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

The Australian Bar Association (ABA) is the peak body representing nearly 6000 barristers throughout Australia. Established in 1963, the ABA is committed to serving our members, improving our profession, and promoting the rule of law and the effective administration of justice.

The ABA appreciates the opportunity to make a submission in respect of the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018* (the Bill).

Following review of the Bill and Explanatory Memorandum by our Family Law Committee, the ABA provides the following specific observations approved by the ABA Executive:

a. the benefits of legal representation for otherwise self-represented litigants;
b. the existing requirements for a litigant to obtain a grant of Legal Aid and the critical importance of such funding;
c. difficulties which may arise in cases where a party does not have a legal representative available at final hearing to undertake cross-examination;
d. the difficulties associated with representation for only a portion of the final hearing.

The benefits of legal representation for otherwise self-represented litigants

1. Almost two decades ago, a former Chief Justice of the Family Court of Australia summarized the benefits of legal representation, and the concomitant detriment of self-representation; the Chief Justice's observations are just as apt today, as they were then:

> While there is a question of fact as to whether the Mother is such a victim [battered woman syndrome], <u>its elucidation was rendered impossible by her lack of representation in these proceedings</u>. It is therefore difficult to see how her rights were protected as required by CEDAW Article 2(b)(c). Similarly <u>it is difficult to see how she was given the opportunity to be equal before the law with men or that she had the same opportunities as men to exercise her legal capacity in civil proceedings</u>, which these were.

I consider that her lack of representation involved discrimination against her in these proceedings that is of serious concern. No doubt the same could be said in respect of a man if the circumstances were to be reversed, but there are fewer examples of battered men in male/female relationships.

Finally, on any view, the Mother would fit the definition of a "disabled person" for the DRDP in that she, in his Honour's view, suffered from a histrionic personality disorder or, on the basis of an alternative assessment, suffered from a post traumatic stress disorder.

The joint reasons of this Court have already commented upon the Mother's difficulties in dealing with the evidence of Dr RS [an expert] and I am of the view that in general, the Mother's lack of proper representation amounted to a breach of Article 11 of the DRDP.

I do not suggest that the fact that these international obligations were breached in this case is determinative of the matter, but I consider that it lends strength to this Court's conclusion that there should be a new trial.

Further, I am of the view that it also suggests the need for a re-think by Government and legal aid authorities as to the sort of cases in which legal aid should be granted.[1]

2. A more recent decision of the Full Court of the Family Court of Australia[2] highlights that the issue of representation or lack thereof, can cause great prejudice to a party, a miscarriage of justice to both parties and potential harm to children:

In the reasons for judgment in respect of the application for expedition of the appeal, Murphy J referred to "some remarkable features" of the proceedings before Judge Street. We adopt his Honour's summary of some of the salient features of the proceedings before his Honour as follows:

10. The net effect of the withdrawal of Legal Aid and the refusal of an adjournment [on the application of the mother] was that a woman with significant mental health issues, who had up until that time been represented by a solicitor and counsel, including at various procedural and other hearings before Judge Jarrett, was left to represent herself at a final hearing of parenting issues where the potential for harm to the child was a central issue.

11. My reading of the transcript reveals that the mother had very significant difficulties in representing herself. Perhaps as a result of that, his Honour asked each of the parties and witnesses a number of questions. It is his Honour's involvement in that manner that, in part, founded the [father's counsel] seeking that his Honour recuse himself. His Honour refused to do so. This forms the basis of a number of different grounds of appeal.

12. The predominant issue before his Honour was the potential for harm to the child if he remained in his mother's full-time care. There were two pieces of expert evidence before his Honour: evidence from the mother's psychiatrist; and evidence from a family consultant.

13. The latter was firmly of the view that the child should immediately be removed from the mother's care. The family consultant was also of the view that that removal

[1] *T & S* [2001] FamCA 1147 (29 October 2001), per Nicholson CJ
[2] *Nimmo & Bush* [2017] FamCAFC 69; (24 April 2017)

should take place expeditiously and that the child was at some considerable risk of harm if he remained in the mother's care.

3. With those difficulties in mind, in proceedings where the mandatory protections proposed by the Bill are to apply, the ABA welcomes and supports the following general concepts, but makes further comments about the mode of representation later in this submission:
   a. the incorporated requirement that a legal representative be retained;
   b. that lay people will not be used to undertake the forensic task of cross-examination; and
   c. the expressed intention for legal representatives to be retained on both sides of the dispute (i.e. a representative both for the alleged victim and the alleged perpetrator).

The existing requirements for a litigant to obtain a grant of Legal Aid and the critical importance of such funding

4. Whilst the Explanatory Memorandum states 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*", the ABA is concerned that the Bill's prohibition on a self-represented party cross-examining the other party will unfairly prejudice each litigant who:
   a. does not meet the criteria for a grant of Legal Aid; and
   b. cannot legitimately afford to retain privately funded legal representation.

5. The existing threshold for a grant of Legal Aid in family law proceedings in Queensland, by way of example, involves the consideration of:
   a. a means test (looking at the applicant's income and assets, as well as any financial help they receive from a third party);
   b. Legal Aid's funding guidelines; and
   c. a legal merits test.

6. A single person (without children) will be refused a grant of Legal Aid if their gross annual income is at or above $52,520. Accordingly, it ought not be assumed "*possible*" for a person in receipt of a gross annual income over that amount, to retain private legal representation.

7. Furthermore, under the legal merits test, the recommendations contained in an untested report of a family consultant can be determinative of whether a party to a dispute receives a grant of Legal Aid for final hearing in parenting proceedings.

8. In property proceedings there are additional stringent bases for the refusal of grants.

9. The current thresholds would prevent many self-represented litigants from accessing representation through a grant of Legal Aid.

10. Thus, the ABA considers it of critical importance that adequate funding be allocated to permit the existing thresholds for grants of Legal Aid (in proceedings where the mandatory protections are to apply) be relaxed, so as to ensure procedural fairness to litigants.

Difficulties which may arise in cases where either party does not have a legal representative available at final hearing to undertake cross-examination

11. Without cross-examination, a Court is left in the unenviable position of determining a dispute without a proper and fulsome testing of the evidence. In short, where there is a dispute of fact but no cross-examination, the court cannot make a finding one way or the other.

12. The suggestion 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*" 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)).

13. As was recently canvassed by the Full Court of the Family Court in *Huda & Huda & Laham*:[3]
    a. a judicial officer can properly "*clear up ambiguities*" and "*clarify the answers being given*", though "*must not cross-examine witnesses*";
    b. a judge who has "*descended into the arena*" may be unable to properly assess the demeanour of a witness and can create the impression of pre-judgment;
    c. pressure from a judge (even if not consciously applied) may result in a witness making concessions which would otherwise not have been made; and
    d. it is an essential aspect of a trial judge's function as the officer presiding in the court to maintain the appearance of impartiality, by maintaining an appropriate degree of detachment.

[3] [2018] FamCAFC 85 (10 May 2018)

14. The idea that the judicial officer can ask the questions, plug the holes and test evidence, is one where we urge significant caution and circumspection.

The difficulties associated with representation for only a portion of the final hearing

15. The ABA is concerned that the model proposed by the Bill suggests the engagement of a legal representative (whether privately or through a grant of Legal Aid), solely for the purpose of cross-examination of the other party and, it would seem, on the supposedly discrete topic of family violence.

16. A number of the difficulties associated with obtaining or engaging legal representation to appear for only a portion of a final hearing, are set out below. The limited nature of such instructions on a brief to appear:
    a. introduces a process where the legal representative for one party will parachute in and then swiftly out of a hearing (for the sole purpose of cross-examining the other party and perhaps only on the topic of family violence);
    b. discourages the legal representative from developing and implementing an overall case plan in preparation for the final hearing;
    c. excludes the legal representative's involvement in preliminary issues at final hearing, for example objections to evidence (which in some cases, will obviate the need for cross-examination on particular topics);
    d. inhibits the legal representatives' understanding of, and ability to adapt to, the issues arising during the earlier stages of the hearing (for example, concessions made by a witness, the oral evidence given by a family report writer, an expert valuer or their own client under cross-examination);
    e. prevents the legal representative from making submissions, arising from the cross-examination undertaken; and
    f. nonetheless, requires the legal representative to read and consider all of the evidence to be relied upon at the final hearing.

17. We also have great concerns that such a model would be contrary to our Constituent Bodies' Rules (inter alia, we are not a mere mouthpiece), and further, we have great concern whether a barristers' professional indemnity insurance would be available for such piecemeal representation (acknowledging of course, the limited immunity which may still survive).

18. The ABA recommends that parties be directed or requested to obtain, and Legal Aid grants be allocated, so as to permit the engagement of legal representation for the entire hearing – as opposed to the sole purpose of cross-examination of one party and/or just on the discrete topic of family violence.

19. We are aware submissions have been made by entities such as the LCA which highlight that family violence is not a discrete topic but can be relevant to many aspects of a property and/or parenting case. We join with those submissions.

The ABA acknowledges that the previously mooted "lay person model" is not proposed under the draft Bill; that is a most welcomed advancement. However, in those cases where the mandatory provisions apply, doing justice between both parties requires *both* parties be represented and for the totality of the trial. Anything short of that is a model of second-rate justice for the most vulnerable and disenfranchised of litigants.

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Please contact either of the people below should you require.

Dr Jacoba Brasch QC
Chair Family Law Committee, ABA
jbrasch@qldbar.asn.au
0438 301 956

Cindy Penrose
Chief Executive Officer, ABA
ceo@austbar.asn.au
0420 309 420

Dr Jacoba Brasch QC
Chair Family Law Committee, ABA jbrasch@qldbar.asn.au
0438 301 956

Cindy Penrose
Chief Executive Officer, ABA ceo@austbar.asn.au
0420 309 420