ACT BAR ASSOCIATION

actlawsociety

13 July 2018

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam,

Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry of the Family Violence and Cross-examination of Parties Bill, July 2018

The ACT Law Society and the ACT Bar Association appreciates the opportunity to make a submission in relation to the current Inquiry by the Legal and Constitutional Affairs Committee of the Senate regarding the *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018.*

The Bill contains proposed amendments to the *Family Law Act (FLA)* that would prevent direct cross-examination of either party if certain conditions are met. The ACT broadly supports the intent behind the legislation. However, the proposed scheme raises very serious issues about how procedural fairness will be preserved.

The submissions will address the following matters:

1. A concern about possible unintended consequences relating to the triggers in proposed section 102NA(1);
2. The role of the Legal Representative;
3. Current protections within the *FLA*; and
4. Potential problems arising with uncooperative clients.

TRIGGERS

The pre-conditions for the operation of the provisions are set out in proposed section 102NA (1). The concerns of the ACT relate to subparagraphs (c)(ii) & (iii). In the ACT it is common for applications for family violence orders or for injunctions under sections 68B or 114 FLA to be resolved by consent on a "*Without Admissions*" basis. This means that there is no need for a

respondent to accept the underlying bases alleged whilst still allowing for the protections afforded by those provisions.

Part of the benefit to an applicant of such an order in that situation includes that they can obtain the protection that they seek without the need for a defended hearing. Not having a defended hearing would also avoid the necessity for the applicant to be cross examined. There is a real benefit to an applicant in this scenario.

Another possible risk of the way the current provision is drafted is that applications for family violence orders or injunctions will be made in circumstances where one of the parties seeks simply to bring proposed section 102NA(1) into play.

The current wording of the triggers in the sub-paragraphs referred to above, requires simply that a final order has been made. This would not take into account the way in which the order was obtained. It is submitted that it would be appropriate that the sub-paragraphs be amended to apply only to final orders made after a defended hearing.

An alternative might be to exclude these sub-paragraphs altogether and, instead, include reference to final family violence orders or final injunctions under the FLA as part of the discretionary considerations of proposed current subsection (c)(iv). That is, the court could be required to take into account, in the exercise of the discretion, whether a final order has been made and the circumstances of the making of that order. Wording similar to that contained in the existing section 60CC(3)(k) would be a possible model here.

ROLE OF LEGAL REPRESENTATIVE

The Bill provides that, if the triggers are satisfied or the court determines, then a party must not cross examine the other party directly and a legal representative must conduct the cross-examination. The ACT strongly supports the proposition that a legal representative should be required to conduct the cross-examination on behalf of the party in relevant cases.

It is unclear however what precisely the role and responsibilities of the legal representative will be if they are appointed pursuant to an order made under these provisions. For a cross-examination to be effective and appropriate the cross-examiner would need to know the whole of the case and have access to all material including subpoenaed material.

Part of the reason that it is appropriate that a legal representative conduct the cross examination is because a legal representative is an officer of the court, and has certain responsibilities as a result. These include not being a "mere mouthpiece" of the client, not making serious allegations without foundation, and having a proper basis for all cross-examination. As a result of these responsibilities, a lawyer could not simply read to the court a series of questions prepared by their client.

In most cases cross-examination will be prepared in line with the "case theory" developed by the lawyer. If the lawyer does not have a full brief and the opportunity to develop a case theory then it is unlikely that cross-examination will be effective. Any cross examination would be hampered (or worse) as a result of a lawyer undertaking it only being able to be

involved in part of the case (by just coming into the case for the purpose of the cross-examination). A simple example where this could be problematic would be where a case is heard over a number of days and where the relevant cross-examination is to occur relatively late in the trial. The cross-examiner would then have not had the benefit of being involved in the case and having heard the other evidence in the case.

The ACT supports the proposition that the relevant lawyer appointed for the purpose of cross examination should also be involved with the balance of the case, notwithstanding that this will obviously have costs implications.

Consideration may also be given to the possibility of the lawyer carrying out cross-examination as a result of proposed section 102NA(1) holding a role similar to a "Counsel Assisting" (rather than as a lawyer for a party), with that person's responsibilities carefully defined. This may also avoid some of the further problems referred to below.

We do not derive great reassurance from the suggestion made in the explanatory memorandum that an unrepresented party would be able to receive a fair hearing on the basis that there "would also be some scope for the court itself to ask questions of a witness who was unable to be cross-examined". This ignores the likelihood of procedural fairness complaints arising from the intrusion or intervention of a trial judge in adversarial proceedings (including through judicial questioning; see for example, the extract at paragraph 2 above)). The committee is respectfully referred to the decision of the full court of the Family Court in *Huda & Huda & Laham*[1].

The idea that the trial judge would play a significant role in testing the evidence to any significant degree is one fraught with difficulties.

The role contemplated for the legal representative that is to be engaged in the circumstances set out in the Bill, raises issues in respect of the rules that apply to advocates and may raise issues as to whether or not such an advocate would be covered by professional indemnity insurance.

CURRENT PROTECTIONS IN THE FLA

Direct cross examination is mostly likely to occur in parenting proceedings - which are conducted under Part VII of the *FLA*. Division 12A of Part VII ("Division 12A") sets out "Principles for conducting child-related proceedings" and includes duties and powers of the court. Division 12A may also apply to parts of the proceedings other than the parenting part (so, for example, to a property aspect) where parties to the proceedings consent (s.69ZM). The powers given to a court under Division 12A may be exercised on the court's own initiative or at the request of one or more of the parties to the proceedings (s. 69ZP). The powers include the power to limit or not allow cross-examination of a particular witness (s.69ZX(2)(i)). This would include the power to put conditions or restrictions on direct cross-examination.

[1] [2018] FamCAFC 85 (85 (10 May 2018)

There are other powers in Division 2 of Part XI, which are available in all types of proceedings. These powers include the power to put safeguards in place, including giving evidence, cross-examining, and making submissions by video or audio link.

The research evidence (AIFS, *Direct cross-examination in family law matters*, 2018), found that safeguards in relation to direct cross-examination were in place in only a minority of cases. The experience of legal practitioners in the ACT is that the existing powers (including those in Division 12A) are used inconsistently across and within registries, but that where they are used (for example, by a judicial officer relaying the cross-examining party's questions), they can be very effective in protecting against the harms which the Bill is designed to address.

The ACT would recommend that, either as an alternative to the Bill, or in addition to it, steps be taken to develop more consistent and rigorous practices in the application of the existing protections in cases involving direct cross-examination where there are allegations of family violence. These might include, for example, the opportunity for judicial officers to meet together to discuss and develop practices in this area and/or the development of Best Practice guidelines.

The Bill should make very clear that the powers in sections 102NA and 102NB are in addition to powers contained within Division 12A (currently the Notes to section 102NA and 102NB indicate that those sections do not limit other laws, but do not refer to the most obvious set - namely Division 12A).

We also recommend that consideration be given to including a discretion not to require cross-examination by a legal practitioner acting on behalf of the examining party if the Court puts in place other appropriate safeguards (for example, a judicial officer relaying the cross-examining party's questions).

POTENTIAL PROBLEMS WITH UNCOOPERATIVE CLIENTS

Possible difficulties arise if the party who seeks to cross examine directly does not want the assistance of a lawyer. Difficulties may arise in at least two scenarios where the client is uncooperative namely:

- in relation to payment if they are not eligible for legal aid; and
- in obtaining of instructions.

The purpose of the proposed legislation appears to be to balance the need to protect victims of family violence whilst still ensuring that procedural fairness is accorded to both parties.

It is noted that the government is in negotiations with National Legal Aid and so the position of funding for these provisions is not yet known. Assuming that legal aid will not be provided for all parties in respect of whom an order under the provisions is made, then the question arises as to how payment will be ensured for those who are not eligible for legal aid. If there is to be a means test applicable to the provision of legal aid for these purposes there will still be a category of people who, although they do not meet the requirements for legal aid on a

means test basis, they nonetheless do not have sufficient resources to pay for a lawyer privately.

There may well be other people who have sufficient means to meet their own legal fees but who are unwilling to do so. It is uncertain how a lawyer will be engaged if there is no guarantee of payment.

If a relevant party against whom an order has been made under these provisions is unwilling to engage with the lawyer appointed on their behalf, then the role of the lawyer becomes even more difficult. Again, some of these issues might be addressed by recasting the role as a "Counsel assisting" role.

Yours faithfully

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