



Law Council
OF AUSTRALIA

Family Law Amendment (Family Violence and Cross- examination of Parties) Bill 2018

Senate Legal and Constitutional Affairs Legislation Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges that this submission has been prepared by the Family Law Section of the Law Council of Australia. The Law Council is also grateful to the Law Society of South Australia, the Law Society of New South Wales, the Queensland Law Society for their assistance with the preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) in relation to its inquiry into the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (**the Bill**).

General observations

2. The Law Council previously made a submission to the Attorney-General's Department in response to the Exposure Draft of the Bill released in July 2017 (**the Exposure Draft Bill**). The Law Council's primary position in response to the Exposure Draft Bill can be summarised by the following passage from that earlier submission:

The Law Council acknowledges that, for survivors of family violence, the prospect of being cross-examined by a violent ex-partner can cause significant emotional distress and trauma and discourage them from continuing litigation. The Law Council therefore supports consideration being given to alternatives to direct cross-examination wherever possible.

However, the Law Council is concerned that proposals that preclude, automatically ban or constrain cross-examination are inimical to each of:

- *the interests and rights of litigants, whether victim or perpetrator;*
- *the ability of the court to properly determine issues, including to properly identify and address issues of and arising from family violence;*
- *the efficient delivery of access to justice;*
- *the cost-effective and timely delivery of justice in cases involving family violence,*

and fundamentally misunderstand the nature and role of cross-examination.

To that end, the Law Council considers that:

- *the existing legislative structure provides sufficient power to the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia to properly protect the rights and interests of both victims and perpetrators;*
- *the Family Court of Australia and Federal Circuit of Australia have published the 'Family Violence Best Practice Principles' which set out how the existing legislative structure will be used by those courts, in particular in relation to vulnerable witnesses;*
- *legislative amendment to Division 12A of the Family Law Act 1975 (**Family Law Act**) could ensure the availability of those powers in all proceedings (rather than just parenting proceedings) where determined to be necessary and appropriate; and*
- *further, and targeted, education of judicial officers and the legal profession will serve to ensure appropriate levels of awareness of the powers and practices available to appropriately protect the interests of litigants.*

For those small number of cases where no other alternative to direct cross-examination is suitable, the Family Law Act could be amended to allow a judge to request a legal aid commission to provide representation for the unrepresented, alleged perpetrator (and the victim if they are unrepresented). The Law Council suggests that the proper administration of justice requires that such a lawyer be engaged for the whole trial, not just the cross-examination. If legal aid commissions effectively become a measure of last resort in this context, they should be provided with additional Commonwealth funding to effectively perform the role.

3. The Law Council is pleased that the Australian Government has accepted many of the Law Council's submissions made in response to the Exposure Draft Bill. This includes the:
 - a. removal of the suggestion that lay people might be the alternative cross-examiner; and
 - b. recognition that cross-examination is a forensic process requiring professional skill and experience, and that as a result the alternative cross-examiner must be a legal practitioner.
4. However, the Law Council has serious reservations about a number of aspects of the revised Bill, including the:
 - a. lack of clarity regarding the proposed model for participation of a lawyer to perform the cross-examination. Specifically, whether it is intended that a legally aided lawyer will only be appointed to perform the cross-examination, or whether they will be appointed to act for the party for the entire hearing;
 - b. failure by government to confirm that extra funding to legal aid commissions to enable them to perform this vital role;
 - c. lack of clarity regarding the guidelines that will be applied by legal aid commissions to people who cannot afford a private lawyer to act for them and who seek the appointment of a legally aided lawyer;
 - d. failure by government to provide extra funding to the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia (the family courts) to enable them to implement the Bill; and
 - e. uncertainty about what is to occur if a party cannot afford a private lawyer and is not eligible for legal aid. The Law Council is particularly concerned that situations may arise where the perpetrator is legally represented, but the victim of family violence is unable to secure legal representation.
5. For the benefit of the Committee, the Law Council repeats some of its general observations made in its earlier submission in response to the Exposure Draft Bill regarding the importance and role of cross-examination in family law proceedings:

The nature of family law proceedings and the existing tools available to manage proceedings involving allegations of family violence

Proceedings involving direct cross examination between an alleged perpetrator and victim at trial, whilst raising significant concerns, are of limited number in the family law system.

Where such issues do arise, there are significant tools available to trial judges in the *Evidence Act 1995 (Cth)* to properly protect victims from improper and unnecessary

exposure to perpetrators and are common to many courts. Further, Division 12A of the Family Law Act provides explicit powers to a trial judge in parenting proceedings to directly control the issues permitted to be pursued in proceedings and the mode by which this is to occur, including in respect of cross-examination. Division 12A also permits a court to make any necessary preliminary determination, including as to whether there has in fact been family violence between an alleged perpetrator and victim and the consequences of the same, including in terms of the proper conduct of the proceedings subsequently.

The last point is important as, in affording appropriate recognition and necessary protection to victims of family violence, it is important to be cognisant of the fact that in many (if not most) instances the occurrence of family violence (or not) will itself be a fact in issue but not always an issue relevant to the proceedings. It is not in the interests of litigants nor the court system that resources be committed to determining issues which are either irrelevant to those before the court or involve separate (and potentially extensive) preliminary proceedings.

The central issues to be determined in most family law cases are what parenting arrangements are in the best interests of children, or what division of property is just and equitable. Whilst a litigant may be a victim of family violence, the violence itself may not be a significant focus of the case. A complete ban on cross examination would mean that, whilst a victim is not cross-examined about the violence, they are also not cross-examined about a range of other facts that are likely to be significant issues for determination by the judge.

Proceedings under the Family Law Act are essentially adversarial in nature. While Division 12A provides for greater powers, some of an inquisitorial nature, in parenting proceedings, such proceedings along with financial proceedings remain fundamentally adversarial in nature. Fundamental to any adversarial system of justice and the right of a party to a fair trial is the right to cross-examine the other party and the witnesses she or he may rely upon.

Balancing the importance of cross-examination with the needs of those who may have experienced family violence

The role of cross-examination is two-fold. It is to test and challenge the evidence of the other party and his/her witnesses. It is also to put the case they are facing to them in order to obtain their response. The significant aspects of a party's case must be put to a witness to satisfy the rule in *Browne v Dunn* (1893) 6R67. It is through cross-examination that the truth or otherwise of an allegation is established, by the testing of the credibility and the veracity of the witness. Effective cross-examination requires the cross-examiner to be present throughout the giving of the other party's evidence and the evidence of his/her witnesses.

The reason the cross-examiner needs to be aware of all the previous evidence given in the court is expressed by Hunt J in *Allied Pastoral Holdings v FCT* (1983) 70 FLR 447:

It has been in my experience always been a rule of professional practice that unless notice has already clearly been given of the cross-examiner's intention to rely upon matters, it is necessary to put to an opponent's witness cross-examination on the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inference to be drawn from it, and to allow the other

party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn.

Cross-examination is not merely asking a set of prepared questions. It requires also listening to the answers and then asking further questions to challenge or test these. As such, the cross-examiner needs to be able to take detailed instructions from the party s/he represents. Failure to allow a party to properly cross-examine renders the judgment ultimately made unreliable and subject to appeal. This is because the right to cross-examine is central to the adversarial trial process. It is only through cross-examination and the testing of evidence that findings may be made as to such matters as the best interests of the child, factual issues relevant to the assessment of each party's contributions or future needs to determine a just and equitable property division, or the truth of allegations of family violence.

Model for the role of a legal practitioner appointed to perform cross-examination

6. It is not clear from the Bill nor the Explanatory Memorandum what model for the role of a legal practitioner performing the cross-examination is being proposed. Is it intended that the legal practitioner acts for the party for the entirety of the proceedings, or for the entirety of the hearing in which the cross-examination is expected to occur (usually only the final hearing/trial) or is it intended that a lawyer would be 'parachuted' into a hearing only for the cross-examination of the witness?
7. It is the Law Council's position that, at the least, a legal practitioner appointed as a result of this Bill must be appointed for the entirety of the hearing in which the cross-examination is expected to occur. The Law Council repeats the comments made in its earlier submission regarding the necessity for a legal practitioner to have access to all of the evidence before the Court in order to effectively cross-examine a witness:

The role of cross examination in contested proceedings is to test and challenge the evidence of the other party and his or her witnesses and to put to that party the essential elements of the case they are facing, in order to obtain their response. Through cross examination, the truth or otherwise of an assertion is tested, along with the credibility of witnesses. Effective cross examination requires the cross examiner to have an understanding of all of the evidence and the central issues in the case and for that person to be present to observe the evidence of the other party, their witnesses and the evidence of his or her own witnesses.

Cross-examination requires an understanding of all of the evidence before the court, and for the cross examiner to understand how pieces of evidence (including oral evidence and material produced under subpoena) fit within a case narrative relied upon by their client or the other party. It is a process that extends far beyond merely asking a set of prepared questions and at a very minimum, requires the questioner to be able to listen to answers, to assess how that evidence then sits with other parts of the evidence and to further challenge or explore matters accordingly.

It is usual and essential for a cross examiner to be able to take further instructions from their client as the evidence unfolds and in response to particular answers being given. Cross-examination is a dynamic and at times, organic process. Limiting or restricting the process of cross-examination, as proposed in the amendments, will severely undermine the utility of the process and may ultimately render a judgment unreliable and subject to appeal.

Depending upon the issues before the court, cross-examination in family law proceedings may traverse matters beyond whether or not family violence occurred (or the particular elements constituting an allegation or allegations of family violence). The advocate engaged in cross-examination must accordingly have a full knowledge of all of the issues in the proceedings and of the evidence before the court (noting in family law proceedings the primary evidence is by way of affidavit and the advocate must have read and appreciated the evidence within those affidavits). In most matters proceeding to trial, there are many affidavits relied upon by each party in support of the orders they seek from the court, and often a considerable volume of additional material produced under subpoena.

8. The Law Council notes that there would be serious ethical and liability issues for legal practitioners if they were asked to perform cross-examination on the 'parachute' model, such that it is unlikely that any legal practitioner would accept such an engagement. The Law Council further notes that the Bill does not deal with what is to occur if a litigant refuses the offer of legal representation, or refuses to give instructions to that lawyer, and notes that such situations will create ethical and possible safety issues for the lawyer involved, is likely to cause delay in the conduct of the proceedings and may further put vulnerable litigants and children at risk.

Funding for National Legal Aid

9. The Law Council notes the comments in the Explanatory Memorandum that the Australian Government is working with National Legal Aid to 'determine impacts that are expected to result from the measures in the Bill and ensure that adequate funding is available'. However, the Law Council is concerned by some media reports which quote the Government as advising that no extra funding will be made available for legal aid commissions arising from the Bill.
10. If legal aid commissions are to provide representation but no new funding is made available, then the Bill will have a significant financial impact on the capacities of legal aid commissions to fund other aspects of family law disputes. Without a commitment to proper funding (which could include a cost recovery framework for litigants who have means to contribute to the cost), one inadvertent result may be that Commissions need to redirect funding away from other services, for example, alternative dispute resolution to meet this new statutory requirement.
11. The Law Council understands that in order to qualify for a grant of legal aid, a dispute needs to fall within Commonwealth guidelines and a person needs to meet a legal aid commission's means and merits test. It is not clear whether an exception is to be made for assessments of eligibility for legal aid as a result of this Bill or whether the usual eligibility rules will apply. It is trite to observe that given the parlous state of legal aid funding noted by the Productivity Commission, many low-income people fail the means test.
12. An unintended consequence of the Bill could arise in circumstances where the alleged perpetrator is able to secure representation, but the victim may be denied legal aid due to their failure to meet a merits or means test. This will impact on the victims right to a fair hearing and ultimately on the Court's ability to make a decision in the best interests of children or on the fairness and equity of a property settlement. There is a risk the victim will suffer further trauma and distress, the very things the Bill attempts to remedy.
13. The Law Council suggests that the model which currently applies to the funding of Independent Children's Lawyers (ICLs) could be considered in this context. To the extent that a legal aid commission funds an ICL, that commission can seek a

contribution to that cost from those parties that can afford it, and where a contribution sought is not paid, the commission can seek a costs order against that litigant in the family courts. In the context of this Bill, such a model would (subject to funding being made available by the government to legal aid commissions) ensure that legal representation would be available in each case.

14. The Explanatory Memorandum suggests that the government anticipates a process by which a Court would make a request or direction that the party engage a lawyer – either privately or through legal aid – for the purposes of cross-examination. The Law Council considers that the most a court could do is ‘request’; a court would not have power to direct a party to engage a private lawyer and could certainly not bind a legal aid commission (a non-party) to provide such representation by direction. The Law Council refers to ‘requests’ which the Courts make for legal aid commissions to provide an Independent Children’s Lawyer, where similarly, the Court can only request and not direct.

Resource implications for courts, and costs and delay implications for litigants

15. The Law Council is concerned that no extra funding for the family courts accompanies the Bill. The Law Council anticipates that without extra resources being provided, the family courts will be unable to implement this initiative without adding to the backlog and delay of their existing caseload.
16. Paragraph 34 of the Explanatory Memorandum sets out the anticipated case management by the family courts in the event that personal cross-examination is likely to be prohibited. The Law Council struggles to see how the family courts can oversee parties acquiring legal representation without, at least, one more extra procedural for each case before trial, adding to the costs of any represented litigant and delays. It is foreseeable that the Bill will have the consequence of trials being adjourned or trial listings being vacated so that legal representation can be obtained. The new provisions may also give parties the opportunity to delay for strategic reasons.
17. Although the number of cases identified in the Australian Institute of Family Studies’ (AIFS) research that may fall within the remit of the Bill are relatively small, some victims of family violence are likely to have previously opted to settle their cases so as to avoid direct cross-examination. It would be reasonable to predict that there will be more cases that fall within the remit of the Bill than that identified in the AIFS research. This will also add to the workload of the family courts.
18. It is also suggested that insufficient time may have been allowed for the commencement of the Bill to enable the establishment of any new or additional legal aid processes, and for the family courts to adopt new practice and case management directions or Rules. The Law Council suggests that the family courts will also need to provide information for litigants about the new measure on their websites and in paper, both in English and in other languages.
19. The Law Council notes that the AIFS research identified that the most common form of judicial intervention in these cases is for the Judge to act as intermediary in asking the cross-examiner party’s proposed questions for them. However, that ought not be considered a substitute for representation and it cannot be expected that a judge will descend into the fray of the fact-finding process. Indeed, the Full Court of the Family Court in *Huda & Huda & Laham* [2018] FamCAFC 85 (10 May 2018) recently observed as follows:

- 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.*
20. Other options are available under existing laws to protect vulnerable witnesses, such as a witness giving evidence by video link from another court room or facility, and a physical screen being put in place to shield the cross-examining party from the view of the witness. The Law Council suggests that the reason these options are not more often used by the family courts is a lack of resources to provide such alternatives. In the majority of cases, video link facilities, alternative court rooms or screens are simply not available to the Judge. Thus, to implement the new section 102NB, the Law Council calls for further resources to be made available to the family courts to enable them to acquire such facilities.

Proposed subclause 102NA(1)(c)(i) – a party charged with family violence offence

21. The Law Council notes that paragraph 17 of the Explanatory Memorandum emphasises that a mere charge relating to violence is not to carry implications of guilt *‘...but merely recognises that a family violence charge between those parties infers a power imbalance that requires a certain level of protection for those parties.’*
22. The Law Council contends that this conflates a charge with a presumption of guilt. The Law Council recommends the reference to *‘or is charged with’* be deleted in proposed subparagraph 102NA(1)(c)(i). The Law Council notes that a court will have discretion to order the ban under proposed subparagraph 102NA(1)(c)(iv) if deemed appropriate and may take into account the fact that a party has been charged with a family violence offence, including whether a party has been indicted and is due to stand trial. The intersection of possible criminal proceedings creates an additional level of complexity in family law matters which highlights the need for legal representation of both the victim and alleged perpetrator.

Other issues

23. The Law Council repeats its suggestion made in its submission to the Explanatory Draft Bill that further, and targeted, education of judicial officers and the legal profession will serve to ensure appropriate levels of awareness of the powers and practices available to appropriately protect the interests of litigants. There is also a need to invest in improvements to the design of courts to better respond to the needs of people with safety concerns, including safe waiting rooms, adequate security staffing and equipment, and separate entry and exit points to court buildings. The Law Council notes that there may be additional safety concerns for legal practitioners themselves who are appointed to act in these cases.
24. As noted above, there will need to be readily accessible information available to litigants both online and at the family courts about the new measure. The Queensland Law

Society suggests that such information be made available to parties by the family courts when they file a Notice of Risk. The Law Council further notes that since the ban on direct cross-examination will flow from family violence orders made in state and territory courts, it will be vital to ensure that litigants in those courts are aware of the serious consequences that will flow from the making of those orders. The Law Council suggests that some litigants who may have been previously prepared to settle those cases on 'without admission' basis, may instead choose to contest those applications. That may in turn lead to further resource implications for state and territory courts.

25. The Indigenous Issues Committee of the New South Wales Law Society queries whether consultation was carried out with Indigenous communities and service providers regarding the Bill, and the particular implications for cases involving Indigenous litigants and children.