Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

18 August 2017

Our ref (NDC/FL)

Dr Natasha Molt
Senior Legal Adviser
Law Council of Australia
GPO Box 1989
CANBERRA ACT 2601

By post and by email: natasha.molt@lawcouncil.asn.au

Dear Dr Molt

Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017

Thank you for the opportunity to provide comments on the Exposure Draft of the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 (**the Bill**). The Queensland Law Society (**the Society**) appreciates being consulted on this important reform.

This submission has been prepared with the assistance of the Family Law Committee, who have considerable experience in this area.

The Society strongly supports legislative reform to prevent direct cross-examination in certain matters involving family violence. Existing protections, including video-link facilities, are vastly inadequate and inconsistently applied. Direct cross-examination of victims of family violence not only perpetuates the abuse but results in the court receiving incomplete or poor quality evidence. Victims of family violence are likely to find court processes stressful and traumatic, which will impede their capacity to properly present their case and effectively cross-examine the other party. This raises significant procedural fairness issues which must be addressed through legislative reform.

We make the following comments on the questions set out in the Consultation Paper:

In what circumstances should direct cross-examination be banned?

While the Society supports the protections provided in the Bill, each case involving family violence is different and the dynamics of fear, power and control between parties will vary considerably.

The prevalence of family violence in family law matters means that an automatic ban on the direct cross-examination of a party in specific circumstances (including where either party has been convicted of or charged with an offence involving violence or the threat of violence or where a family violence order applies to the parties) would impact a significant proportion of matters.

Given this, the Society recommends the Bill be amended to provide greater discretion for the court to determine whether, in each case, it is necessary to make an order to prevent the direct cross-examination of a witness, rather than imposing an automatic ban in specific circumstances. This could be set out in the same manner as proposed section 102NB whereby, in any matter involving family violence, the court may make an order preventing direct cross-examination on its own initiative or on the application of a party.

In our view, parties should be at liberty to make the relevant application at any stage throughout proceedings. The experience of attending court can be extremely stressful and may trigger behaviour that causes direct cross-examination to become unviable once proceedings have already commenced.

Which people would be most appropriate to be appointed by the court to ask questions on behalf of a self-represented person?

In our view, the person appointed by the court to ask questions on behalf of a self-represented person should be a legal practitioner.

A legal practitioner would provide the courts with an independent person who has ethical duties to perform the role of asking questions appropriately and with regard to principles of procedural fairness. Rule 21.8.2 of the Australian Solicitors Conduct Rules 2012, for example, compels a solicitor to take into account any particular vulnerability of the witness in the manner and tone of the questions that the solicitor asks. This requirement would also ensure the court-appointed person maintains a paramount duty to the court and the administration of justice.[1]

We recommend the scheme be set up similar to the duty lawyer scheme whereby legal practitioners are available at the courts to undertake questioning on behalf of self-represented litigants. Alternatively, the scheme could provide practitioners from community legal centres or a panel of private solicitors. Importantly, the scheme will need to be adequately resourced to be effective.

We further recommend that information about the scheme be easily accessible online and at the courts and provided to parties upon the filing of a Notice of Child Abuse, Family Violence or Risk of Family Violence to ensure that affected persons are aware of the protections available.

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

The court-appointed person should have his or her name entered in the High Court Register of Practitioners which allows the person to practise in areas of federal jurisdiction. In accordance with the rules that apply to the High Court Register of Practitioners, the court-appointed person must be entitled to practise as a barrister, solicitor or legal practitioner in the Supreme Court of a State or Territory.

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

In our view, the requirements regarding who the court can appoint and their qualifications should be included in the *Family Law Act 1975* (Cth).

[1] The Australian Solicitors Conduct Rules 2012, rule 3.1.

What should be the scope of the role of the court-appointed person?

In the Society's view, the court-appointed person would not be retained by the litigant or act as an advocate, but should play a discrete and limited role in the proceedings and this role should be clearly articulated in the *Family Law Act 1975* (Cth).

The scope of the role must be carefully managed to mitigate risk to practitioners and to ensure the framework does not become a means of by-passing ordinary eligibility requirements for legal assistance or avoiding the need to engage private legal representation.

It is crucial that the role of the court-appointed person be limited to asking questions posed by the self-represented party. The court-appointed person should obtain a list of questions from a self-represented party and the witness should be asked each of the questions. It may also be appropriate for a short adjournment to take place so that a further list of any questions arising can be provided by the self-represented litigant to the court-appointed person. The court-appointed person should not provide legal advice (generally or on the list of questions) or assist in any negotiation discussions with other parties.

The model must include mechanisms to reduce legal practitioners' exposure to claims. Solicitors have a duty of care to apply a degree of skill and exercise reasonable care in carrying out the relevant task. In circumstances where a legal practitioner undertakes brief consultation with a party, there is a risk that he or she will be compelled to manage issues beyond the scope of the role. For example, it may become apparent that the self-represented litigant should take certain action to protect their interest and the solicitor would then ordinarily be on notice in relation to the issue and would have a proactive obligation to warn the person.

To provide some protection against this risk, we recommend the self-represented litigant receive information (by way of brochure or handout) which details the scope of the court-appointed person. The information should include: general information about the scheme and process, the fact that the practitioner has not been "retained" and that the practitioner cannot provide legal advice. The Society would welcome further consultation in relation to the contents of the proposed handout.

While advocates immunity offers some protection to legal practitioners for negligent actions or omissions done in the conduct of court proceeding, the scope of this doctrine has been narrowed recently by decisions including *Kendirjian v Lepore* [2017] HCA 13 and *Atwells v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16. This emphasises the importance of providing information to litigants about the limited scope of the service provided.

This limited scope potentially conflicts with some obligations under the Australian Solicitor Conduct Rules in relation to advocacy and litigation, including rule 17.1 which provides "*a solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client*". However, in our view, given the solicitor would be appointed by the court for the purposes of asking a discrete list of questions and is not retained as an advocate, the practitioner would not be obliged to follow ordinary rules in relation to advocacy and litigation.

It is important that the framework does not encourage litigants to be self-represented. If a person is able to receive legal representation from the court-appointed person where they have been deemed ineligible for Legal Aid or other legal assistance services, they may be less likely to seek legal advice from a private solicitor, which would adversely delay the progression

of matters through the court system. These concerns are also mitigated by limiting the role of the court-appointed person.

Given this limited role, it is essential that the court play an active role in proceedings. Although current practice varies, judicial offers may ask further questions during cross-examination or clarify responses. The Family Law Courts' *Family Violence Best Principles* must be proactively applied to matters involving family violence and judicial offers should use court powers available to facilitate fair hearings.

Finally, it is impractical to require the court-appointed person to be present in court for the whole of the proceedings. A trial may run for up to several weeks and the presence of the court-appointed person throughout this time would be a poor use of resources. Further, given the limited role the court-appointed person should play, it is unnecessary.

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

The Society strongly opposes the suggestion that a self-represented person be allowed to nominate the court-appointed person. The risk that the model could be used as a means of intimidating or exerting control over a victim of family violence would be too great in these circumstances.

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

The Society is very concerned about the lack of information currently provided in relation to the court-appointed person model, and in particular, how the scheme will be funded and consistently implemented.

Should the court only grant leave for the direct cross-examination to occur if both parties to the proceedings consent?

In our view, circumstances will vary significantly between matters and the court should maintain discretion to prevent direct cross-examination in all circumstances.

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?

The court should exercise its discretion to ban direct cross-examination if it considers that the cross-examination will adversely affect the ability of the party being cross-examined to testify or the ability of a party to conduct cross-examination. In our view, evidence cannot be properly or appropriately tested if the capacity of the witness to provide evidence is adversely affected.

As referred to above, judicial officers must continue to proactively apply the Family Law Courts' *Family Violence Best Practice Principles* in matters involving family violence. These principles set out the general powers of the court to control proceedings to ensure victims of family violence are not re-traumatised by the court process. Where appropriate, courts should require that an alleged perpetrator be shielded from view while the victim provides evidence, allow the victim to have a support person nearby while providing evidence, close the court to

the public and disallow certain questions on the basis that they are misleading, confusing, offensive or based on stereotype.[2]

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

The court may wish to exercise its discretion to prevent direct cross-examination of a party if the content of particular questions appears to have an adverse impact on the witness.

In parenting proceedings, for example, the court must determine what is in a child's best interest based on an assessment of the factors set out in section 60CC of the *Family Law Act 1975* (Cth), including the need to protect the child from physical or psychological harm from being subjected to, or exposed to, family violence[3] and the nature and circumstances of any family violence order.[4] Given this, specific details of past violent incidents between the parties are commonly raised during cross-examination, which may trigger a particular negative response for a victim of family violence.

The proposed amendments should not be limited to parenting matters but should apply to all family law matters including property proceedings, maintenance and child support.

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?

In our view, the amendments should apply to all proceedings, irrespective of whether they were instituted before or after the commencement of the legislation.

Should any changes be made to the proposed amendments to ensure that all parties receive a fair hearing and the courts are able to make informed decisions?

The issues raised in the Bill are highly complex and formulating a scheme which ensures victims of family violence are not re-traumatised while maintaining principles of procedural fairness is difficult. We agree that both parties should have the opportunity to make their case and the opportunity to test any evidence against them. The capacity of the court to make informed decision will be compromised where this does not occur.

The issues are further complicated by the fact that, in the experience of our members, cross-allegations of family violence are relatively common and therefore both parties are an alleged victim and an alleged perpetrator.

Again, judicial officers should remain cognisant of the Family Violence Best Practice Principles and should be encouraged to exercise the courts general powers to actively manage the conduct of proceedings.[5]

General comments

We are not aware of any information about how the proposed scheme will be resourced. We emphasise that the prevalence of family violence in family law matters means that a significant proportion of matters may require a court-appointed person to undertake cross-examination on behalf of a self-represented party. Inadequate funding will undermine the success of the

[2] See *Family Violence Best Practice Principles*, December 2016.
[3] *Family Law Act 1975* (Cth), section 60CC(2)(b).
[4] *Family Law Act 1975* (Cth), section 60CC(3)(k).
[5] Also see *Family Law Act 1975* (Cth), section 69ZN

scheme and place greater stress on the already underfunded and over-burdened family law courts.

The Society would welcome the opportunity to provide further feedback or to be consulted directly on these important reforms.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor, Natalie De Campo, 3842 5889 or by email Natalie.DeCampo@qls.com.au.

Yours faithfully

Christine Smyth
President