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Public consultation: Family violence cross-examination amendments

Family Violence Taskforce
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
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Re: Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018

We welcome the opportunity to provide a submission to the public consultation on the proposed cross examination amendment – the *Family Law Amendment (Family Violence and Cross-Examination of Parties) Bill 2018*. We are all researchers in the Law Faculty at UTS. We make this submission further to our submission on the Exposure Draft Bill.

An important area of concern

We agree that reform preventing or limiting direct personal cross examination is required in family law proceedings. The direct cross-examination of victims of family violence by unrepresented perpetrators of that violence in Family Law proceedings is an important area of concern. We are strongly in favour of measures being introduced to assist victims of family violence in family law proceedings where one or both parties are without representation. We believe that this 2018 Bill is an improvement upon the 2017 Exposure Draft Bill.

Important background points

- Family law proceedings are distinctly different to criminal or civil protection order proceedings as a result of the breadth of issues that may be in issue and the nature of those proceedings. It is not possible to simply transpose a model used in those jurisdictions to family law. This difference in the possible length of cross-examination and the range of possible issues covered in family law proceedings is the main source of our concerns with the Bill given that no information in relation to funding of proposals is given in the Bill or the Attorney General's Explanatory Memorandum.

- The Attorney-General has talked of a “very small number of cases” where the issue arises. We recognise that the Australian Institute of Family Studies (AIFS) research found approximately 170 hearings in 2 years where the issue arose. However, the Attorney-General is not considering the possibly large (but unknown) number of cases which settled due to the threat of direct cross-examination. As such, it is possible, that if this legislation works as intended there will be a greater number of cases in which legal representation is necessary to avoid direct cross-examination.
- It should always be remembered that many self-represented litigants (SRLs) are unrepresented because they do not qualify for legal aid but are unable to pay for legal services. The Attorney- General stating that “parties will also have access to representation through legal aid commissions” is disingenuous given that he also stated in a media interview that “those prevented from cross-examining their ex-partner would only be able to access legal aid if they met its usual rules for qualifying”.
- Legal Aid funding should be increased to allow Legal Aid to take on representation of SRLs in such cases. Additional funding for Community Legal Centres should also be provided given that many SRLs will turn to CLCs for assistance when faced with the prospect of losing the right to cross-examine.

We have some remaining concerns in relation to the Bill

- We believe that there should be a discretion to grant leave for direct cross - examination. This should be used sparingly. However, removing all discretion in Clause 102NA removes women’s autonomy. There may be cases where a woman feels able and wishes to cross-examine or be cross-examined by her perpetrator. Indeed, research shows that women, if they are supported, may feel empowered by the process of cross-examination. Such cross-examination may very clearly reveal the “true character” of the perpetrator to a judicial officer. This is subject to the protections in clause 102NB being available as required.
- A useful model to consider is section 70(3) of the Victorian *Family Violence Protection Act* which provides that the respondent in protection order proceedings ‘must not’ cross examine the protected witness unless: that witness is an adult who consents to being cross-examined, and; the court decides that such personal cross-examination ‘would not have a harmful impact on the protected witness’. Similarly, under section 44C of the Western Australian *Restraining Orders Act 1997*, the respondent is not entitled to cross-examine a ‘person with whom the examiner is in a family relationship’ directly unless: the person ‘to be examined requests that the order prohibiting cross-examination not be made’ and; ‘the court considers it appropriate in all the circumstances for the order not to be made’.
- A victim of violence who wishes to carry out her own personal cross-examination should have the option of doing so if she feels able. If such a victim is self-represented, it is likely that she has not satisfied the (very stringent) means test for Legal Aid and she is also unable to pay for legal representation. It would appear unfair for her to be required to pay for legal representation for cross-examination in such circumstances or not have the

right to cross-examine her perpetrator. Cross-examination in family law cases can last for many days; lawyers' fees for such cross-examination would be very expensive.

- Clause 102NB which deals with special arrangements for cross-examination is presented as an alternative to prohibiting cross-examination. However, if there was a discretion to allow cross-examination even where the triggering ground in clause 102NA apply, then these protections should be available.
- Clause 102NA(iv) allows the court to make an order prohibiting cross-examination in any case. However, no guidance is given as to when this might apply. Maybe this would be useful? Under s 151(2) of the *QLD Domestic and Family Violence Protection Act 2012*, the court may make an order if it 'satisfied that the cross-examination is likely to cause the protected witness to suffer emotional harm or distress or be so intimidated as to be disadvantaged as a witness'. Another option might be to provide guidance in Note form as in Clause 102NB or in the Family Court Best Practice Principles.
- Clause 102NB would be a welcome addition to the *Family Law Act*. Such special arrangements for cross-examination are already available (ss102C-D; 69ZX), but according to our research and anecdotal evidence, are very rarely used or requested.
- However, we believe that Clause 102NB should be amended to make clear that special arrangements are available EVEN where a legal representative undertakes the cross-examination. There are cases where a victim should be able to give evidence via video link or audio link in any event and should not be required to be in the same courtroom as her perpetrator. Indeed, we suggest that Clause 102NB should be a freestanding section that should be considered in ALL family law proceedings and not linked to the issue of direct cross-examination. We are aware that the Women's Legal Services Australia has suggested reforms to the ALRC review to improve the early identification of family violence in the family law system. If those measures were adopted, the court could then automatically consider if protections were appropriate in all hearings for identified cases.
- We are pleased to see that a legal representative must conduct the cross-examination where an order is made prohibiting cross-examination. However, the Bill is silent in relation to the funding and legal liability of such representatives. More detail is needed in relation to this before the Bill is presented to Parliament.
- If a self-represented litigant decides that they are unable to pay for the services of a legal practitioner or is not eligible for legal aid then the Explanatory Memorandum states that the litigant could present evidence via their evidence in chief or by personally questioning other witnesses. However, it must be remembered that such litigants are self-represented and generally do not provide well-drafted affidavits or know how to issue subpoenas for relevant evidence or witnesses. The court may therefore be faced with insufficient evidence upon which to make a proper determination. Further thought should be given to whether the court should be able to order that the relevant Legal Aid Commission provide legal representation for the purposes of cross-examination unless the litigant arranges their own legal representation or decides not to cross-examine the other party.

- As such, in a parenting matter, it is very likely that the Court will decide to appoint an Independent Children's Lawyer (ICL) to represent the children's best interests and ensure that the case is properly managed. The government will be well aware that ICLs are paid for from Legal Aid budgets. Therefore there are further indirect funding implications from a decision not to fund legal representatives for cross-examination purposes.

Please do not hesitate to contact us if you require further information or have any questions about our comments or suggestions.

Yours faithfully

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