SOCIAL POLICY SCRUTINY COMMITTEE

RESPONSE BY THE DEPARTMENT OF THE ATTORNEY-GENERAL AND JUSTICE

TO WRITTEN QUESTION FROM THE COMMITTEE

EVIDENCE AND OTHER LEGISLATION AMENDMENT BILL 2019

1. **The Crime Victims Advisory Committee (CVAC) expressed concern that, as drafted, proposed section 113B of the *Domestic and Family Violence Act 2007* does not allow use of the recorded statement in relation to an application for a domestic violence order where a child of the defendant or the person making the statement is the protected person.**

   (a) ***Can you clarify for the Committee why this is the case?***

   (b) ***How would it impact on the operation of the Bill if clause 113B were amended to extend the provision to cover domestic violence orders where a child of either the defendant or the person making the statement is the protected person?***

AGD Response:

1.(a)

The purpose of clause 10 of the Evidence and Other Legislation Amendment Bill 2019 (the Bill) is to enable recorded statements that are taken from complainants under Part 3A of the *Evidence Act 1939* to be admitted in domestic violence order civil proceedings under the *Domestic and Family Violence Act 2007*. The Bill does not add any further, or change any, rules or procedures relating to the taking and admissibility of recorded statements.

The pre-conditions to the use of recorded statements are set out in new section 113B, and include that the statement must have been taken from the protected person as a complainant in domestic violence offence proceedings. The definition of complainant in new section 113A refers to section 21G of the *Evidence Act 1939*. That definition only includes adult complainants.

Part 3A of the *Evidence Act 1939* was inserted by the *Justice Legislation Amendment (Body-worn Video and Domestic Violence Evidence) Act 2017*. The Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, in her Second Reading Speech for the *Justice Legislation Amendment (Body-worn Video and Domestic Violence Evidence) Act 2017* stated:

> 'New section 21G sets out the relevant definitions for the Part. Of note, the complainant must be an adult. As the complainant may be in an emotional and possible (sic) injured state when the recorded statements are taken, it is appropriate that statements only be taken from adults.'

It is not intended that recorded statements be taken from children because of the requirement that the statements must be made as soon as practicable after the events mentioned in the statement occurred. The contemporaneous nature of recorded statements under Part 3A of the *Evidence Act 1939* makes the application of that Part to children impractical. This is because complainants may be in an emotional and, possibly, injured state when the recorded statements are taken, and it is appropriate that the statement only be taken from adults. Where Police take a statement from a child, it is important that the child have an adult guardian or support person present. That will not always be possible in the immediate aftermath of a domestic violence incident.

1.(b)

Further to the above with respect to part 1.(a) of the question, it is noted that the *Domestic and Family Violence Act 2007* contains a number of provisions that are designed to protect child witnesses in domestic violence order civil proceedings. In particular, section 107 provides that the evidence of a child must be given by written or recorded statement. A 'recorded statement' is defined in section 104 by reference to section 21A(1) of the *Evidence Act 1939*, which means a recorded interview with the child by an authorised person. Section 109 also provides that a child who gives evidence by written or recorded statement need not appear at the hearing and cannot be cross-examined in relation to his or her evidence. Section 109 is also amended by the Bill to make it clear that it applies when the defendant is unrepresented.

The Department does not consider it is necessary to make further amendments with respect to child witnesses.

2. **The CVAC advised the Committee that the Commonwealth Family Law Amendments preventing a domestic and family violence party from directly examining a party who is the victim of the domestic family violence was accompanied by additional funding to the Legal Aid Commission to establish and fund a panel of practitioners for this purpose. However, CVAV noted that it is unclear how a legal practitioner will be identified, appointed and paid for should the Bill be passed.**

   (a) ***In relation to proposed section 114A(3), can you clarify for the Committee how a legal practitioner will be identified, appointed and paid for?***

   (b) ***Has any consideration been given to establishing and funding a panel of practitioners for this purpose? If not, why not?***

   (c) ***In developing the Bill, what consideration was given to the availability of 'independent lawyers' in regional and remote centres?***

AGD Response:

2.(a) and (b)

The Bill, and in particular the new model of cross-examination by unrepresented defendants in new sections 114 to 114B of the *Domestic and Family Violence Act 2007* (and similar amendments made to the *Evidence Act 1939* in clause 18, and the *Sexual Offences (Evidence and Procedure) Act* in clause 28 were developed in consultation with the (now former) Chief Judge of the Local Court, Dr John Lowndes, and the Chief Justice of the Supreme Court, the Hon Michael Grant. The Law Society Northern Territory Social Justice Committee, Northern Territory Legal Aid Commission, North Australian Aboriginal Justice Agency and the Northern Territory Women Lawyers Association were also consulted.

The procedures for appointing legal practitioners to conduct cross-examination for unrepresented defendants will be developed with the new Chief Judge of the Local Court, Elizabeth Morris, and the Chief Justice, and the relevant provisions of the Bill will not be commenced until those procedures are finalised. It may be necessary for the Local Court to develop Practice Directions and the Supreme Court to develop Rules to provide for these procedures. It should be noted that Supreme Court Rules, Local Court Rules and Practice Directions are developed by the Chief Justice and Chief Judge respectively.

Specifically, how a legal practitioner will be identified and appointed is the subject of ongoing discussion with the Chief Judge and Chief Justice. Options may include identifying a panel of barristers, or negotiating arrangements with Legal Aid agencies. These arrangements have not been settled pending the passage of the Bill.

There are no specific funding arrangements for this procedure. Payment of the court appointed lawyer will be funded by the Courts and Tribunals Division of the Department of the Attorney-General and Justice.

It is also noted that appropriate processes for the appointment and funding of non-lawyers to conduct cross-examination for unrepresented defendants would need to be determined even if the model of appointing lawyers was not adopted.

2.(c)

The model for cross-examination by unrepresented defendants was developed in consultation with stakeholders with what was considered to be best practice in mind, noting the challenges that might arise in its implementation. Ultimately the model represents a balance between protecting vulnerable witnesses from trauma and eliciting the best evidence possible, and ensuring procedural fairness for the defendant.

Although the Department considers this issue is unlikely to arise often outside of the major centres, consideration was given to the potential challenges in identifying independent lawyers in remote or regional locations. These are issues that will need to be managed by the court.

It was considered that the model involving a court appointed lawyer conducting the cross-examination for an unrepresented defendant if the court considers it is necessary in the interests of justice to do so was still a better model than a non-lawyer conducting cross-examination and acting as a conduit for the unrepresented defendant.

It is also noted that there is potential for similar issues of lack of independence to arise in remote and regional locations if a model for appointment that did not involve legal practitioners were adopted.

3. **The CVAC advised the Committee that currently the presiding judge is able to put questions to the witness from an unrepresented defendant. As drafted, CVAV suggested that "it is not clear if this will still be an approach that is open to the court, particularly in the Local Court which may not have inherent jurisdiction to require a practitioner to appear amicus."**

   (a) Can you clarify for the Committee if the presiding judge will still be able to put questions to the witness from an unrepresented defendant? If not, why not?

   (b) How would it impact on the operation of the proposed legislation if the Bill were amended to provide an exception for Local Court proceedings which allows the judge to continue to put questions on behalf of the defendant, if appropriate, in the interest of justice and the witness?

AGD Response:

3.(a)

There is currently no process under the *Domestic and Family Violence Act 2007*, the *Evidence Act 1939*, or the *Sexual Offences (Evidence and Procedure) Act 1983*, through which a presiding judge is able to put questions to the witness from an unrepresented defendant. This position is not changed by the Bill.

A process to this effect did formerly exist in the *Domestic and Family Violence Act 2007*, but that was repealed by the *Justice Legislation Amendment (Vulnerable Witnesses) Act 2016*. The *Justice Legislation Amendment (Vulnerable Witnesses) Act 2016* amended section 114 of the *Domestic and Family Violence Act 2007* to mirror the amendments to section 5 of the *Sexual Offences (Evidence and Procedure) Act 1983* to relieve judges of the responsibility of relaying questions from self-represented defendants, if an order was made precluding the defendant from cross-examining the witness directly.

The Second Reading Speech for the *Justice Legislation Amendment (Vulnerable Witnesses) Act 2016* explains that the Northern Territory Department of Justice 2011 'Report on the Review of Vulnerable Witness Legislation' highlighted the 'inappropriateness of a judge asking questions, particularly when the complainant's credibility is an issue, and that there is a suggestion that the judge could be seen by the jury to agree with questions posed to the complainant and this would be detrimental to the case.' The move away from judges asking questions in 2016 was also intended to remove the possibility that a complainant may be intimidated by a member of the judiciary asking questions.

The Second Reading Speech also referred to the Australian Law Reform and New South Wales Law Reform Commissions' 2010 Report No. 114 titled 'Family Violence - A National Legal Response' which stated that judges should not ask questions on behalf of unrepresented defendants because it 'places a judicial officer in a difficult position in determining the admissibility of the questions and may raise perceptions of bias.'

3.(b)

For these reasons it is not recommended to allow for a process whereby judges may put questions on behalf of an unrepresented defendant.

However, if the Committee were to recommend that Local Court Judges be able to put questions on behalf of unrepresented defendants, further provisions would need to be included in the Bill to provide for this scenario as an alternative to the court appointing a legal practitioner. While it is not clear whether it was intended by the CVAC, it is suggested that this process should be consistent across the *Evidence Act 1939* and the *Sexual Offences (Evidence and Procedure) Act 1983*.

4. **The CVAC also raised concerns that the proposed reform to allow the court to appoint a legal practitioner to cross-examine a vulnerable witness may delay completion of the matter which is not in the best interests of the victim. While the Committee notes that clause 114A(2)(d) provides that the Court may specify the date by which the defendant must notify the court of the name of the arranged legal practitioner, the Bill does not impose a time limit on the length of an adjournment for the court to appoint a lawyer.**

AGD Response:

4.

Section 114A(2)(d) states that if the court does not grant an unrepresented defendant leave to cross-examine a vulnerable witness or other witness who is in a domestic relationship with the defendant under section 114(2), the court must as soon as practicable explain to the defendant that the defendant must notify the court of the name of a legal practitioner who is to cross-examine the witness by a date specified by the court. The judge controls the proceedings and will determine an appropriate timeframe in the circumstances in which the defendant is to make the arrangements.

If the defendant does not make arrangements for a legal practitioner or does not advise the court within the timeframe required, the court may appoint a legal practitioner under section 114A(3)(b) if the court considers it is necessary in the interests of justice. The Bill does not specify a timeframe in section 114A(3)(b) in which the court is to appoint a legal practitioner. In deciding whether the appointment is necessary in the interests of justice, any potential for delay would likely be one of the relevant considerations for a judge.

The Department of the Attorney-General and Justice appreciates that the procedure may give rise to two adjournments and consequent delays, but does not recommend imposing an express time limit within which the court must appoint a legal practitioner for an unrepresented defendant. The time required for such an appointment will likely vary based on the circumstances of each case, and it is considered preferable to allow courts flexibility to manage each matter on a case by case basis, or through the development of Practice Directions as the court sees fit. Courts are alert to the impact of delays on proceedings, and more broadly on the administration of justice.

However, if the Committee is so minded, an amendment could be made to the effect that if the court decides it is in the interests of justice to make an appointment, such an appointment should be made 'as soon as practicable', or similar wording.

5. **The CVAC questioned how the proposed reforms will operate in more remote settings, particularly those where video conferencing facilities are not currently available to the court.**

   (a) In these cases, can you clarify how the court would appoint a legal practitioner and how they would be made available, including payment for travel?

   (b) How would it impact on the operation of the proposed legislation if the Bill were amended to clarify that, in determining whether appointment of a legal practitioner is in the interests of justice, the court must also consider the impact of any delays in proceedings that may result from the decision to appoint a legal practitioner, and the availability/access to video conferencing facilities?

AGD Response

5.(a)

As noted above with respect to question 2, the arrangements and processes for appointing legal practitioners to conduct cross-examination for unrepresented defendants will be the subject of further work with the Chief Justice, Chief Judge and legal profession prior to commencement of the relevant parts of the Bill. The Chief Judge may also decide to develop Practice Directions to deal with these matters and also issues relating to the appointment and appearance of legal practitioners in remote locations.

The Department of the Attorney-General and Justice considers the issue of appointment of legal practitioners to undertake cross-examination for unrepresented defendants is unlikely to arise often outside of the major centers.

5.(b)

The phrase 'necessary in the interests of justice' was drafted broadly to enable a judge to take into account any matter it considers is relevant in the circumstances. In deciding whether the appointment is necessary in the interests of justice, any potential for delay would likely be one of the relevant considerations for a judge.

It is unlikely that a legal practitioner would conduct substantial cross-examination on behalf of an unrepresented defendant via video-conferencing, but it is conceivable and a matter for the court to determine. Though the expansion of video-conference facilities is an ongoing project, the unavailability of video-conference facilities in some remote locations may pose a challenge.

The court's consideration of 'the interests of justice' would likely include consideration of the practicalities of the appointment, including whether facilities were available to facilitate the cross-examination by a legal practitioner, or whether other arrangements could be made such as moving the proceedings to another location and the impacts of such decisions. Additionally, these are matters which may be covered by a Practice Direction.

The Department does not consider it is necessary to include the impact of any delays in proceedings or the availability/access to video-conferencing facilities as additional considerations in determining whether the appointment of a legal practitioner is in the interests of justice, as it is unlikely to add substance to the existing provision. However, if the Committee were to make a recommendation along the lines of that recommended by the CVAC, the Department recommends that the recommended amendment not limit the scope of what the court can take into account when considering whether the appointment is in the interests of justice.