



Australian Government

Attorney-General's Department

Submission of the Attorney-General's Department

Senate Legal and Constitutional Affairs Legislation Committee

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

The Attorney-General's Department (the department) thanks the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) for the opportunity to make a submission to its inquiry into the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (the Bill).

This submission is provided to supplement the information contained in the Explanatory Memorandum to the Bill.

Introduction

The issue of direct cross-examination of victims of family violence by their alleged perpetrators in family law matters is an issue of community concern. Direct cross-examination is where a party asks questions of another party or witness directly, rather than having questions asked by a legal representative.

Direct cross-examination by an alleged perpetrator can expose victims of family violence to re-traumatisation and can affect their ability to give clear evidence. It can also be problematic for victims to directly cross-examine their alleged perpetrator due to the power imbalances created by family violence.

A number of inquiries and reports have considered and/or made recommendations on the issue of direct cross-examination in family law matters involving allegations of family violence:

- The House of Representatives Standing Committee on Social Policy and Legal Affairs 2017 *Parliamentary inquiry into a better family law system to support and protect those affected by family violence* recommended that the Bill be introduced into Parliament to prohibit perpetrators of family violence from cross-examining the other party (recommendation 12).¹
- At the Council of Australian Governments National Summit on Reducing Violence against Women and their Children in October 2016, it was agreed that a ban should be placed on the direct cross-examination of victims by their perpetrators in family violence and family law proceedings.²
- In its 2016 report on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, the Family Law Council noted that in family law matters involving an unrepresented victim of family violence, direct cross-examination can perpetuate the abuse and result in incomplete and poor quality evidence.³
- The Productivity Commission recommended, in its 2014 *Access to Justice Arrangements* inquiry report, that the Family Law Act be amended 'to include provisions restricting personal cross-examination by those alleged to have used violence along the lines of provisions that exist in State and Territory family violence legislation' (recommendation 24.2).⁴

The Bill would ensure that appropriate protections for victims of family violence are in place during cross-examination in all family law proceedings under the *Family Law Act 1975*.

¹ https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform.

² <https://pmc.gov.au/resource-centre/office-women/coag-2016-national-summit-reducing-violence-against-women-and-their-children>.

³ <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Family-with-Complex-Needs-Intersection-of-Family-Law-and-Child-Protection-Systems-Final-Report-Terms-3-4-5.PDF>.

⁴ <https://www.pc.gov.au/inquiries/completed/access-justice/report>.

In developing the measures in the Bill, the department has undertaken extensive consultation to ensure that the amendments offer protection for victims of family violence, while also ensuring procedural fairness for all parties. The department is working with the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia (the family law courts) and National Legal Aid to ensure that the amendments are successfully implemented.

Prevalence of direct cross-examination in family law matters involving allegations of family violence

Although there has been general agreement about the need for reform, there has, until recently, been no specific data on the extent to which direct cross-examination takes place in family law proceedings involving allegations of family violence. In June 2017, the department engaged the Australian Institute of Family Studies (AIFS) to work with the family law courts to determine the prevalence of direct cross-examination. The department used this research to inform further stakeholder consultations and support the policy development of the Bill. The report was published by AIFS on 28 June 2018.⁵

The AIFS research found that up to 227 matters involving allegations of family violence and at least one self-represented party proceeded to final hearing in the Family Court of Australia or the Federal Circuit Court of Australia over two years (between 2015 and 2017) (i.e. up to 114 per annum).⁶ Direct cross-examination may have occurred in up to 173 of those 227 matters.⁷ This suggests that the amendments will potentially apply in up to 114 matters per annum in the Family Court of Australia and Federal Circuit Court of Australia, compared to the roughly 6 000 trials that occur per annum across those two courts. The research also found that the existing protections for victims of family violence are currently applied inconsistently in the family law courts.⁸

Data was also collected from the Family Court of Western Australia, but in accordance with a different methodology (information from the Family Court of Western Australia was only able to be collected from unreported judgments, rather than directly from the court file). In the Family Court of Western Australia, 39 unreported judgments were identified as in scope over two years (between 2015 and 2017).⁹ Direct cross-examination occurred in around 44% of those matters.¹⁰ However, due to the difference in methodology, these numbers are not included in the totals.

⁵ Carson, R., Qu, L., De Maio, J., & Roopani, D. (2018). Direct cross-examination in family law matters. Melbourne: Australian Institute of Family Studies. Available at <https://aifs.gov.au/publications/direct-cross-examination-family-law-matters>.

⁶ Ibid 11.

⁷ Ibid.

⁸ Ibid – see Chapter 5 “Arrangements made to accommodate direct cross-examination”.

⁹ Ibid vii.

¹⁰ Ibid – see page vii: “However, as information was collected from judgments rather than directly from FCoWA court files, it is possible that direct cross-examination may have been undertaken but not mentioned in additional judgments in the Western Australia sample”.

Consultation

The department released an Exposure Draft of the Bill for public consultation from 17 July 2017 to 25 August 2017.¹¹ The department received 43 submissions from organisations, recognised experts, judicial officers writing in their personal capacity, and members of the public.¹²

Consistent with the Bill, the Exposure Draft contained a legislative ban which would prevent an unrepresented party from directly cross-examining, or being cross-examined by, another party if there is an allegation of family violence between them, and certain circumstances apply.

Consistent with the Bill, the Exposure Draft contained a discretion for the court to prevent direct cross-examination in instances where the legislative ban does not apply but an allegation of family violence between parties exists.

The Exposure Draft also contained a discretion for the court to grant leave for parties to directly cross-examine each other despite the legislative ban applying, where the parties consent to this occurring and the court considers it appropriate to do so having regard to the quality of the evidence and the potential impact on the victim of the family violence.

Finally, the Exposure Draft contained a power for the court to appoint an intermediary to put questions to the witness on behalf of a party, where a self-represented party is prohibited from conducting the cross-examination.

Stakeholders raised three key issues in response to the Exposure Draft. Firstly, stakeholders were concerned with who the court appointed person should be. The majority of stakeholders strongly argued that cross-examination should only be conducted by a legal representative.

Secondly, most stakeholders did not agree on the circumstances in which a ban on direct cross-examination should occur. Some argued that a ban on direct cross-examination should apply in all matters where there are allegations of family violence (for example, Women's Legal Services Australia), while others argued that the circumstances should be narrowed (for example, the Law Council of Australia).¹³

The third issue was whether the court should be able to grant leave for direct cross-examination to occur. Some stakeholders submitted that there would be potential for perpetrators to pressure victims to provide consent to cross-examination.

The Bill has been revised based on this feedback and further consultation with key stakeholders such as National Legal Aid, the Law Council of Australia, the family law courts, and Women's Legal Services Australia.

¹¹ <https://www.ag.gov.au/Consultations/Pages/Family-violence-cross-examination-amendments.aspx>

¹² Ibid.

¹³ Submissions are available at <https://www.ag.gov.au/Consultations/Pages/Family-violence-cross-examination-amendments.aspx>.

The key changes made to the Bill to respond to stakeholder feedback are:

- requiring that, when direct cross-examination is banned, cross-examination must be conducted by a legal representative
- making no provision for the court to grant leave to allow direct cross-examination (where it would otherwise be banned), and
- requiring the court to apply existing protections, as appropriate, if the ban does not apply.

Measures in the Bill

The Bill sets out the conditions for when the ban on direct cross-examination will apply in family law proceedings. If there is an allegation of family violence between the parties, there will be a mandatory ban on direct cross-examination if any of the following apply:

- either party has been convicted of, or is charged with, an offence involving violence, or a threat of violence, to the other party
- a family violence order (other than an interim order) applies between the parties
- a family law injunction for the personal protection of either party is directed against the other party.

If there is an allegation of family violence, but the above circumstances do not apply, the court has discretion to order that the ban applies.

If the ban applies, the alleged perpetrator will be prohibited from directly cross-examining the victim, and the victim will also be prohibited from directly cross-examining the alleged perpetrator. Where direct cross-examination is prohibited, both parties will be required to conduct cross-examination through legal representatives.

Where direct cross-examination is not banned, the court must ensure that appropriate protections for the victim of family violence are in place during the cross-examination, such as the use of video link or screens.

Circumstances in which the ban applies

The circumstances in which the legislative ban will apply include a variety of indicators that family violence has occurred. The circumstances do not assume the guilt of a party, but instead comprise specific circumstances in which it is considered appropriate for the court to apply protections for victims of family violence.

Convictions or current charges

Where a party has been found guilty of an offence of violence against the other party, another court has made a finding of fact that violence occurred. Where a party is currently charged with an offence of violence against the other party, the police have determined that there is sufficient evidence to charge that party with an offence. In both instances, it is appropriate that the victim is protected from direct cross-examination in family law proceedings.

Final family violence orders

Where a final family violence order currently applies between parties, there is a final court order in existence that requires a party to be protected from family violence. It is therefore appropriate that the victim be protected from direct cross-examination in family law proceedings.

Interim family violence orders have not been included in the circumstances because they may be made *ex parte* or without a hearing. This leaves open the potential for a party to obtain an interim family violence order shortly before or during a family law hearing, for the purpose of delaying or frustrating the hearing. Where an interim family violence order applies between the parties, a victim of family violence will be able to apply to the court for the ban to apply. The court will also be able to make such an order on its own initiative.

Family law injunctions for personal protection

Where a family law injunction for personal protection currently applies between parties, the court has determined that a party is in need of protection from the other party. It is therefore appropriate that the victim be protected from direct cross-examination in family law proceedings.

Court order for ban to apply

The department acknowledges that reporting family violence can be challenging for victims and consequently allegations of family violence are sometimes made for the first time during family law proceedings. If there is an allegation of family violence, but none of the prescribed circumstances apply, the court will nevertheless be able to make an order for the ban on direct cross-examination to apply. The court will be able to make such an order on its own initiative, on the application of a party, or on the application of an independent children's lawyer.

Requirement to apply other appropriate protections

Where direct cross-examination is not banned, the court will be required to apply other appropriate protections if there are allegations of family violence. Examples of protections which the court could apply include, but are not limited to:

- directing or allowing a person to give testimony and/or appear by video or audio link
- disallowing certain questions (for example, if they are asked in a manner or tone that is inappropriate)
- changing the venue of a hearing to a safer location
- requiring that an alleged perpetrator be shielded from view while the victim is giving evidence
- allowing the victim to have a support person near them while giving evidence, and
- closing the court to the public or excluding specific persons from the courtroom.

Circumstances in which the court may choose not to exercise its discretion to apply the ban, and instead be required to apply appropriate protections, might be where the allegation of family violence is historical and of a low level, there are no current safety concerns, and the victim has not applied for the ban.

Commencement and application

The department is working with the family law courts to determine the internal processes and procedures that will best facilitate legal representation and minimise delays for the courts. The maximum three month delay for commencement is intended to allow the courts time to make any necessary rules of court and practice directions. The six month application period will ensure that parties with already allocated court dates have adequate time to obtain legal representation, and prevent any unnecessary delays to their court proceedings.

Review

Given the important role that cross-examination plays in testing evidence, and the aim of the amendments to reduce trauma to victims of family violence in family law proceedings, the amendments will be reviewed after two years. The intention of the review is to ensure that the amendments are operating as intended to reduce potential trauma to victims of family violence, while also maintaining procedural fairness for all parties. The review will also examine whether the amendments have had any unintended consequences.

The department will review the amendments, in consultation with the family law courts, National Legal Aid and other relevant stakeholders.

Legal representation and court processes

When the ban on direct cross-examination applies, cross-examination must be conducted by a legal representative. Parties will be able to engage their own legal representation. Where a party is unable to obtain private legal representation, parties will be able to seek representation through legal aid commissions. Parties may be required to contribute to the costs of their representation where they can afford to do so. A party who chooses not to utilise legal representation, would effectively be foregoing their opportunity to cross-examine the other party – the matter would proceed nonetheless.

In March 2018, the department formed a Steering Committee with representatives from National Legal Aid and the family law courts, to ensure the necessary processes and procedures to successfully implement the measures are developed prior to their commencement. This work includes determining the processes and procedures that will best facilitate legal representation when the ban is in place. National Legal Aid is best placed to work with the department on the reforms because, unlike other legal assistance providers, legal aid commissions have national coverage and currently provide legal representation services in all family law court registries.

Generally, it is expected that legal representation provided through legal aid commissions will apply to the final hearing, where cross-examination is most likely to take place. This is envisaged to include the necessary preparatory work for that hearing, including opportunities for settlement through late-stage legally-assisted family dispute resolution, where appropriate.

The Government is working with National Legal Aid to determine the impacts of the Bill, and ensure adequate funding is available to ensure the Bill is effectively implemented. This work is currently underway and includes consideration of issues such as contributions from those that can afford to pay and ensuring the measure cannot be exploited.

Procedural fairness

The Bill ensures procedural fairness for both the victim of family violence and the alleged perpetrator as, when the ban is in place, both parties may still conduct cross-examination through a legal representative.

The court will allow a party adequate time to obtain legal representation, and representation through legal aid commissions will be available where a party is unable to obtain private representation.

Where a party refuses to utilise legal representation, the matter will still proceed, with that party foregoing their opportunity to cross-examine the other party. An unrepresented party will still be entitled to present his or her case through his or her own evidence in chief or by directly questioning other witnesses.

Conclusion

The department thanks the Committee for considering this submission. The Bill will have real benefits for victims of family violence. It is important that the changes are made as soon as possible to provide better protection for victims of family violence in family law proceedings.

The department would be happy to provide further information to the Committee as required.