



COPY

FAMILY COURT OF AUSTRALIA
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CHIEF JUSTICE

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Ms Cathy McGowan AO, MP
Member for Indi, Victoria
PO Box 6022
House of Representatives, Parliament House
Canberra ACT 2600

By email: Cathy.McGowan.MP@aph.gov.au

Dear Ms McGowan,

RE: Cross examination of 'victims' by 'abusers'**

I thought you might be interested in comments both from the Court in general (see The Submission by the Family Court of Australia and the Federal Circuit Court of Australia to the Victorian Royal Commission into Family Violence, 6 August 2015, at pages 13–14) and from me specifically (see paper delivered to the Judicial Conference of Australia's colloquium on 10 October 2015, pages 4 and 9) on the issue of cross examination of alleged victims by alleged perpetrators.

I think we can all agree that this is undesirable. However, stating the problem is much easier than finding the solution. Let me just highlight some of the issues:

1. The most obvious solution is for legal aid to be extended to both parties, but in what cases? Family violence is alleged in at least 40% of cases, so funding immediately becomes an issue. If there is a decision between funding a woman or the allegedly violent partner, it is preferable for the woman to be funded but this leaves the cross examination issue.
2. Family law litigation is private litigation and, unlike many IVO or AVO applications which are prosecuted by the police and the woman is simply a witness (distressing enough I agree), the woman is a party and must be involved.
3. The litigation is not just about whether the violence occurred. These are parenting and/or property proceedings and will involve multiple disputed issues of fact, possibly pertaining to various incidents which may stretch over many, many years. Strategies for conducting cross examination in other jurisdictions, where the issues are contained, do not readily transfer to family law proceedings. For example, having someone come in to the proceedings specifically to cross examine one party would necessarily involve them knowing all about the case and hearing all the evidence. This effectively requires the provision of a lawyer. Putting questions in

writing in advance, on the other hand, does not work where you need the answer to the previous question to formulate the next.

4. Where there are contested issues of fact, judges must be in a position to make findings about whether certain incidents or transactions occurred as described, and there are usually allegations and counter allegations that need to be tested by cross examination. Indeed the law requires it to be done — see the rule in *Browne & Dunne*.
5. The courts must provide procedural fairness to both parties, so restrictions on the capacity of one party to cross examine would infringe this fairness. Indeed, if the proceedings were about property, for example, one might ask why there should be a restriction at all.

I am not sure that these issues are well understood when solutions which seem superficially attractive are proffered.

That should not prevent us from seeking solutions, which are in fact employed by judges at their discretion. You would not likely hear from those litigants for whom it was deemed appropriate to place limits on cross examination, only those for whom it was not.

Division 12A of part VII of the Family Law Act 1975 (Cth) provides principles for conducting child-related proceedings and includes duties and powers relating to evidence. Section 69ZX(1) and (2) are of particular relevance and say:

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.

But given the very wide definition of *family violence* in the Act, it is difficult to have hard and fast rules that apply in every case where family violence is raised as an issue. One must also remember that the Act is in gender neutral terms.

I have some ideas about how we might deal with the issue and would be happy to share them.

** I put these words in quotes simply to denote that, at the time of the cross examination, the allegations may be contested and no findings have been made.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Diana Bryant', written in a cursive style.

Diana Bryant AO
Chief Justice

