

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
FAMILY COURT OF AUSTRALIA

Question No. AE16/066

Senator Waters asked the following question at the hearing on 9 February 2016:

1. Over the last year, there has been a broad sweep of support for changing the rules in the Family Court to stop perpetrators of DV from cross-examining victims in court to bring the Family Court up to the standard of State and Territory Courts. Have you got current plans to implement a change like that?
2. If not, why not?
3. What is the status of that reform if any? When does the Court expect it to take place?
4. This was a recommendation of the Productivity Commission's Access to Justice report – recommendation 24.2 – recommending this change be made is it the government's intention to respond to that recommendation?
5. Is it your view that a rule change like that could be achieved by the Court acting alone (i.e. a change to the Court Rules), or does it require an amdt to the Family Law Act?

The answer to the honourable senator's question is as follows:

1. This is a matter for Government. However, the *Evidence Act 1995* (Cth), the *Family Law Act 1975* (Cth) and Family Law Rules 2004 already permit a judge to limit or prevent cross examination (see Annexure 1). Judges employ these sections frequently in many ways, including having parties in different rooms where this is physically possible.
2. See response to Question 1.
3. See response to Question 1.
4. See response to Question 1.
5. Any changes to the Act are a matter for the Government and the Parliament. The Court notes that the Attorney-General's Department held a Roundtable meeting with all relevant stakeholders on 10 March to discuss the enormous complexities surrounding this issue. Some of those complexities and the reason why private law litigation cannot be equated to criminal processes are described in the letter the Chief Justice wrote to Ms McGowan MP and was tabled at the hearing on 9 February 2016.

ANNEXURE 1: Legislative Provisions relevant to the Question Of Cross Examination

Family Law Act 1975 (Cth)

69ZN Principles for conducting child-related proceedings

Application of the principles

- (1) The court must give effect to the principles in this section:
 - (a) in performing duties and exercising powers (whether under this Division or otherwise) in relation to child-related proceedings; and
 - (b) in making other decisions about the conduct of child-related proceedings.
Failure to do so does not invalidate the proceedings or any order made in them.
- (2) Regard is to be had to the principles in interpreting this Division.

Principle 1

- (3) The first principle is that the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.

Principle 2

- (4) The second principle is that the court is to actively direct, control and manage the conduct of the proceedings.

Principle 3

- (5) The third principle is that the proceedings are to be conducted in a way that will safeguard:
 - (a) the child concerned from being subjected to, or exposed to, abuse, neglect or family violence; and
 - (b) the parties to the proceedings against family violence.

Principle 4

- (6) The fourth principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.

Principle 5

- (7) The fifth principle is that the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

69ZX Court's general duties and powers relating to evidence

- (1) In giving effect to the principles in section 69ZN, the court may:
 - (a) give directions or make orders about the matters in relation to which the parties are to present evidence; and
 - (b) give directions or make orders about who is to give evidence in relation to each remaining issue; and
 - (c) give directions or make orders about how particular evidence is to be given; and
 - (d) if the court considers that expert evidence is required—give directions or make orders about:
 - (i) the matters in relation to which an expert is to provide evidence; and
 - (ii) the number of experts who may provide evidence in relation to a matter; and
 - (iii) how an expert is to provide the expert's evidence; and

- (e) ask questions of, and seek evidence or the production of documents or other things from, parties, witnesses and experts on matters relevant to the proceedings.
- (2) Without limiting subsection (1) or section 69ZR, the court may give directions or make orders:
- (a) about the use of written submissions; or
 - (b) about the length of written submissions; or
 - (c) limiting the time for oral argument; or
 - (d) limiting the time for the giving of evidence; or
 - (e) that particular evidence is to be given orally; or
 - (f) that particular evidence is to be given by affidavit; or
 - (g) that evidence in relation to a particular matter not be presented by a party; or
 - (h) that evidence of a particular kind not be presented by a party; or
 - (i) limiting, or not allowing, cross-examination of a particular witness; or
 - (j) limiting the number of witnesses who are to give evidence in the proceedings.
- (3) The court may, in child-related proceedings:
- (a) receive into evidence the transcript of evidence in any other proceedings before:
 - (i) the court; or
 - (ii) another court; or
 - (iii) a tribunal;and draw any conclusions of fact from that transcript that it thinks proper; and
 - (b) adopt any recommendation, finding, decision or judgment of any court, person or body of a kind mentioned in any of subparagraphs (a)(i) to (iii).
- Note: This subsection may be particularly relevant for Aboriginal or Torres Strait Islander children.
- (4) In proceedings under this Part in which the court is required to regard the best interests of the child as the paramount consideration:
- (a) subsection 126K(1) of the *Evidence Act 1995* does not apply in relation to information that would:
 - (i) reveal the identity of a journalist's source; or
 - (ii) enable that identity to be discovered;if the court considers that it is in the best interests of the child for the information to be disclosed; and
 - (b) the court must not direct, under a law of a State or Territory relating to professional confidential relationship privilege specified in the regulations, that evidence not be adduced if the court considers that adducing the evidence would be in the best interests of the child.

100 Evidence of husbands and wives

- (1) The parties to proceedings under this Act are competent and compellable witnesses.
- (2) In proceedings under this Act, the parties to a marriage are competent and compellable to disclose communications made between them during the marriage.
- (3) Subsection (2) applies to communications made before, as well as to communications made after, the date of commencement of this Act.

100B Children swearing affidavits, being called as witnesses or being present in court

- (1) A child, other than a child who is or is seeking to become a party to proceedings, must not swear an affidavit for the purposes of proceedings, unless the court makes an order allowing the child to do so.

(2) A child must not be called as a witness in, or be present during, proceedings in the Family Court, or in another court when exercising jurisdiction under this Act, unless the court makes an order allowing the child to be called as a witness or to be present (as the case may be).

(3) In this section:

child means a child under 18 years of age.

101 Protection of witnesses

(1) The court shall forbid the asking of, or excuse a witness from answering, a question that it regards as offensive, scandalous, insulting, abusive or humiliating, unless the court is satisfied that it is essential in the interests of justice that the question be answered.

(2) The court must forbid an examination of a witness that it regards as oppressive, repetitive or hectoring, or excuse a witness from answering questions asked during such an examination, unless the court is satisfied that it is essential in the interests of justice for the examination to continue or for the questions to be answered.

102D Appearance of persons

(1) The court or a Judge may, for the purposes of any proceedings, direct or allow a person to appear before the court or the Judge by way of video link, audio link or other appropriate means.

Note: See also [section 102F](#).

(2) The power conferred on the court or a Judge by subsection (1) may be exercised:

(a) on the application of a party to the proceedings concerned; or

(b) on the court's own initiative or on the Judge's own initiative, as the case may be.

(3) This section applies whether the person appearing is in or outside Australia, but does not apply if the person appearing is in New Zealand.

Note: See Part 6 of the [Trans-Tasman Proceedings Act 2010](#).

Family Law Rules 2004 (Cth)

Rule 15.75 Transcript receivable in evidence

A transcript of a hearing or trial may be received in evidence as a true record of the hearing or trial.

Evidence Act 1995 (Cth)

Division 3—General rules about giving evidence

26 Court's control over questioning of witnesses

The court may make such orders as it considers just in relation to:

- (a) the way in which witnesses are to be questioned; and
- (b) the production and use of documents and things in connection with the questioning of witnesses; and
- (c) the order in which parties may question a witness; and
- (d) the presence and behaviour of any person in connection with the questioning of witnesses.

27 Parties may question witnesses

A party may question any witness, except as provided by this Act.

28 Order of examination in chief, cross-examination and re-examination

Unless the court otherwise directs:

- (a) cross-examination of a witness is not to take place before the examination in chief of the witness; and
- (b) re-examination of a witness is not to take place before all other parties who wish to do so have cross-examined the witness.

29 Manner and form of questioning witnesses and their responses

- (1) A party may question a witness in any way the party thinks fit, except as provided by this Chapter or as directed by the court.
- (2) A court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form.
- (3) Such a direction may include directions about the way in which evidence is to be given in that form.
- (4) Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

30 Interpreters

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

31 Witnesses who cannot hear adequately or speak adequately

- (1) A witness who cannot hear adequately may be questioned in any appropriate way.
- (2) A witness who cannot speak adequately may give evidence by any appropriate means.
- (3) The court may give directions concerning either or both of the following:
 - (a) the way in which a witness may be questioned under subsection (1);
 - (b) the means by which a witness may give evidence under subsection (2).
- (4) This section does not affect the right of a witness to whom this section applies to give evidence about a fact through an interpreter under section 30.

32 Attempts to revive memory in court

- (1) A witness must not, in the course of giving evidence, use a document to try to revive his or her memory about a fact or opinion unless the court gives leave.
- (2) Without limiting the matters that the court may take into account in deciding whether to give leave, it is to take into account:
 - (a) whether the witness will be able to recall the fact or opinion adequately without using the document; and
 - (b) whether so much of the document as the witness proposes to use is, or is a copy of, a document that:
 - (i) was written or made by the witness when the events recorded in it were fresh in his or her memory; or
 - (ii) was, at such a time, found by the witness to be accurate.
- (3) If a witness has, while giving evidence, used a document to try to revive his or her memory about a fact or opinion, the witness may, with the leave of the court, read aloud, as part of his or her evidence, so much of the document as relates to that fact or opinion.
- (4) The court is, on the request of a party, to give such directions as the court thinks fit to ensure that so much of the document as relates to the proceeding is produced to that party.

33 Evidence given by police officers

- (1) Despite section 32, in any criminal proceeding, a police officer may give evidence in chief for the prosecution by reading or being led through a written statement previously made by the police officer.
- (2) Evidence may not be so given unless:
 - (a) the statement was made by the police officer at the time of or soon after the occurrence of the events to which it refers; and
 - (b) the police officer signed the statement when it was made; and

- (c) a copy of the statement had been given to the person charged or to his or her Australian legal practitioner or legal counsel a reasonable time before the hearing of the evidence for the prosecution.
- (3) A reference in this section to a police officer includes a reference to a person who, at the time the statement concerned was made, was a police officer.

34 Attempts to revive memory out of court

- (1) The court may, on the request of a party, give such directions as are appropriate to ensure that specified documents and things used by a witness otherwise than while giving evidence to try to revive his or her memory are produced to the party for the purposes of the proceeding.
- (2) The court may refuse to admit the evidence given by the witness so far as it concerns a fact as to which the witness so tried to revive his or her memory if, without reasonable excuse, the directions have not been complied with.

35 Effect of calling for production of documents

- (1) A party is not to be required to tender a document only because the party, whether under this Act or otherwise:
 - (a) called for the document to be produced to the party; or
 - (b) inspected it when it was so produced.
- (2) The party who produces a document so called for is not entitled to tender it only because the party to whom it was produced, or who inspected it, fails to tender it.

36 Person may be examined without subpoena or other process

- (1) The court may order a person who:
 - (a) is present at the hearing of a proceeding; and
 - (b) is compellable to give evidence in the proceeding;to give evidence and to produce documents or things even if a subpoena or other process requiring the person to attend for that purpose has not been duly served on the person.
- (2) A person so ordered to give evidence or to produce documents or things is subject to the same penalties and liabilities as if the person had been duly served with such a subpoena or other process.
- (3) A party who inspects a document or thing produced to the court because of subsection (1) need not use the document in evidence.

41 Improper questions

- (1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a *disallowable question*):

- (a) is misleading or confusing; or
 - (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive;
or
 - (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate;
or
 - (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).
- (2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:
- (a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality; and
 - (b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject; and
 - (c) the context in which the question is put, including:
 - (i) the nature of the proceeding; and
 - (ii) in a criminal proceeding—the nature of the offence to which the proceeding relates; and
 - (iii) the relationship (if any) between the witness and any other party to the proceeding.
- (3) A question is not a disallowable question merely because:
- (a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness; or
 - (b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.
- (4) A party may object to a question put to a witness on the ground that it is a disallowable question.
- (5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.
- (6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

Note: A person must not, without the express permission of a court, print or publish any question that the court has disallowed under this section: see section 195.

81 Hearsay and opinion rules: exception for admissions and related representations

- (1) The hearsay rule and the opinion rule do not apply to evidence of an admission.
- (2) The hearsay rule and the opinion rule do not apply to evidence of a previous representation:

- (a) that was made in relation to an admission at the time the admission was made, or shortly before or after that time; and
- (b) to which it is reasonably necessary to refer in order to understand the admission.

Note: Specific exclusionary rules relating to admissions are as follows:

- evidence of admissions that is not first-hand (section 82);
- use of admissions against third parties (section 83);
- admissions influenced by violence etc. (section 84);
- unreliable admissions of accused persons (section 85);
- records of oral questioning of accused persons (section 86).

Example: D admits to W, his best friend, that he sexually assaulted V. In D's trial for the sexual assault, the prosecution may lead evidence from W:

- (a) that D made the admission to W as proof of the truth of that admission; and
- (b) that W formed the opinion that D was sane when he made the admission.

84 Exclusion of admissions influenced by violence and certain other conduct

- (1) Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by:
- (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
- (b) a threat of conduct of that kind.
- (2) Subsection (1) only applies if the party against whom evidence of the admission is adduced has raised in the proceeding an issue about whether the admission or its making were so influenced.