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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
familylawunit@ag.gov.au

Re: Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017

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 2017*.

Our submission does not address the specific questions raised in the submission template but rather addresses a number of general concerns about the proposed amendments.

An important area of concern

The direct cross-examination of victims of family violence by unrepresented perpetrators of that violence in Family Law proceedings is an important area of current concern. Recent inquiries,¹ research reports² and work by service providers³ have highlighted it as an area requiring reform. It is also an area under current examination by a parliamentary inquiry.⁴

Being cross-examined by the perpetrator of family violence is very traumatic for victims in family law proceedings and may lead to unsatisfactory outcomes in terms of parenting and property orders.⁵ In this regard we welcome the Federal Government taking steps to address this important area of concern, and we are strongly in favour of measures being introduced to

¹ See Productivity Commission (2014), *Access to Justice Arrangements: Productivity Commission Inquiry Report: Volume 1*, Report No 72, rec 24.2; Victorian Royal Commission into Family Violence (2016), *Report and Recommendations: Vol IV*, at pp. 197-198

² Kaspiew et al, *Domestic and family violence and parenting: mixed method insights into impact and support needs* (ANROWS, 2017)

³ Janet Loughman, 'Protecting vulnerable witnesses in family law' (2016) 19 *Law Society of NSW Journal* 26.

⁴ Standing Committee on Social Policy and Legal Affairs, *Parliamentary Inquiry into a Better Family Law System to Support and protect those Affected by Family Violence*, Terms of reference
<http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Terms_of_Reference>

⁵ Eg see discussion in Loughman above n.3; Victoria Legal Aid, *A Better Family Law System: Submission to Parliamentary Inquiry into a better family law system to support and protect those affected by family violence* (May 2017), Submission 60 at p. 18, available at
<http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Submissions>

assist victims of family violence in family law proceedings where one or both parties are without representation. It is beneficial to see that the proposed model seeks to address the difficulties in conducting direct cross-examination by both victims and perpetrators of family violence who are not legally represented in proceedings. However, we are also of the view that further research and development needs to be undertaken before an appropriate and workable model can be put in place in the Family Law arena.

Models from other jurisdictions

Various approaches to preventing or limiting the direct personal cross examination of victims of family violence by the alleged perpetrator of that violence are demonstrated in the legislative protections afforded in most Australian States and Territories in criminal and/or civil protection order proceedings. All jurisdictions have prevented such direct personal cross examination in sexual assault proceedings,⁶ some jurisdictions have extended this to other family violence related criminal proceedings⁷ and/or civil protection order proceedings.⁸

A close examination of these different models, however, reveals considerable variation in terms of whether the protection from direct personal cross examination is mandatory or discretionary,⁹ whether the person who is to carry out the cross examination is specified or is left general,¹⁰ whether that person has legal qualifications,¹¹ whether the legislation provides for a process to enable the unrepresented person to gain legal representation prior to these measures around cross-examination,¹² and whether there is reciprocal provision to assist an unrepresented victim to conduct cross examination where required.¹³

There has been no evaluation of these different State and Territory provisions, nor research about whether one model is to be preferred over others in terms of which one provides the most appropriate protection to victims giving evidence and being cross examined in such proceedings.

Very little is known about how these various state and territory provisions operate in practice. Some information is available in regard to the Victorian approach as a result of recent

⁶ *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8A; *Crimes Act 1914* (Cth) ss 15YF-15YG; *Criminal Procedure Act 1986* (NSW) s 294A; *Criminal Procedure Act 2009* (Vic) s 356-358; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D; *Evidence Act 1929* (SA) s 13B; and *Evidence Act 1977* (Qld) ss 21O-21R.

⁷ *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D; *Criminal Procedure Act 2009* (Vic) s 356; *Evidence Act 1977* (Qld) s 21O; and *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8A; *Evidence Act 1929* (SA) s 13B. See also *Evidence Act 1906* (WA) s 25A which, whilst it does not prevent personal cross examination in these cases, does specify the use of mechanisms to assist victims (eg the use of screens and video link) when the unrepresented defendant seeks to personally cross examine the victim

⁸ *Family Violence Protection Act 2008* (Vic) s 70; *Restraining Orders Act 1977* (WA) s 44C; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 29(4); *Domestic and Family Violence Act* (NT) s 114; *Family Violence Act 2016* (ACT) s 63; and the *Domestic and Family Violence Act 2012* (Qld) s 151.

⁹ Eg the prohibition on personal cross examination is mandatory in the ACT in civil protection proceedings (see *Family Violence Act 2016* (ACT) s 63) but is discretionary in Queensland, Victoria, South Australia, Northern Territory and Western Australia (eg see *Family Violence Protection Act 2008* (Vic) s 70).

¹⁰ Eg some jurisdictions specify that the person to conduct the cross examination on behalf of the unrepresented person is from the respective Legal Aid Commission (see *Family Violence Protection Act 2008* (Vic) s 71), in other jurisdictions the person to be appointed is not specified (see *Criminal Procedure Act 1986* (NSW) s 294A(2) which simply refers to 'a person appointed by the court').

¹¹ Eg under the NSW provision in sexual offence proceedings the legislation simply refers to 'a person appointed by the court', whilst there is a special provision to protect that person if they are an 'Australian lawyer' being a lawyer is not a requirement to being appointed to conduct this cross-examination on behalf of the accused person: *Criminal Procedure Act 1986* (NSW) s 294A.

¹² Eg in Victoria the legislation sets out steps, including adjournments, to encourage the unrepresented person to seek legal representation prior to requesting Victorian Legal Aid to undertake the cross examination on behalf of the person: in relation to sexual offence proceedings see *Criminal Procedure Act 2009* (Vic) s 357.

¹³ Eg, in civil protection order proceedings where the victim has made a private application and does not have any legal representation.

submissions by Victoria Legal Aid to recent inquiries.¹⁴ Given Victoria Legal Aid’s extensive experience in taking on the cross-examination function in civil and criminal proceedings in that jurisdiction, it is significant that they do not recommend a similar approach for family law. Instead they recommend the piloting of a ‘counsel assisting’ role as recommended recently by the Family Law Council.¹⁵

Providing protection in family law proceedings

We agree that reform preventing or limiting direct personal cross examination is required in family law proceedings. We are, however, of the view that more work needs to be undertaken to ascertain the most appropriate and workable approach for that jurisdiction. As both the Family Court of Australia and the Victorian Legal Aid Commission point out in their respective submissions to the Parliamentary Inquiry, 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.¹⁶ This means that it is not possible to simply transpose a model used in those jurisdictions to family law.

It is also important to recognise that the difficulties that arise when a perpetrator of violence (or the victim) are self-represented in family law proceedings are not necessarily confined to the conduct of cross examination, but may indeed permeate the proceedings. For example, other difficulties associated with self-represented perpetrators include delays, potential frivolous claims, inappropriate questioning of other witnesses, use of court proceedings to control or intimidate a victim, and adverse outcomes.¹⁷

Concerns with the model set out in the exposure Bill

Mandatory approach for a small number of cases

The draft Bill outlines a mandatory provision that would apply in cases where there is an allegation of violence and one of the following is satisfied:

- i. Either party has been convicted, or is charged with, an offence involving violence, or a threat of violence, to the other party;
- ii. A family violence order (other than an interim order) applies to both parties;
- iii. An injunction under section 68B or 114 applies to both parties.¹⁸

Domestic and family violence remains a highly unreported crime. An analysis of the ABS Personal Safety Survey revealed that ‘less than one third of male and female victims contacted the police after their most recent incident of physical violence’.¹⁹ Victim contact with the police was even less likely for the most recent incident of sexual assault (with only

¹⁴ See Victoria Legal Aid, above n.5.

¹⁵ Ibid, p. 20, referring to Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report* (2016), Recommendation 8 and discussion at pp. 67-8

¹⁶ See Victoria Legal Aid, above n5; Family Court of Australia, Submission to Parliamentary Inquiry into a better family law system to support and protect those affected by family violence, Submission 44 at p. 8-9, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Submissions>

¹⁷ Amanda George and Bridget Harris, *Landscapes of Violence: Women surviving family violence in regional and rural Victoria 2014*, p.84

¹⁸ Proposed 102NA(1)(c).

¹⁹ Peta Cox, Violence Against Women in Australia: Additional Analysis of the Australian Bureau of Statistics’ Personal Safety Survey, 2012, (ANROWS Horizons Research Report, 2015) p. 39.

one in five women and one in three men contacting the police about their most recent sexual assault by an opposite sex perpetrator).²⁰

In addition, there is a high rate of attrition through the legal system; in the Personal Safety Survey, of the victims who contacted the police after the most recent incident of physical assault, only one-third indicated that the perpetrator had been charged. It is also unclear whether (i) would include a case where the party has been found not guilty of a violence offence to the other party. Such convictions are notoriously difficult to obtain, particularly if they involve sexual violence.²¹

This makes satisfaction of (i) difficult for many victims of family violence.

(ii) While civil protection orders are more widely sought by victims of family violence (compared to *Family Law Act* injunctions and criminal proceedings) the statistics on reporting to the police, recent research by the Australian Institute of Family Studies found that approximately one-quarter of family law cases included information about a family violence order on the file. However, at least half of these were interim orders.²² This further suggests that few victims may satisfy this criterion.

This proposed mandatory provision also raises questions that require further consideration and/or clarification:

- In relation to (ii) is any type of final civil protection order accepted (ie will it include orders made by consent, ex parte, and by contest)? It is important that this provision does extend to cover orders made by consent given that the vast bulk of civil protection orders are resolved this way.
- In relation to (ii) should it include interim civil protection orders? We note that the 2011 amendments expanded the reference to family violence orders in section 60CC to include interim orders.
- Cl 102NA(1)(c)(i) appears to emphasise physical forms of violence rather than the much wider understanding of family violence incorporated in the FLA since 2012.

We note that in contrast to the model in the Exposure Draft, Women's Legal Services Australia have suggested that direct cross-examination be prohibited in any case where there family violence is listed as a factor in the Notice of Risk (Form 4) or where it is alleged through the course of the proceedings.²³ We recommend that further research is conducted to ascertain whether the three matters set out in the proposed 102NA are too restrictive and will in practice afford little protection to victims of family violence from direct cross-examination.

²⁰ Ibid, p. 42.

²¹ See generally Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439.

²² Kaspiew, R., Carson, R., Qu, L., Horsfall, B., Tayton, S., Moore, S. et al. (2015). *Court Outcomes Project (Evaluation of the 2012 Family Violence Amendments)*. Melbourne: Australian Institute of Family Studies, 52-4. The proportion of interim orders could actually be higher given that in 21.5% of cases with family violence order information, it was unclear if the orders were final or interim orders

²³ Women's Legal Services Australia, Submission to Parliamentary Inquiry into A better family law system, submission 6, recommendation 12. Accessed at: http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Submissions

Discretionary approach for some cases (likely to be the bulk of cases)

The exposure Bill provides for the court to limit or prevent direct cross examination on a discretionary basis for other family violence cases that do not meet the higher threshold that is proposed for the mandatory provision (discussed above).

The court already, at least in child-related proceedings, has the discretion to limit or prevent personal cross examination.²⁴ It would however appear that the application of these provisions is highly variable; Victoria Legal Aid has commented that ‘the use of these provisions is unpredictable, inconsistent and dependent on discretion of the individual judge’.²⁵ In addition recent research conducted in the UK on this very issue of direct cross-examination of vulnerable and intimidated witnesses also noted the variability in judicial practice when faced with discretionary provisions.²⁶

In the context of the exposure draft, then, it would therefore appear to be problematic to leave the vast bulk of cases to the discretion of an individual judge, given that only a small number of cases will fall within the mandatory provisions as currently drafted. Even an experienced judge with a good understanding of domestic abuse may not be aware that the proposed cross-examination is an extension of the abuse: a seemingly innocuous line of questioning could well have a much more sinister meaning for the victim due to previous abuse patterns.

A person appointed by the court

Both of the proposed provisions require the cross-examination that would have been conducted by the self-represented person to be conducted by a ‘person appointed by the court’. Whilst we appreciate that the consultation has asked a specific question on who this person should be, we suggest that this question is precisely why further investigation needs to be undertaken into whether this approach is the best one for family law proceedings, or whether an entirely different approach may be better (for example, some commentators have suggested the need for a ‘counsel assisting’ role instead).²⁷

The various Australian states and territories have adopted different approaches as to who this person should be – with some jurisdictions being specific (for example in Victoria it is specified that the conduct of the cross-examination will be undertaken by Legal Aid) whereas others have left it unspecified (for example, in NSW in sexual offence proceedings the legislation simply refers to ‘a person appointed by the court’²⁸). We recommend that any proposed model for the family law arena should explore ‘who’ has been appointed in practice in other jurisdictions, how they are protected from liability, how they are funded and whether there is anything that can be learnt from that experience.

In summary, we have a range of concerns about the proposed model to prevent and limit direct personal cross examination in Family Law proceedings. We submit that the Government should undertake further research into the models that currently operate in the

²⁴ FLA s69ZN.

²⁵ Victoria Legal Aid above n.5, at p. 19.

²⁶ Natalie Elizabeth Corbett and Amy Summerfield, *Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross-examination of Vulnerable and intimidated Witnesses* Ministry of Justice Analytical Series (2017) UK) at pp. 15-28.

²⁷ Family Law Council, above n.15; Victorian Legal Aid above n. 14 at p. 20

²⁸ *Criminal Procedure Act 1986* (NSW) s 294A(2).

various state and territory jurisdictions in respect of cross-examination in criminal and civil proceedings to ascertain whether those models are effective in assisting victims to give the best evidence possible, and whether such models require any adaptation for the distinctly different environment of family law. This investigation should extend to consider whether an entirely different approach is required for family law proceedings. As recommended by the Family Law Council, the Government should “explore the viability of piloting a Counsel Assisting model in cases with self-represented litigants and allegations of family violence or other safety concerns for children.”²⁹

We recommend to the Family Law Unit the following papers and submissions:

- Natalie Corbett & Amy Summerfield, Ministry of Justice (UK), *Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross-examination of Vulnerable and intimidated Witnesses*, Ministry of Justice Analytical Series (2017) available at: <https://www.gov.uk/government/publications/alleged-perpetrators-of-abuse-as-litigants-in-person-in-private-family-law>
- Victorian Legal Aid Commission, *A Better Family Law System: Submission to Parliamentary Inquiry into a better family law system to support and protect those affected by family violence* (May 2017), Submission 60 available at: http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Submissions

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

Yours faithfully

Dr Tracey Booth

Associate Professor
Faculty of Law
University of Technology, Sydney
PO Box 123
Broadway NSW 2007
[contact details redacted]

Miranda Kaye

Senior Lecturer
Faculty of Law
University of Technology, Sydney
PO Box 123
Broadway NSW 2007
[contact details redacted]

Dr Jane Wangmann

Senior Lecturer
Faculty of Law
University of Technology, Sydney
PO Box 123
Broadway NSW 2007
[contact details redacted]

²⁹ Family Law Council, above n.15 at Recommendation 8