, 1; For Kids Sake, *Submission to the Standing Committee 79*, 5, Australian Brotherhood of Fathers, *Submission to the Standing Committee 110,* 16 VLA, *to the Standing Committee 60*, 21.

37 ALRC Interim Report 127, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (2015) [10.111]-[10.113].

> 10.111 The second type of right—to be provided a lawyer at the state's expense—is less secure. In *Dietrich v The Queen*, Mason CJ and McHugh J said:
>
> Australian law does not recognise that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial.
>
> 10.112 The court held that the seriousness of the crime is an important consideration: 'the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only'.
>
> 10.113 In this same case, Mason CJ and McHugh J said that, although 'the common law of Australia does not recognise the right of an accused to be provided with counsel at public expense',
>
> the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system. The power to grant a stay necessarily extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence.

89. Further, the Law Council of Australia has remarked that:[38]

> the right to a fair trial and effective access to justice is undermined by a failure of successive governments to commit sufficient resources to support legal assistance services, as evidenced by increasingly stringent restrictions on eligibility for legal aid.

90. The Bill's Explanatory Memorandum states at [13] that:

> There are no direct financial implications from implementing the measures in the Bill. The Australian Government is working with National Legal Aid to determine the impacts that

[38] Ibid, [10.122], quoting Law Council of Australia, *Submission 75*.

> are expected to result from the measures in the bill and ensure that adequate funding is available.

91. It is unclear how Legal Aid will be supported to meet the new demands created by this Bill without further funding and investment by the Commonwealth.

92. In light of the number of self-represented litigants currently in Australia's family law system, the implementation of this Bill even without the other legislative change forecast for family law over the next 18 months will produce significant delays and impose costs on parties and legal aid providers.

93. This Bill reduces the incentive for parties to provide and independently fund their own legal representation, if the implication is that legal aid will be secured for non-represented parties in such situations. This will exacerbate resourcing problems with legal aid.

94. In this way, the Bill does not assist the administration of justice.

95. Third, the Bill is silent on what is to happen in the event that a party deliberately refuses to engage legal representation, whether due to financial considerations or in order to deliberately prevent the occurrence of cross-examination that may be critical to establishing a finding of fact. In this way by refusing legal representation, if section 102NA is engaged, a party may be able to hold the administration of justice hostage and deliberately sabotage a fair hearing. This Bill does not provide any way to get around this occurrence.

96. The Bill's Statement of Compatibility with Human Rights states that:[39]

> The Bill anticipates a process through which the court would make a request or direction that the party engage a lawyer – either privately or through legal aid – for the purposes of cross-examination.

97. Yet this process and the powers of the Court are not explicitly provided for in the Bill, which creates further uncertainty as to when and how a court may direct a party to engage a lawyer, and whether this is in fact within the Court's power.

98. If the Government wishes to proceed with this Bill, this section must be carefully re-drafted in order to guard against unintended consequences that may have dire impacts on families, including the very victims of family violence that this Bill is intended to better protect.

---

[39] Statement of Compatibility with Human Rights, [4].

99. Finally, the Bill is likely to have the unintended consequence of shifting the impact upon victims of family violence and the associated resource burden to state-based Court systems.

100. The consequence of section 102NA(1)(c)(ii) is that the mandatory ban on cross-examination will arise once a family violence order had been entered. In the vast majority of cases victims of family violence have first recourse to a state or territory court to obtain an order for their personal protection – orders which are not always, but are routinely, entered on a consensual basis or without the need for a hearing, and hence oral evidence and cross-examination of the victim.

101. This position means that victims are able to obtain that "first line" of protection without being exposed to the very difficulties this Bill is intended to prevent and without the imposition on those courts of the need to hear oral evidence.

102. The consequence of section 102NA is that alleged perpetrators would be ill-advised to adopt the above course and would be compelled to defend the application for a state-based order to avoid the mandatory ban that would then arise in any family law proceedings. Indeed, and unless able to afford or secure legal representation in any later family law proceedings, the respondent to such an application would be compelled to cross-examine the victim in the state-based court in order to have the family violence issues properly determined.

RECOMMENDATIONS

103. Accordingly, the Association makes the following recommendations:

1. That section 102NA of the Bill be amended to operate when the Court determines in its discretion it is appropriate, and not as a mandatory ban;

2. That the Bill not be passed, or alternatively that its commencement be delayed until:

    i. The ALRC has completed its review of the family law system; and

    ii. Appropriate discussions have occurred and funding agreements have been secured between the Australian Government, National Legal Aid and state and territory legal aid providers to ensure adequate funding is available;

3. A properly-resourced, specialist family law court must be preserved in the future of Australia's family law system to provide the specialist legal training, expertise and discretion required to appropriately hear and determine these issues, while providing

targeted, appropriate protections for victims of family violence during the court hearing; and

4. The Federal Government provide greater funding and resource support to the family courts and Legal Aid.

CONCLUSION

104. In conclusion, the Association urgently asks the Committee to consider our proposed Recommendations which are intended to achieve a better balance between promoting the administration of justice for all, safeguarding fair trials and protecting the victims of family violence, both during their trials and for their lifetimes beyond.

105. The Association firmly believes that the best way to protect victims of family violence both during and after trial is through the maintenance of a properly resourced, specialised family law court.

106. The Association encourages the Committee to consider the resourcing and funding of Australia's family law system and Legal Aid as a crucial factor that will impact this Bill's success in practice.

107. The Association would be pleased to provide any additional information or answer any further questions the Committee may have.

13 July 2018

Annexure A

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)*

Publication of submissions

Submissions will be published on the Attorney-General's Department website. Please advise if you wish all or part of your submission to remain confidential.

Please prepare your submissions in this template and submit in Microsoft Word format (.doc or.docx) to familylawunit@ag.gov.au. Use of the submission template assists in meeting the Australian Government's commitment to enhancing the accessibility of published material.

The department will consider hardcopy submissions received by mail, but these submissions will not be published on the website.

Please also note that it is an offence under section 121 of the *Family Law Act 1975* (Cth) to disseminate to the public or to a section of the public by any means any account of any proceedings under the Act that identifies:

- a party to the proceedings;
- a person who is related to or associated with a party to the proceedings or is otherwise concerned in the matter to which the proceedings relate; or
- a witness in the proceedings.

Your details

Name/organisation *(if you are providing a submission on behalf of an organisation, please provide the name of a contact person)*	New South Wales Bar Association
Contact details *(one or all of the following: postal address, email address or phone number)*	Selborne Chambers B/174 Phillip Street Sydney NSW 2000

Confidentiality

Submissions received will be made public on the Attorney-General's Department website unless otherwise specified. Submitters should indicate whether any part of the content should not be disclosed to the public. Where confidentiality is requested, submitters are encouraged to provide a public version that can be made available.

I would prefer this submission to remain confidential (please tick if yes) ☐

Your submission

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

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

The NSW Bar Association is of the opinion that there should be no automatic ban on cross-examination in any circumstances.

We are of the opinion that any constraint on the ability of a party to challenge evidence in proceedings and the means by which this may or may not occur should remain, at all times, a matter for the discretion of the court in each individual proceeding.

Any automatic ban is inimical to the method by which courts are to determine issues in proceedings, including particularly those involving the interests of children in parenting proceedings, and would give rise to a significant risk that the evidence upon which such determinations depend is unable to be properly explored and tested in proceedings, thereby compromising the ability of courts to determine issues and to act in the interests of the children the subject of proceedings.

Any automatic ban would be as likely to prejudice the interests of 'victims' as those of 'perpetrators', as it would necessarily constrain the ability of a court to properly determine necessary issues, including the whether family violence has occurred and the consequences of that violence for parenting and financial determinations.

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

No, the courts have sufficient powers presently to appropriately control and manage the oral evidence of parties in proceedings, including when and what cross-examination will be permitted. Such powers are to be found in the *Evidence Act 2006* (Cth), the *Family Law Act 1975* [**FLA**] and associated *Rules*, including particularly Division 12A of Part VII in parenting proceedings.

The NSW Bar Association is to the opinion that the section may well, in many proceedings, result in both parties being banned from cross-examination of the other. The section presupposes that there will be only one party who falls to be characterised as the 'victim' and one as the 'perpetrator' but this does not accord with the experience of members of the NSW Bar appearing in such proceedings. The result is that a court may be put in a position where the section operates to prevent the cross-examination of each party by the other.

Further, we are of the opinion that the section, as drafted, is too broad in its operation and goes well beyond that which could be considered as reasonably proportionate and necessary to address that which is intended. By way of limited example:

(a) sub-section (1)(b) operates in respect of 'allegations of family violence' which in turn engages the definition of family violence in section 4AB FLA. Section 4AB incorporates within that definition many issues, including those involving the financial support of spouses, which is otherwise to be addressed pursuant to Part VIII of the FLA and is unlikely to give rise to issues to which the proposed amendments are directed; and,

(b) sub-section (1)(d) operates in respect of a range of orders, including injunctions entered pursuant to section 114 of the Act, which injunctions are not limited to those entered for personal protection and related reasons, but also to injunctions entered for any purpose in proceedings under the Act entirely unrelated to such issues – by way of example, in relation to jurisdiction and for the protection of assets.

The result is that the section as drafted could give rise to an automatic ban in entirely inappropriate circumstances.

Further, section 102NA(1)(c)(i) operates in respect of either a 'conviction' or 'charge' and it is suggested that the section could not, without more, operate in respect of a person charged but acquitted.

Finally, sub-section (1)(c) operates to confine the ban to circumstances where there are pending or have been certain criminal proceedings and, thereby, does not operate in relation to the many persons who will have experienced family violence without resulting criminal proceedings.

There are a significant numbers of proceedings in which the nature of the allegations arising, and the evidence in support of those allegations, gives rise to series concerns of 'family violence' but which evidence is (or have been found to be) insufficient to support a criminal conviction on the different (and higher) standard of proof required. In many instances there will not have been any involvement with the criminal law nor applications for protection / restraining orders. The courts administering the FLA deal on a daily basis with persons in such circumstances but for whom allegations and experience of significant family violence is a reality.

In this respect, the draft gives no evident or appropriate recognition to the 'family violence', and the consequences of the same, which it is presumed to seek to address in the context of proceedings pursuant to the FLA.

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.

No.

Whilst the NSW Bar Association is not clear about that which is intended by reference to the 'Notice of Risk', it ought be noted that rules of the Federal Circuit Court of Australia require that such a Notice be filed in all proceedings, whether or not there is any allegation of risk. Thus reliance upon the filing of such a Notice as a 'trigger' for the operation of section 102NA(1), if this be intended or being considered, would have unintended and inappropriate consequences.

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?

No.

This has been largely addressed above and our concern stems from recognising:

(a) that there will not always be only one 'victim' and one 'perpetrator'; and,
(b) that adoption of such a course would deprive a court of the ability to determine the necessary issues in the proceedings with consequent constraints on the ability of the court to determine necessary issues and, in parenting proceedings, to protect and advance the interests of children.

A mutual ban on cross-examination would deprive a court of the ability to determine whether family violence has, in fact, occurred, thereby depriving a victim the opportunity to obtain protective orders, appropriate parenting orders and have any relevant financial consequence addressed.

Further, and as addressed below, real issues emerge for consideration in relation to the source of funding where one or both party are to be so constrained.

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?

Any discretionary power of a court should be available to be exercised on the application of any party to the proceedings (including any Independent Children's Lawyer) and by the court of its own motion.

It would be inconsistent with fundamental notions of justice if a party to proceedings was to be prevented, without more, from bringing an application in the proceedings to the court or if a court was to be prevented from dealing with such applications.

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

The most appropriate person to undertake the role is an appropriately qualified and experienced legal practitioner.

The NSW Bar Association notes that the proposed ban is to operate in relation to cross-examination and that any questions to be asked on behalf of a person are to be by way of cross-examination, as opposed to the simple 'asking of questions' as posed by that person.

For the purpose of addressing this question, and those that follow, it is important to recognise that the role of cross examination is two-fold. It is to test and challenge the evidence of the other party and his/her witnesses. It is also to put the case the case they are facing to them in order to obtain their response. The significant aspects of a party's case to a witness must be put to satisfy the rule in *Browne v Dunn*. It is through cross-examination that the truth or otherwise of an allegation is established, by the testing of the credibility and the veracity of the witness. Effective cross-examination requires the cross-examiner to be present throughout the giving of the other party's evidence and the evidence of his/her witnesses.

The reason the cross-examiner needs to be aware of all the previous evidence given in the court is expressed by Hunt J in *Allied Pastoral Holdings v FCT* [1983] 1 NSWLR 1 at 16:

It has been in my experience always been a rule of professional practice that unless notice has already clearly been given of the cross-examiner's intention to rely upon matters, it is necessary to put to an opponent's witness cross-examination on the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inference to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn.

Cross-examination is not merely asking a set of prepared questions. It requires listening to the answers and then asking further questions to challenge or test these. As such the cross-examiner needs to be able to take detailed instructions from the party s/he represents.

Failure to allow a party to properly cross-examine renders any judgment ultimately made unreliable and subject to appeal. This is because the right to cross-examine is central to the adversarial trial process. It is only through cross-examination and the testing of evidence that findings may be made as to such matters as the best interests of the child or the truth of allegations of family violence.

The importance and role of cross-examination was considered *inter alia* by the Australian Law Reform Commission in February 2006 and the subject of the report *Uniform Evidence Law* (ALRC Report 102). Without repeating the detailed content of that report, from paragraph 5.70 the ALRC considered 'Constraints in the cross-examination of vulnerable witnesses' and reviewed the then existing legislative provisions on both a Commonwealth and State basis. The work done by the ARLC (in conjunction with the NSWLRC and the VRC) provides a valuable basis for further consideration of any proposals and, importantly, a benchmark from which the reforms thereafter implemented can be assessed.

More particularly in relation to this question, we are particularly concerned with the adoption of any proposal which would seek to impose an unqualified and/or uninstructed intermediary to undertake such role. An intermediary who is not retained and instructed by a party is unable to properly discharge their duty both to the court and to the party that are appearing on behalf of. Denied a source of instruction, and a role as a representative, there is no proper basis for such an intermediary to effectively advance the case in relation to

relevant issues, including in challenging evidence where necessary and appropriate – that is, to undertake the cross-examination which the party is to be precluded from doing themselves.

We urge that further funding be made available to the Legal Aid Commissions of the various States and Territories to ensure that appropriately experienced and qualified legal representation is made available where required, including in proceedings where courts require assistance in dealing with allegations of family violence.

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

For the reasons outlined in response to question 6, any court-appointed person ought be an appropriately qualified and experienced legal practitioner.

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

In the event that, notwithstanding these submissions, a person other than a legal practitioner is to be appointed to fulfil the foreshadowed role, the qualifications and experience to be required of such a person ought be incorporated in the *Family Law Act* (or *Rules* or *Regulations*).

For the reasons outlined below, both the parties and the courts will necessarily depend upon that which is done (and not done) by any court-appointed person in the course of the proceedings and for that reason some delineation of the qualifications and experience to be required is necessary.

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.**

In the event that a legal practitioner is to be appointed to fulfil the foreshadowed role, all of the above matters and, more broadly their duties to the court and other parties, are ones well-established by both legislation and authority. Similarly there are well established procedures and structures by which the courts and other agencies regulate the conduct of legal practitioners.

If persons other than legal practitioners are to fufil the role of the court-appointed person, it will be necessary to:

(a) clearly provide for the duties and obligations of such person, not only in the proceedings generally, but to the court, the person on behalf of whom they are asking questions and the other parties to the proceedings;
(b) clearly provide for the consequences of any failure to fulfil such duties or breach of such obligations; and,
(c) establish and maintain a procedure by which such failures and breaches are to be dealt with and a structure for addressing such matters.

It is otherwise noted that the examples provided above illustrate a consideration of a role for the person appointed other than to undertake 'cross-examination'. That is, the examples posit a role which would not permit proper cross-examination on behalf of a person – for example, as the appointed person may not be present throughout the proceedings, may have limited or directed involvement with the person precluded from asking questions and/or may be prevented from asking 'their own' questions.

For the reasons outlined above, significant concerns arise for the proper administration of justice and the proper conduct of proceedings is a person is to be precluded from conducting a direct cross-examination and any court-appointed person is than unable to conduct such a process on that person's behalf. Most materially in the present context, such an approach would deny the court the ability to even determine whether family violence has occurred, let alone properly address the consequences of such violence for both parties and children.

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

In circumstances where a court precludes a person from direct cross-examination, and that person otherwise refuses to retain or accept the appointment of a legal practitioner to act on their behalf, that person should be entitled to nominate an alternate person, provided that any person so nominated is not such as to perpetuate any concerns as to the impact of family violence. The court ought retain the discretion to refuse to permit any such nominated person from being involved in the proceedings.

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

Yes, for the reasons set out above.

As addressed, the questions posed above and the 'model' confuse and insufficiently delineate between the concepts of 'asking questions' on behalf of a person and cross-examination. The former involves a person as a mere 'mouthpiece' for a party, the latter involves the exploration and testing of evidence relevant to the determination of issues in the proceedings.

Further, there is no evident consideration given to the manner in which such persons will be identified and funded in practice.

An analagous circumstance has been experienced in proceedings pursuant to the *Family Law Act* where a Case Guardian is sought to be appointed for a party. Recurring requests of courts and parties to the Attorney-General's Department have failed to identify any persons who can be identified to take on such roles and failed to elicit any proposal for the appropriate funding of such roles. There is no reason to suspect the position will be any different here.

An absence of identifiable persons and/or appropriate funding will only exacerbate the difficulties already experienced by those experiencing family violence in such proceedings, which difficulties will include the further delay of already prolonged proceedings and the inability of courts to properly consider and address family violence.

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

No. As outlined, there ought be no automatic ban on cross-examination. Further, the availability of cross-examination is not a matter that ought be put in the hands of the parties to proceedings.

There may be good reasons why a victim may not oppose direct cross-examination, including because he or she seeks to put a court in a position to determine issues on a timely basis.

There may be circumstances in which it is to the advantage of a perpetrator to prevent cross-examination occurring by withholding consent, including denying a court the ability to make findings adverse to them.

The mode by which cross-examination is to occur in circumstances involving family violence ought remain, ultimately, in the discretion of the court seized with the particular proceedings.

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?

No. As outlined above, the mode by which cross-examination is to occur in circumstances involving family violence ought remain, ultimately, in the discretion of the court seized with the particular proceedings.

As part of any such determination, the impact of cross-examination on the alleged victim is and would inevitably and ought be one of the primary matters to be taken into account.

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

As above, to the extent that this question is predicated upon there otherwise being a ban on cross-examination, the answer is 'no'.

We agree, however, that in determining the course of oral evidence in proceedings, a court ought consider both the impact upon the 'victim' and the manner in which the 'perpetrator' might intend or be reasonable apprehended to intend to undertake any cross-examination.

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

The matters addressed above are repeated here.

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?

Any amendments ought only apply prospectively.

Any pending proceedings have been prepared and conducted to date without reference to any amendments which may come into effect. The recasting or reformulation of proceedings to take into account any amendments can only result in further delay and expense to parties who will already have inevitably experienced significant cost and delay in awaiting determinations.

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

For the reasons outlined above, it is our view that the amendments are both flawed and unnecessary.

If any version of the amendments are to be pursued, including any proposal to give content and direction to any 'court-appointed model' of representation, we would appreciate the opportunity to comment further.

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?

See the responses above.

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

See the responses above.

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?

See the responses above.

21. Any general comments.

It is our view that the amendments represent an unnecessary and ill-considered approach to the issue of the impact of proceedings on victims of family violence.

The courts already have a variety of power available to regulate the manner in which proceedings are conducted and to protect victims of family violence from the impact of oral evidence in those proceedings. These include the powers under the *Evidence Act 2006* (Cth), the *Family Law Act 1975* (including Division 12A of Part VII) and as part of the courts power to regulate proceedings more generally.

The real issue for victims of family violence is that the courts administering the *Family Law Act* are in a state of disarray, including as a result of sustained under-funding and slow and poor judicial appointments.

All litigants in New South Wales, including victims of family violence, face appalling delays of more than 3 years in having their proceedings determined. No amendment to the legislation will address this issue, which is the primary cause of harm to the welfare of victims, including children. This amendment is only likely to add to the expense and delay experienced in proceedings.

The most appropriate, efficient and cost-effective means of protecting the victims of family violence, including children, is to ensure that a properly funded legal system is available to determine proceedings in which they are involved on a timely basis.