



**Australian
Human Rights
Commission**

President
Emeritus Professor Rosalind Croucher AM

17 July 2018

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018

Thank you for the opportunity to provide a written submission to the inquiry into the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (the Bill).

The Australian Human Rights Commission previously made a submission to the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 — Public Consultation on Cross-examination Amendment*, stating its broad support for the intended aims of the Bill, to ensure that victims of family and domestic violence are not re-traumatised in giving their evidence to the court, as well as safeguarding the best interests of the child in family law matters.

The Commission's submission to that consultation highlighted a number of preliminary human rights issues that required consideration in drafting the Bill.

The Commission does not, in the time available for this inquiry, provide a position on whether there should be an automatic prohibition on direct cross-examination in certain circumstances, and does not comment on the relevant procedural fairness issues and potential limitations on the unrepresented party's ability to effectively examine the witness. These issues have been canvassed in the submissions of other stakeholders to the consultation on the Exposure draft – Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017.

The Commission makes the following comments on the particular provisions of the Bill.

Availability of adequate legal assistance

The Bill amends the *Family Law Act 1975* (Cth) (FLA) to prohibit direct cross-examination where there is an allegation of family violence between the parties to proceedings in certain circumstances.

The Explanatory Memorandum notes that, to facilitate this prohibition, the Bill anticipates a process through which the court would make a request or direction that the party engage a lawyer — either privately or through legal aid — for the purpose of cross-examination (where either party is unrepresented).¹

The Commission acknowledges the Attorney-General's Second Reading speech, which states that:

The government is working closely with the family law courts and National Legal Aid to determine appropriate processes, fully consider anticipated impacts and ensure adequate funding is available to ensure the bill is effectively implemented. These will be in place well prior to the provisions being applied to matters before the courts.²

The Commission understands that under the current framework, availability of legal aid for family law matters is limited in some circumstances.³ The National Legal Aid (NLA) submission to the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 — Public Consultation on Cross-examination Amendment* emphasised the need for full legal representation for each party, to ensure procedural fairness, and suggested that the administration of the appointment of lawyers could be managed by legal aid commissions. However, NLA's submission noted that this could not be accommodated under existing legal aid funding levels.⁴

The Commission emphasises the need to ensure that legislative reforms do not commence until availability of legal aid for these matters is guaranteed, to ensure that unrepresented parties to whom the provisions in this Bill apply are not disadvantaged in putting their case before the court.

Proposed section 102NA — mandatory protections for parties in certain cases (definition of family violence order)

A key aim of the proposed amendments is to address family violence and improve the protections offered through the family law system to those affected by violence and abuse.⁵ The Bill does this by amending the FLA to prohibit direct cross-examination where there is an allegation of family violence between the parties to proceedings in certain limited circumstances, including where a family violence order (other than an interim order) applies to both parties.⁶

The FLA currently defines 'family violence order' to include an interim order, made under a prescribed law of a State or Territory to protect a person from family violence.⁷

The Australian Institute of Family Studies' Report on direct cross-examination in family law matters, commissioned as part of these legislative reforms, found that:

- where litigants were self-represented in family law matters, 72% of cases involved direct cross examination

- there were higher rates of allegations of family violence against both parents where there was direct cross-examination (compared to cases analysed with no direct cross-examination)
- the rate of allegations of family violence against the father was higher than that against the mother (83%:39%), and
- in terms of the evidentiary profiles of the matters viewed, the most frequently submitted forms of evidence were family violence orders (57% of cases).⁸

The Commission is concerned that excluding interim family violence orders in the Bill's proposed new s 102NA(c)(ii) is not consistent with the overall aims of the reforms. The Commission draws the Committee's attention to the NLA submission to the *Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 — Public Consultation on Cross-examination Amendment*, which states, in the context of extending the ban on cross-examination to include circumstances where an interim family violence order has been made, that:

It is difficult to see reasons not to impose a ban to also protect those people who may well be at risk of trauma from direct cross-examination because they have suffered the same (or worse) violence, but where a finding about the violence is yet to be made.⁹

While the Bill does allow the court to make an order to prohibit direct cross-examination (proposed section 102NA(1)(c)(iv)), this process could amount to an additional burden on a victim of family violence to seek an order from the court to prevent direct cross-examination. The Explanatory Memorandum states that interim family violence orders can be made without a hearing and can therefore be used to delay or frustrate the family law matter.

However, the Commission notes that interim family violence orders are still issued based on an assessment of risk made either by police or a court, to provide immediate protection to a person. To maintain consistency with relevant definitions in the broader FLA, and the overall aims of the Bill, the Commission supports the inclusion of interim family violence orders in proposed section 102NA(1)(c)(ii).

Availability of appropriate courtroom protections for parties in other cases

Proposed section 102NB of the Bill requires the court to ensure the availability of appropriate protections for an alleged victim of family violence, where there are allegations of family violence between the parties but where proposed section 102NA of the Bill does not apply. The Commission understands that alternative protections could include the use of a screen to give evidence, and/or for the cross-examination to be conducted via video or audio link.

The Commission emphasises the need to ensure that courts are adequately resourced to deal with the potential increase in demand for the use of the alternative protections provided for in the Bill. The availability of alternative arrangements for victims of family violence to give evidence will ensure that matters before the family court that involve allegations of family violence are not further delayed, and will also safeguard against the provisions being used vexatiously or to further perpetrate abuse.

Thank you for the opportunity to provide a submission to this inquiry.

Yours sincerely,

**Emeritus Professor Rosalind Croucher AM
President**

¹ Explanatory Memorandum, Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018, 4 (Cth).

² Commonwealth, *Second Reading Speech*, House of Representatives, 28 June 2018, 13–14 (The Hon. Christian Porter MP).

³ National Legal Aid, *Submission to the Attorney-General's Department: Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 – Public Consultation on Cross-examination amendment* (17 September 2017), 6. At: <https://www.ag.gov.au/Consultations/Pages/Family-violence-cross-examination-amendments.aspx> (viewed 5 July 2018).

⁴ National Legal Aid, *Submission to the Attorney-General's Department: Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 – Public Consultation on Cross-examination amendment* (17 September 2017), 7. At: <https://www.ag.gov.au/Consultations/Pages/Family-violence-cross-examination-amendments.aspx> (viewed 5 July 2018).

⁵ Commonwealth, *Second Reading Speech*, House of Representatives, 28 June 2018, 13 (The Hon. Christian Porter MP).

⁶ Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018 (Cth), schedule 1 item 102NA(1)(c)(ii).

⁷ *Family Law Act 1975* (Cth), s 4.

⁸ 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), vii. At: <https://aifs.gov.au/publications/direct-cross-examination-family-law-matters> (viewed 5 July 2018).

⁹ National Legal Aid, *Submission to the Attorney-General's Department: Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 – Public Consultation on Cross-examination amendment* (17 September 2017), 4-5. At: <https://www.ag.gov.au/Consultations/Pages/Family-violence-cross-examination-amendments.aspx> (viewed 5 July 2018).