

# Chapter 1

## Introduction and background

1.1 On 28 June 2018, the Senate referred the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 [Provisions] (the bill) to the Legal and Constitutional Legislation Committee (the committee) for inquiry and report by 13 August 2018.

1.2 The Senate Selection of Bills Committee recommended that the bill be referred for inquiry for a number of reasons, including to:

- ensure the bill is fit for purpose; and
- enable stakeholders to provide advice on potential problems or improvements that could be made to the bill.<sup>1</sup>

1.3 The bill makes a number of amendments to the *Family Law Act 1975* (Cth) (the Act) in order to prohibit direct cross-examination between parties in proceedings where allegations of family violence are raised.

### Background and purpose of the bill

1.4 The bill is primarily concerned with the practice of direct cross-examination in proceedings under the Act where family violence is alleged. According to the Attorney-General's Department's (AGD) submission, direct cross-examination is defined as:

...where a party asks questions of another party or witness directly, rather than having questions asked by a legal representative.<sup>2</sup>

1.5 Concerns have been raised in recent years regarding the potential for victims of family violence to be cross-examined by their alleged abuser. This situation has been widely recognised as causing additional harm for victims of family violence. As the Attorney-General, the Hon. Mr Christian Porter MP, explained:

The direct cross-examination of a victim of family violence by their alleged perpetrator can expose the victim to significant re-traumatisation and affect their ability, importantly, to give clear and cogent evidence. The power dynamics underlying family violence can also make it difficult for victims to effectively cross-examine their alleged perpetrator. Victims of family violence also cite the fear of being cross-examined directly by their alleged perpetrator as a significant factor in deciding to settle a matter, often on terms they consider to be unfavourable. This can place victims and children at increased risk of harm.<sup>3</sup>

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1 Senate Standing Committee for the *Selection of Bills, Report No. 7 of 2018*, 28 June 2018, Appendix 3.

2 Attorney-General's Department, *Submission 16*, p. 2.

3 The Hon. Mr Christian Porter MP, Attorney-General, *Parliamentary Debates*, 28 June 2018, p. 13.

1.6 Direct cross-examination in cases where allegations of family violence exist appears to be a relatively regular occurrence. According to the Attorney-General, that research conducted by the Australian Institute of Family Studies indicated that, between 2015 and 2017, direct cross-examination in final hearings had occurred in 173 matters where allegations of family violence were present and one or more of the parties were self-represented.<sup>4</sup>

1.7 Judicial officers have general but extensive powers in relation to the cross-examination of witnesses under other legislation.<sup>5</sup> Case law has also acknowledged the high level of discretion that can be exercised by judicial officers in managing proceedings containing family violence, including whether and how cross-examination will proceed.<sup>6</sup> However, at present, there is no specific prohibition on one party directly cross-examining another party in cases where family violence allegations have been raised.

1.8 The need for reform in this regard has been recognised in a number a recent reports and inquiries, including:

- The Productivity Commission's 2014 report on its *Access to Justice Arrangements* inquiry, which recommended that amendments be made to the Act to prevent direct cross-examination in cases where family violence has been alleged.<sup>7</sup>
- The Family Law Council's 2016 report on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*, which noted that direct cross-examination can perpetuate the abuse of victims of family violence and lead to incomplete and poor-quality evidence.<sup>8</sup>
- At the October 2016 COAG National Summit on Reducing Violence against Women and their Children, 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.<sup>9</sup>

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4 The Hon. Mr Christian Porter MP, Attorney-General, *Parliamentary Debates*, 28 June 2018, p. 13.

5 See, for example, the *Family Law Act 1975* (Cth) (the Act), the *Evidence Act 1995* (Cth) and in state legislation.

6 *Truman & Truman* [2008] FamCAFC 4 (21 January 2008).

7 Productivity Commission, *Access to Justice Arrangements* inquiry report, December 2014, <https://www.pc.gov.au/inquiries/completed/access-justice/report> (accessed 7 August 2018).

8 Family Law Council, *Family Law Council Report to the Attorney-General on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report*, June 2016, <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> (Accessed 7 August 2018).

9 Attorney-General's Department, *Submission 16*, p. 2.

- The House of Representatives Standing Committee on Social Policy and Legal Affairs December 2017 report, *A better family law system to support and protect those affected by family violence*, recommended legislation to prohibit perpetrators of family violence from cross-examining the other party.<sup>10</sup>
- The 2018 report by the Australian Institute of Family Studies, *Direct cross-examination in family law matters: Incidence and context of direct cross-examination involving self-represented litigants*, which worked with the family law courts to determine the prevalence of direct cross-examination.<sup>11</sup>

1.9 The bill is intended to address the need for reform in this area. In his second reading speech on 28 June 2018, the Attorney General stated that the purpose of the bill is to ensure that victims of family violence have adequate protection during cross-examination in all family law proceedings.<sup>12</sup> The key provisions of the bill are summarised below.

### **Key provisions**

1.10 As outlined in the Explanatory Memorandum, the bill would amend the Act to provide new restrictions on direct cross-examination in situations where family violence allegations exist.<sup>13</sup> The bill would insert new 'Division 4-Cross-examination of parties where allegations of family violence' into Part XI of the Act, and would make the following key amendments:

- the prohibition of personal cross-examination where there is an allegation of family violence between the parties to the proceedings and certain circumstances are satisfied;
- the provision that if personal cross-examination is prohibited, cross-examination must be conducted by a legal representative; and
- the provision that, if there is an allegation of family violence and personal cross-examination is not prohibited, the court must ensure that there are appropriate protections for the party who is the alleged victim of the family violence.

1.11 The bill also includes provision for a review of the bill's operations, to be conducted after the second anniversary of the legislation's commencement.<sup>14</sup>

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10 House of Representatives Standing Committee on Social Policy and Legal Affairs, *A better family law system to support and protect those affected by family violence*, December 2017.

11 Australian Institute of Family Studies, *Direct cross-examination in family law matters: Incidence and context of direct cross-examination involving self-represented litigants*, June 2018, [https://aifs.gov.au/sites/default/files/publication-documents/1806\\_direct\\_cross-examination\\_in\\_family\\_law\\_matters\\_report\\_0.pdf](https://aifs.gov.au/sites/default/files/publication-documents/1806_direct_cross-examination_in_family_law_matters_report_0.pdf) (accessed 19 July 2018).

12 The Hon. Mr Christian Porter MP, Attorney-General, *Parliamentary Debates*, 28 June 2018, p. 13.

13 Explanatory Memorandum, p. 4.

14 Explanatory Memorandum, pp. 2–3.

***Prohibition of personal cross-examination where allegations of family violence have been raised***

1.12 The bill would prohibit personal cross-examination where certain circumstances exist in a case. New section 102NA provides that if, in proceedings under the Act, a party intends to cross-examine another party, an allegation of family violence exists, and certain circumstances are present, mandatory requirements will apply to the cross-examination.<sup>15</sup> The circumstances are:

- one party (the examining party) intends to cross-examine another party (the witness party); and
- there is an allegation of family violence between the examining party and the witness party; and
- any of the following are satisfied:
  - 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 to both parties;
  - an injunction under section 68B or 114 of the Family Law Act for the personal protection of either party is directed against the other party; or
  - the court makes an order that the mandatory requirements apply to the cross-examination.<sup>16</sup>

1.13 If the above circumstances are found to exist, the following mandatory requirements under proposed subsection 102NA(2) would apply to the cross-examination:

- the parties must not personally cross-examine each other; and
- the cross-examination must be conducted by a legal representative acting on behalf of the examining party.<sup>17</sup>

1.14 Proposed subsection 102NB introduces a requirement for the court to ensure there are appropriate protections for the party who is the alleged victim of the family violence in situations where the mandatory requirements do not apply. Subsection 102NB applies where:

- the examining party intends to cross-examine the witness party personally; and
- an allegation of family violence between the examining party and the witness party is present; and

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15 Explanatory Memorandum, p. 9.

16 Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018, subsection 102NA(1).

17 Explanatory Memorandum, pp. 8–9.

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- section 102NA does not apply to prevent the examining party cross-examining the witness personally.<sup>18</sup>

1.15 The Explanatory Memorandum states that where the mandatory protections do not apply the court may order a number of protections, including those currently under the Act and in other legislation.<sup>19</sup> Examples of appropriate protections suggested in the Explanatory Memorandum may include video links or screens during cross-examination.<sup>20</sup>

### ***Review of the proposed Division***

1.16 Proposed section 102NC of the bill would provide that a review of the proposed amendments be commenced as soon as possible after the second anniversary of the legislation commencing.<sup>21</sup> The review period may be altered by regulation under proposed subsection 102NC(b).<sup>22</sup>

1.17 According to the Explanatory Memorandum, the purpose of the proposed review would be:

...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.<sup>23</sup>

### **Consultation on the bill**

1.18 After noting the recommendations of the Council of Australian Governments (COAG) and other stakeholders, the Attorney-General's Department (AGD) released an Exposure Draft of the bill for public consultation from 17 July 2017 to 25 August 2017.<sup>24</sup> AGD received a number of submissions from organisations, experts, judicial officers and members of the public, which informed the bill's scope and suggested amendments, some of which were later implemented.<sup>25</sup>

### **Conduct of the inquiry**

1.19 Details of this inquiry were advertised on the committee's website, including a call for submissions to be received by 13 July 2018. The committee also wrote directly to some individuals and organisations inviting them to make submissions.

1.20 The committee received 31 submissions, which are listed at appendix 1 of this report. All submissions are available in full on the committee's website.

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18 Explanatory Memorandum, p. 13.

19 Explanatory Memorandum, p. 13.

20 Explanatory Memorandum, p. 14.

21 Explanatory Memorandum, p. 15.

22 Explanatory Memorandum, p. 15.

23 Explanatory Memorandum, p. 15.

24 Attorney-General's Department, *Submission 16*, p. 4.

25 Attorney-General's Department, *Submission 16*, p. 4.

1.21 The committee held a public hearing on 1 August 2018 in Melbourne.

### **Financial implications**

1.22 The Explanatory Memorandum states:

There are no direct financial implications from implementing the measures in the Bill. The Australian Government is working with National Legal Aid to determine the impacts that are expected to result from the measures in the Bill and ensure that adequate funding is available.<sup>26</sup>

1.23 This issue was raised by a number of submitters who expressed concerns regarding the financial implications of this bill, particularly in relation to National Legal Aid services and the family courts. This issue will be further examined in chapter 2.

### **Compatibility with human rights**

1.24 According to the Explanatory Memorandum, the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.<sup>27</sup> These rights and freedoms include:

- eradication of discrimination against women: Articles 2 and 3 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- the right to a fair hearing: Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR);
- best interests of the child: Article 3(1) of the Convention on the Rights of the Child (CROC); and
- protection of children on dissolution of a marriage, and generally: Articles 23(4) and 24(1) of the ICCPR, and Article 3(2) of the CROC.

### **Structure of this report**

1.25 This report consists of two chapters:

- This chapter provides a brief background and overview of the bill, as well as the administrative details of the inquiry.
- Chapter 2 outlines the provisions of the bill in more detail, discusses matters raised by submitters about the proposed amendments, and outlines the committee's views.

### **Acknowledgements**

1.26 The committee thanks all organisations and individuals that made submissions to this inquiry, as well as those that gave further evidence at public hearings.

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26 The committee's website can be found at [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs)

27 Explanatory Memorandum, p. 3.