Submission to the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017—Public Consultation on Cross-examination Amendment

Sent to familylawunit@ag.gov.au

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Submission on spousal cross examination 2017

1. **Should direct cross-examination only be automatically banned in specific circumstances?**

The harm to victims of spousal abuse via any form of financial violence outweighs the probative value of evidence tendered. The per se regime proposed by the policy folks at the AGs office is robust – both morally and intellectually. It is the first step towards recognition of the role the brutal family law litigation system itself plays in maximising financial violence.

However Divorce Partners would much prefer substantive reforms that markedly reduce financial violence well inside 90 days, regardless of the relative wealth of any Australian family. See our submission about lessons to be gleaned from behavioural economics as articulated to *The Parliamentary Inquiry into a better family law system to support and protect those affected by family violence*: Submissions

A similar view about the need for substantive, and not merely procedural reform, was espoused by Ms Batty and Ms Johnson at the same inquiry, as regards children at risk.

2. **Should direct cross-examination be banned in each of the specific circumstances set out in the new proposed subsection 102NA (1)?**

Add

(1A) This section does not apply notwithstanding that a final Family Violence Order has been issued if the Order ***does not relate to physical violence*** and either:

a) the Named Person did ***not have the effective assistance of counsel at the time of a final family violence hearing*** because a Court administering this Act has failed to release substantive undisputed funds, or a person has failure to qualify for legal aid; or
b) there is reasonable cause to suspect that the family violence order was obtained for ***purposes including either the suppression of evidence in proceedings under this Act or to obtain a tactical advantage in any other litigation involving the parties or their associates***.

Policy Rationale: Para (b) will have largely political, not legal, effect. In the most comprehensive review of AVOs to date - Cashmore, J., Parkinson, P., and Single, J. *Post-Separation Conflict and the Use of Family Violence Orders*. (2011) 33 Sydney Law Review 1 - ALL family lawyers surveyed admitted that the AVO system had been abused for tactical advantage in cases in which they were recently involved. To expect that this proposed cross examination system simply will never be gamed at some level by some bottom feeders would be the unlikely triumph of hope over experience.

3. **Should direct cross-examination be banned in any additional circumstances not referred to in the new proposed subsection 102NA (1)? For example, in the courts' Notice of Risk/ Notice of Child Abuse, Family Violence or Risk of Family Violence.**

Add

(1B) This section applies to both evidence in chief, cross examination, and any other communication or dialogue between The Protected Person and the Named Person during any stage of any proceedings under this Act ("the Protected Dialogue").

Policy rationale: All confrontational dialogue between spouses needs to be regulated in like manner. For example, a cross examination of the "Bad Hombre" should also be able to be avoided if the Protected Person is herself a self rep. See the UK policy espoused at

https://www.judiciary.gov.uk/wp-content/uploads/2017/01/PD12J-child-arrangement-domestic-violence-and-harm-report-and-revision.pdf

(1C) This section also applies to any person who is subject to an ***Interim Family Violence Order,*** and in respect of whom any of the following subparagraphs also applies such that the Named Person is or was:

a) charged with assault or an offence against any person at any time and, whether a current or former intimate partner or otherwise,

b) charged with a breach of any family violence order of any kind by any governmental authority, and whether in relation any current or former spouse;
c) convicted of any breach of law that did, or could have resulted in a jail sentence of more than 6 months duration, and whether relating to physical violence or otherwise
d) Has been the subject of a series of domestic interventions in relation to any habitual relationship conflict, as evidenced by way of police record, and whether in relation to any current or former intimate relationship partner
e) is a gun owner, police or armed services officer, or is employed by or associated with a business that seels or utilises any weapons of any kind.
f) has engaged in coercive or belligerent behaviour in any other legal forum, including any warning given by any judicial officer of any state or territory court at any hearing at which any interim family violence order was issued
g) Resides, or consorts with, or is an intimate relationship partner of, or a business associate of a person to whom any preceding sub paragraph applies or would have applied, and whether that other person is or was at any time the subject of any Family Violence Order
h) A vexatious litigant or person who has initiated more than two claims in relation to matters arising under this Act in a self-represented capacity, or who has breached any Order of any Court administering this Act.

Policy rationale: Interim Family Law hearings cover important matters- like parenting arrangements. And so many matters never get to a final hearing. Interim hearings in family courts do not correlate with final FVO status in state courts. Using state law timing rules as a proxy for hearing status in federal courts is ineffective, especially if fresh interim FVOs arise at the end of a family law case. Better to focus on the gravitas of the allegations and the track record of the Named Person to gauge their propensity for coercive conduct, as the Brits suggest. See Part 4B of The Prisons and Courts Bill 2017 (UK) which is // was concerned about offences against the person- not ASBOs

https://publications.parliament.uk/pa/bills/cbill/2016-2017/0145/cbill_2016-20170145_en_6.htm#pt2-pb8-l1g47

https://www.amazon.co.uk/d/cka/Lionel-Asbo-State-England-Martin-Amis/0099565684

Interim FVOs are themselves of little probative value having been issued during a 2 minute "interim hearing" at which Magistrates earnestly believe there is no right to be "heard".

Add

(1D) This section also applies to any person who was ever the subject of a Final Order even it has since lapsed and whether in relation to that intimate partner or otherwise.

4. Should any ban on direct cross-examination apply to both parties to the proceedings asking questions of each other, or only to the alleged perpetrator of the family violence asking questions of the alleged victim?

Answer: The latter

5. Should the discretionary power only be exercised on application by the alleged victim, or by the courts' own motion, or should the alleged perpetrator also be able to make an application to prevent direct cross-examination?

Answer: Protected Person and the Court.

6. Which people would be most appropriate to be appointed by the court to ask questions on behalf of a self-represented person? For example, a court employee not involved in the proceedings, other professionals, lay people.

Subsection 2 "delete the words "unless the Court grants leave".

No *McKenzie friends* – in any circumstances even if ill – see *Ex parte Pelling* [1999] 4 All ER 751 and *Portello* v *Goh* [2002] NSWSC 997; mckenzie friends. This message needs to be both loud and be unequivocal.

7. What qualifications, if any, should the court-appointed person have?

Add to subsection 2 after the words "legal practitioner" the words "or any designated person appointed by the Named Person or failing that, the Court". Replace subs (3) with this section:

(3) A designated person referred to in subsection (2), and for the purposes of this Act, is an Australian citizen who:

a. Has graduated from an Australian university with a Bachelor of Law degree, or who would otherwise be entitled to be admitted as a barrister or solicitor in any state or territory, and whether admitted before any Court, or a member of any professional association; and
b. Has not been bankrupt, nor the subject of a disciplinary order nor investigation by any federal or state regulatory authority at any time, including any legal professional association.

Policy Rationale: As well as lawyers, people with legal training should be permitted to cross examine. Implementation of The Productivity Commissions 2014 recommendation that access to justice is best served by increasing competition for the legal profession is apt, well before making any funding request of the Federal Treasury in respect of this policy initiative. The Prime Minister has raised concerns about an additional $ 43 million in legal aid expenditure, and such concerns need to be addressed early, and cogently, by the Policy Team. It is more efficacious public policy, rather than paying inexperienced lawyers to cross examine at the cost of the taxpayer, to de regulate the legal profession. Family law is the best area in which to confer this benefit to assist Australia's most vulnerable citizens.

Matthew Knott, How the court system allows domestic violence perpetrators to continue abuse, Sydney Morning Herald

8. Should any requirements regarding who the court can appoint and their qualifications be included in the Family Law Act?

See above- people have a right to counsel of THEIR CHOICE, within designated limits. Thus add:

(3A) A Named Person may only engage in any Prohibited Dialogue directly or indirectly with a Protected Person if that Named Person uses the services of:

(a) A solicitor who is an accredited family lawyer, or
(b) A barrister whose primary professional calling is the practice of family law, or
(c) if that Named Person has assets of less than $ 1 million a Designated Person

of their own volition, or failing that as appointed by the Court, but in all such circumstances, during any Protected Dialogue, or any proceeding under this Act any such advocate must not:

(d) Be or have been the subject of more than 2 complaints to any legal regulatory authority or professional association; and
(e) Be a relative (within the meaning of section 1AC of the Principal Act) of either The Named Person nor the Protected Witness ; and
(f) been charged with any criminal offence that could have rendered that person subject to a jail term of more than 6 months

Policy rationale: Cross examination by any family member or associate of the Named Person is morally offensive - whether admitted to practice, or otherwise. Representing your brother in law is just too common an occurrence.

Subpara (d) is directed at tort lawyers displaced by the reforms of Mr Justice Ipp, who bring with them the most egregious aspects of litigation culture. No constraints over legal practitioners exposes vulnerable victims to harm. If the objective of the regime is to protect the weak that protection should extend to certain solicitors who have not "made family law their calling".

(3B) A Designated Person may provide advocacy, drafting, advisory or other services to any person in respect of, or in relation to this Act, but only if their client has assets of less than $ 1 million or a Court so directs is necessary in relation to a Protected Dialogue governed by this Division.

9. **Should any further information about the scope of the role of the court-appointed person be included in the Family Law Act? For example:**
    - **how the court-appointed person obtains questions from a self-represented party**
    - **the level of engagement the court-appointed person should have with a self-represented party on whose behalf they are asking the questions**
    - **whether the court-appointed person should be present in court for the whole of the proceedings or just during cross-examination**
    - **what discretion the court-appointed person can exercise (if any) in relation to asking the questions they have been provided by a self-represented party**
    - **whether the court-appointed person can ask any questions of their own (not provided by the self-represented party) during cross-examination**
    - **whether they are under a duty to cooperate with other parties to the proceedings such as an Independent Children's Lawyer appointed in a case, and**
    - **the intersection between the court-appointed person's role and that of the judicial officer.**

Add
(3B) No cross examination is permitted of a Protected Person or their relatives by or on behalf of a Named Person unless:

a)The questions being asked of a Protected Person are set out in writing with 21 days notice given to the Registrar; and

b) The person seeking to engage in the cross examination can at that time justify in writing that a written sworn response by the Protected Person is manifestly inadequate in the prevailing circumstances relating to each such question; and

c)a Court admistering this Act promptly permits the same; and

d) If any such questions are to be asked a Registrar must ensure video streaming technology is deployed for the benefit of the Protected Witness or their relatives unless a judge orders that it is not reasonably practicable in those circumstances or generally in that region for a designated period.

Coercion in court foyers is not addressed in the proposed legislation and should be:

Review of Practice Direction 12J FPR 2010, Child Arrangement and Contact Orders: Domestic Violence and Harm

Victims Information, Expanding the use of video-conferencing in Family Court

Coercion conduct of affiliates by The Named Person should also be addressed as part of this per se rule

10. **Should a self-represented person be allowed to nominate the person who is appointed by the court to ask questions on their behalf?**

The self rep should have a right to counsel first and foremost of their choice, whatever selection criteria are used ex post by a judge. To fund counsel all spouses must release uncontested sums at the interim stage.

Add

(3C) It is the overarching duty of all persons involved in any financial dispute before any Court administering this Act, and most specifically any professional advisers always, to narrow claims made, to

focus upon the real issues in dispute, to disclose information as early as possible, and to release funds or property, or to pay money in whole or in part that are not reasonably in dispute to each of the respective spouses or parties in order to:

a) Enable each party to obtain equal representation before any Australian court; and
b) Ensure that this Act is only ever used as a shield for the weak, and never as a sword for the financially powerful or the well-funded; and
c) Optimise the management of litigation so as to ensure that the burden always rests upon litigants and upon solicitors as officers of this Court, and not upon The Court itself; and
d) Remove any spectre of financial abuse arising from the litigation process envisaged by this Act; and
e) Minimise tension inter parties; and
f) Enable the Court itself to focus always on the substantive issues in dispute which the parties are not reasonably able to resolve on their own.

Policy rationale: Solicitors, not the Court, should carry the burden of narrowing the gap in financial matters (in most cases to 5 – 15% of wealth) to enable access to counsel. A rule equivalent to S 56 Civil Procedure Act 2005 (NSW) etc, would limit the dispute, financial tensions, and financial violence.

Cf Directive 7.2 Federal Court of Australia, Central Practice Note

11. Do you have any concerns about the court-appointed person model?

The financial impost of the new regime should not fall on the state, but rather it should be incumbent on parties to fund counsel of their choice for this purpose, unless they are indigent. See response to question10.

12. Should the court only grant leave for direct cross-examination to occur if both parties to the proceedings consent? i.e. where an alleged victim consents to being directly cross-examined or consents to conducting direct cross-examination, should the alleged perpetrator's consent also be required?

A few FVOs are paternalistic. Limit consent to nonphysical violence and to a judge being satisfied no coercion.

13. Should the court only grant leave for direct cross-examination to occur if it has considered whether the cross-examination will have a harmful impact on the party that is the alleged victim of the family violence?

No leave should be given by judicial discretion.

It would be a perverse outcome if the protected person is worse off financially because their evidence is to be "treated with caution" simply because their spouse was impecunious at the time. A simpler solution would be to specify that the evidence which is not challenged must be accepted as determinative of the issue, unless manifestly inadequate on its face. Leaving the issue of probative weighting and warnings to be dealt with via expensive appellate litigation is inefficient.

See
https://publications.parliament.uk/pa/bills/cbill/2016-2017/0145/cbill_2016-20170145_en_6.htm#pt2-pb8-l1g47

And add this boiler plate equivalent, to forestall meandering debate –

"(3) Cross-examination in breach of subsection (1) or (2) does not affect the validity of a decision of the court in the proceedings, if the court was not aware of the protective injunction when the cross-examination took place.
(4) Cross-examination in breach of subsection (1) or (2) does not affect the validity of a decision of the court in the proceedings, if the court was not aware of the conviction or charge when the cross-examination took place."

14. **Should the court only grant leave for direct cross-examination to occur if it has considered whether the cross-examination will adversely affect the ability of the party being cross-examined to testify under the cross-examination, and the ability of the party conducting the cross-examination to conduct that cross-examination?**

No view on this matter.

15. **Are there any other issues the court should be required to consider before granting leave for direct cross-examination to occur?**

No leave should be given by judicial discretion.

16. **Should the amendments apply to proceedings started before the law comes into effect, or should they only apply to proceedings started after the law comes into effect?**

As from the date of enactment, not filing. No self-represented person had a reasonable expectation of eternal grandfathering as they knew, or are taken to know, that a Court had a discretion in any event to intervene.

17. **Should any changes be made to the proposed amendments to ensure that all parties receive a fair hearing?**

No special rule suggested.

18. **Should any changes be made to the proposed amendments to ensure that the courts can be satisfied that any cross-examination of the parties that occurs through a court-appointed person will enable the judicial officer to accord procedural fairness to the parties?**

The whole point of a prohibition is not to allow discretion. A trade off arises between possible injustice, or the spectre of it, and protection of the meek.

19. **Should any changes be made to the proposed amendments to ensure that the courts are able to make informed decisions?**

No specific response given.

20. **Should any changes be made to the proposed amendments to ensure that they do not have any unintended consequences for victims of family violence?**

Over 55% of self reps in the UK are women but the equivalent metric in Australian family law disputes is elusive- hence a reason to exclude nonphysical FVOs. It may also make sense for a specific subsection dealing with the case of mutual orders between spouses and its effect on evidence.

Justice Faulks, Self-represented Litigants: Tackling the challenge

Productivity Commission Inquiry Report: Acces to Justice Arrangements

E Richardson, T Sourdin and N Wallace, Self-Represented Litigants, Final Report 2012 (Diagram 2.8)

Civil Justice Council, Access to Justice for Litigants in Person

Clairs Keeley Lawyers, Cross examination of victims of family and domestic violence by self-represented perpetrators in family law proceedings

21. **Any general comments.**

Evolving a compliance culture is as important than the specific legislative text deployed in relation to cross examination.

Many middle-class citizens self-represent because busy family law judges habitually deny self-represented litigants access to their wealth. Including access to uncontested sums and liquid assets. Most family law judges cannot undertake "the full *Strachan* interim analysis" in the 7 minutes they have allotted for mentions in a case. Some Federal Circuit Court judges go further and openly articulate visceral antipathy to releasing uncontested sums because FVOs arise in another forum – a state court. Neither rationale is a sufficient reason for ignoring requests for a right to counsel. Whatever awkward excuse may be proffered, in far too many instances FVOs are obtained without any good faith attempt at a fair hearing. In the world's 8th most prosperous democracy that is surely no badge of pride.

State or territory Magistrates who issue FVOs also often currently "advise" the self-represented to "roll over "and accept an FVO without admission because they use language such as "it's of no real effect, it's just a cooling off order for a few months". There are about 2,000- 3,500 self reps in family courts that the proposed regime could impact each year. If the effect of the proposed law is to cause many of the self reps henceforth contest final FVOs, the impact will overwhelm the budgets of local courts. Some final FVOs take 4 hearing days. Up to 8,000 more hearing days across Australia, or more for those who fear the spectre of lopsided federal litigation at any future point, would be an unmitigated disaster. At both state, and then at federal, levels. State FVOs purport to disallow all communication- good or bad- and whether in relation to federal matters or otherwise. But in any event, they generally require 3rd party resolution.

It would be a better public policy imperative to avoid the litigation vortex entirely rather than try to regulate its most egregious features. As one noted American jurist best put it:

> Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people. To rely on the adversarial process as the principal means of resolving conflicting claims is a mistake that must be corrected.".
>
> Chief Justice of the US Supreme Court Warren Burger, 12 September 1984, Speech to the American Bar Association.

The proposed measures need to be coupled with robust public policy integrity measures including:

- Mandatory rules requiring solicitors, and self reps, to unlock all rationally uncontested funds to enable proper representation in ALL Courts pre-filing. Such a rule will diminish the likelihood of financial violence occurring in the first place and will shorten all family disputes, including any court queues, in relation to all property disputes. Thereby allowing a focus on our greatest and most precious natural resource- Australian children.
- Rules to enable effective legal representation in courts, and in all family law matters - as was suggested by The Productivity Commission 3 years ago. That APC recommendation is the most important access to justice reform recommendation of the last quarter century. It has not even been trialled to date.
- The proposed regime to be more granular and distinguish BETWEEN types of FVOs.
- State funding to assist the indigent.

Regular monitoring. The suggested reforms are most unlikely to be a set and forget exercise for astute policy makers

Divorce Partners