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Dr Sean Turner  
Committee Secretary  
Legal and Constitutional Affairs Legislation Committee  
The Senate  
Australia Parliament  
ACT 2600

Dear

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

Cross-examination is to be blunt the interrogation of a witness in criminal, civil or other proceedings. It is a way to 'tackle by ordeal' a witness (or party) who gives evidence contrary to the interest of the opposing person (for example, the accused defendant in criminal proceedings) or the cross examiner's client (when the accused defendant, for instance, is represented by legal counsel).

Unnecessary cross-examination adds to court delay. Unscrupulous or inappropriate, offensive, or intimidating cross-examination can be cause harm and for victims of crime too often results in a 'second injury'.

In many jurisdictions there are both law and court rules regulating cross examination, which rely on the preparedness of the presiding judicial officer to intervene and apply. There are also professional legal conduct rules dealing with cross examination, which if breached may lead to disciplinary action. Notably, lawyers and their professional bodies (such as Criminal Bars and Law Societies) have been instrumental in the evolution of the law, court rules and legal conduct rules. Many of these lawyers acted or act mainly for accused persons, so mitigating the risk accused defendants' will be found guilty is a paramount consideration. In an adversarial context, "trials are typically characterised by a highly competitive and confrontational atmosphere"<sup>1</sup> and 'winning' a not guilty verdict became the priority.

Although cross-examination is purported to be a 'tool' for extracting the truth, yet in adversarial justice systems in the context of the contest between the accuser and the accused truth recovery is not the primary objective. Rather, the primary objectives of cross examination are said to be: to elicit something in the cross-examiner's favour; to weaken the

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<sup>1</sup> Doak, J. (2005) Victims' rights in criminal trials: Prospects for participation. Journal of Law and Society. p4. Online [http://irep.ntu.ac.uk/id/eprint/11527/1/192442\\_822%20Doak%20PrePrint.pdf](http://irep.ntu.ac.uk/id/eprint/11527/1/192442_822%20Doak%20PrePrint.pdf)

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force of what the witness has said against the cross-examiner; and, to weaken or destroy the effect of the witness' testimony<sup>2</sup>.

It seems to me that especially in sexual assault cases and domestic / family violence cases, defence counsel pursuing the greatest benefit or favour for their client. It also seems to me that cross-examination is sometimes abused, such as when the prime purpose appears to be to confuse or embarrass a vulnerable witness. I have dealt with grievances that 'prima facie' suggest defence counsel have intimidated victims as witnesses, thus continuing the violence and maintaining the power imbalance common in domestic and family violence as well as child abuse cases.

Prohibiting unrepresented defendants and parties in family law from directly cross-examining is laudable. Requiring judicial officers and specialist questioners to conduct the examination of victims of domestic or family violence is preferable.

Counsel representing defendants and parties should be entitled to cross-examine; however, prohibited from asking unscrupulous, offensive, intimidating, harassing or like questions.

No matter who conducts the cross-examination, the law and rules should ensure victims and other witnesses do not become 'evidentiary cannon fodder'<sup>3</sup> that discourages citizens assuming their role and responsibilities in court proceedings. "There are many difficulties vulnerable witnesses must face in the criminal justice process, but unfair and discriminatory cross-examination need not be one of them."<sup>4</sup>

In accordance with international law (such as the United Nations Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power) and international procedural guidelines (such as Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime<sup>5</sup>)

The objective should be to ensure procedural justice for victims and other witnesses. Thus, I support the Bill that validates, at least in part, the perseverance and struggle of victims who seek fair, just and equitable treatment in court proceedings. It tackles the momentous question on the appropriateness and conduct of cross-examination in a modern justice system.

Furthermore, parties should have access to legal aid consistent with the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>6</sup>. The principles and guidelines recognise that "certain groups are entitled to additional protection or are more vulnerable when involved with the criminal justice system", and that it is appropriate to provide specific provisions for women, children and groups with special needs, such as those escaping domestic or family violence.

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<sup>2</sup> Wrottesley, F.J. (1910) *The Examination of Witnesses in Court including Examination in Chief, Cross Examination and Re-Examination: Founded on 'The Art of Winning Cases' by Henry Hardwicke*. Great Britain: Sweet and Maxwell, p109; see also

<sup>3</sup> Braithwaite, J. (1993) 'Juvenile Offending: New Theory and Practice', in L Atkinson and S Gerull (eds), *National Conference on Juvenile Justice*. Canberra, ACT: Australian Institute of Criminology, p36. See also Victorian Law Reform Commission report on Victims and Criminal Justice, Online [http://www.lawreform.vic.gov.au/sites/default/files/Role\\_of\\_Victims\\_of\\_Crime\\_Info\\_Paper\\_1\\_web.pdf](http://www.lawreform.vic.gov.au/sites/default/files/Role_of_Victims_of_Crime_Info_Paper_1_web.pdf)

<sup>4</sup> Bowden, P., Henning, T. & Plater, D. (2014) Balancing fairness to victims, society and defendants in the cross-examination of vulnerable witnesses: An impossible triangulation, *Melbourne University Law Review*, 37, pp539-584. [https://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0010/1699012/37\\_3\\_1.pdf](https://law.unimelb.edu.au/__data/assets/pdf_file/0010/1699012/37_3_1.pdf)

<sup>5</sup> <http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf>

<sup>6</sup> [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf)

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Thank you for the invitation to comment on and express my support for the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018.

Yours faithfully

Michael O'Connell AM APM  
Commissioner for Victims' Rights  
South Australia