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Our ref: HS – FL/DFV

Dr James Popple
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By email: [REDACTED]

Dear Dr Popple

Family Law Cross-Examination Arrangements: Options Paper

Thank you for the opportunity to provide feedback on the Family Law Cross-Examination Arrangements options paper. The Queensland Law Society (QLS) appreciates being consulted on this important matter.

This response has been compiled by the QLS Family Law Committee and Domestic and Family Violence Committee, whose members have substantial relevant expertise.

Members of the QLS committees report concerns with the scheme consistent with those identified in the options paper. While the scheme appropriately recognises, and attempts to protect against, the risk of further trauma being inflicted upon a victim-survivor of family violence, unintended consequences have come to the fore. This includes inappropriate use of the scheme by perpetrators of family violence, particularly by litigants with legal representation terminating their representation prior to a final hearing to cause delay and/or to access representation through the scheme for free, even where they have the means to pay. This may be in circumstances where the victim-survivor party continues to pay for their representation.

QLS submits access to legal aid funded representation should be means tested. Further, QLS agrees there should be legislatively guided discretion as to whether a ban should apply in the particular circumstances of the matter. Our members report the ban is commonly triggered by a family violence order, which is a blunt criteria given that orders vary between jurisdictions, can be imposed without admission, and can have a broad range of conditions. For example, an order may be made with the mandatory conditions only and the parties may be interacting with each other frequently (eg at handovers) and not necessarily in need of the mandatory ban.

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We answer the specific questions upon which our committees have provided feedback below.

Focus Question 1: *Do you agree with the issues relating to the operation of the legislative ban identified in this Options Paper? Are there other issues with the legislative ban which have not been identified?*

QLS agrees with the issues identified in the options paper. An additional issue on the horizon in Queensland is the introduction of 12-month police protection directions under the Domestic and Family Violence Protection and Other Legislation Amendment Bill 2025 (currently before Parliament) and how such directions would interact with the scheme.

Focus Question 2: *Do you agree with Option 1A? Noting the purpose of the ban on cross-examination is to protect victim-survivors from further harm, what safeguards would need to be considered to ensure removal of the mandatory ban does not result in a reduction of those protections?*

QLS is open to consideration of a repeal of the mandatory ban, provided there is legislative guidance, in the form of a non-exhaustive list, regarding the factors to be taken into account in exercising a discretionary ban. The list must include the alleged victim-survivor's views/consent, the existence of a family violence order (and whether it was made by consent without admissions) and other relevant information about the alleged violence (recency, nature of the allegations etc).

Focus Question 3: *Do you agree with Option 1B? If the mandatory ban were able to be overturned, what particular safeguards should be included around the use of that discretion?*

QLS is open to this option being explored as an alternative to option 1A.

We acknowledge both options 1A and 1B will likely result in longer mentions and therefore additional strain on the parties and court resources. We also highlight that any amendment to the statutory provisions should be drafted with a view to making them easy to understand, given the provisions only become relevant where at least one party is self-represented.

Focus Question 4A: *Do you agree with Option 1C? Should any changes also be considered for subparagraphs 102(1)(c)(i) and (iii)?*

QLS is wary of option 1C, given it would retain the ban in respect of some categories but not others. QLS prefers options 1A or 1B. In terms of amendments to s102NA(1)(c)(i), we agree with inserting 'family violence'.

Focus Question 5A: *Do you agree with Option 1D? Would your opinion be different if the mandatory ban was repealed and the ban on direct cross-examination was entirely discretionary? What factors should be considered as part of the non-exhaustive list?*

As indicated above, QLS is in favour of statutory guidance to support exercise of judicial discretion, whether this discretion is in respect of a discretionary ban or discretion to exempt a matter from the mandatory ban. The litigant's ability to satisfy the relevant means/merits test should be part of the non-exhaustive list, along with other factors mentioned above.

Focus Question 5B: *Alternatively, would a 'quality condition' and 'significant distress condition' test, similar to section 31U of the UK MFP Act, be warranted or appropriate in the Australian context? Should a 'not contrary to the interests of justice' test be included as part of the exercise of the discretionary ban, as per subparagraph 31U(1)(b)(ii) of the UK MFP Act?*

QLS is in favour of a non-exhaustive list of factors and therefore does not consider that these 'conditions' are necessary.

Focus Question 7: *Have you or your organisation experienced/witnessed any litigants using the cross-examination ban or Scheme to continue to perpetuate systems abuse, coercive control and/or family violence? If so, are these occurrences rare in nature or do they represent a more widespread trend? Have you or your organisation experienced/witnessed any other types of inappropriate behaviours from litigants accessing the ban or Scheme?*

Our members have commented that they have witnessed this type of misuse of the scheme. One example is the 2022 matter of *Zong & Lim* where the father dismissed his appointed lawyers on multiple occasions, resulting in adjournments of the trial.¹

It is also not uncommon for litigants with significant wealth to rely on the scheme to access legal aid funding after having privately paid their solicitors up until the point trial directions were issued. In those circumstances parties who otherwise have resources available to them to fund legal costs, are allocated public funds to the detriment of the scheme.

Focus Question 8: *Do you agree with Option 2A? If so, do you have views on whether Legal Aid should be given standing in the relevant proceeding or given the right to provide a submission in such cost order decisions?*

QLS notes the difficulties identified with legal aid commissions recovering contributions but considers requiring litigants with appropriate means to contribute to the scheme would be appropriate, both in terms of allocation of public funds and as a disincentive to misuse of the scheme. Costs orders may be an appropriate way to achieve this without requiring contributions to be made during the matter.

Ultimately, the aims of the s 102NA regime will be better met and the scheme will be more sustainable if litigants with the capacity to meet the costs of their legal representation are required to do so. This could be achieved in several ways, including requiring litigants to engage their own representative where the Court (or a means test threshold) is satisfied they have the capacity to do so, or reimbursement to legal aid where it is found the party acted unreasonably

¹ *Zong & Lim* [2022] FedCFamC2F 196

in refusing previous offers to resolve the matter prior to trial and a costs order would otherwise be appropriate if the client did not have legal aid funding.

Another option may be for an opt-in category of solicitors prepared to act at a reduced fixed fee rate for parties who are not eligible for the s102NA scheme on the basis they failed a means test. This might then have flow on effects in terms of potential increases to the legal aid rate paid to lawyers who take on these matters and therefore the ability to attract or retain more lawyers who can take on these matters and dedicate sufficient time to their preparation.

Focus Question 9: *Do you agree with Option 2B? What are some of the practical considerations that would need to be explored to implement this option? What would you consider to be a reasonable 'high-value property' threshold?*

As noted by the options paper, Option 2B would impact victim-survivors as well as perpetrators of family violence. In effect, the victim-survivor would be indirectly contributing to the perpetrator's legal costs.

QLS would prefer a model where parties who are likely to receive more than a certain amount of funds from the pool are required to reimburse legal aid or engage a private lawyer. We note, however, that there are difficulties in estimating what a party is likely to receive and potentially pre-empting the decision of the court and therefore consider that Option 2A is preferable. However, identifying for parties that legal aid funding may be required to be reimbursed if the party receives a particular property division may divert parties who can fund their legal costs to other litigation funding options or private payment.

Focus Question 10A: *Do you agree with Option 2C implementation method A? What are some of the practical considerations that would need to be explored to implement this option? Would the relevant legal aid fee scale or a separate fee scale to be determined by legal instrument be the most appropriate remuneration arrangements?*

and

Focus Question 10B: *Do you agree with Option 2C implementation method B? Would you have concerns about the potential perceived conflict of interest involved with this option? Do you have any suggestions about how this option could be operationalised in a way that would mitigate this risk?*

By way of general comment in relation to the proposed court based legal representative model, QLS foresees several disadvantages and complications.

QLS notes the proposed limited scope of work to be conducted by the CBLR. The downside of this, compared to the current model, is the additional difficulty for the other litigant (who may be the victim-survivor) and the court in knowing the unrepresented litigant's case where they have not had legal assistance in drafting documents leading up to the hearing. The quality of such documents may be poor or cause distress to the victim-survivor which could have been avoided if a legal representative undertook the preparation.

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Additional risks include delays caused by inadequate availability of CBLRs and appeals sought by unhappy litigants. Issues may also arise in respect of conflicts of interest and difficulty in defining the scope of the CBLR's duties.

Focus Question 11: *Do you agree with Option 3A? Do you agree Option 3A should only be considered in combination with other options included in this paper (for example, Option 1B), or with other safeguards not covered by this paper? Do you have any views on whether the standard legal aid means/merits test should be used, or whether a specifically designed means/merit test should be considered for the Scheme?*

QLS considers a specifically designed means test would be appropriate. Consideration should be given to excluding the litigant's principal place of residence from the test (provided the value of the home does not exceed a prescribed value) and requiring a litigant who has recently terminated their private legal representation to demonstrate there has been a change in financial circumstances such that they can no longer afford private representation.

QLS agrees that the introduction of any means/merit test is intertwined with consideration of repealing the mandatory ban/introducing a discretion to overturn the mandatory ban.

Focus Question 12: *Do you agree with Option 3B? In your view, are there any aspects of the services currently provided for under the Scheme which could be reconsidered?*

QLS does not consider that the scope of work can realistically be reduced in a sustainable way. Any reduction in scope would either fail to be observed or quickly re-expand to the current scope, given practitioners' obligations to clients and the court.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on [REDACTED] [REDACTED]

Yours faithfully



President