

ISSUES PAPER

PROHIBITION ON SELF-REPRESENTED LITIGANTS IN THE FAMILY COURT PERSONALLY CROSS-EXAMINING THE VICTIM OF FAMILY VIOLENCE

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¹For victims of family violence, the experience of being personally cross-examined by their perpetrator in court proceedings can be just as traumatic as the original violence itself.

The distress suffered by a victim when being personally cross-examined by their perpetrator in family law proceedings should be addressed to ensure that victims are more adequately protected in family law proceedings.

This issue has been highlighted recently in the media. It is time for a national discussion about how victims of family violence can be better protected when involved in family law court proceedings.

The current legislative framework is insufficient in ameliorating some of the negative experiences for victims of family violence during family law proceedings and does not protect victims from the effects of being directly confronted by their perpetrator. Criminal law reform preventing personal cross-examination in certain cases is a useful starting point in recognising the issues and possible remedies.

In our adversarial system the court has a role to ensure that there is a 'level playing field' upon which the parties of a dispute put their respective cases forward for determination. The adversarial system has been said to be 'less effective in producing a just outcome'² in the absence of a level playing field.³ This is often the case where one of the parties in the proceedings has a dominant position due to a relationship characterised by a history of violence. The adversarial system and its processes can be traumatic for a victim of crime, particularly cross-examination.

Cross-examination is considered a core feature of our adversarial system and has been said to be the most effective method to test the truth and accuracy of a

witness' account of events.⁴ The purpose of cross-examination may vary depending on who is conducting it – either the trained, objective and specialised advocate, or the self-represented litigant, who may not understand or be able to apply the rules of evidence, and will not have the 'emotional objectivity or distance' from the case.⁵ Unlike a trained lawyer, a self-represented litigant has a direct personal interest in the final outcome.

Fundamental to the adversarial system is the right to a fair trial, which is said to encompass the accused's opportunity to robustly cross-examine witnesses, who are often also the victim of the alleged offence or offences.⁶ This is not only the case in criminal proceedings but also civil matters where both parties are given the opportunity to cross-examine the other party and their witnesses, for example, in hearings for final domestic violence orders. However, any 'right' to cross-examine is not absolute: it is bound by the rules of evidence and procedure governing both the content and form of questions. Various statutory safeguards, designed to protect the interests of vulnerable parties from cross-examination and to restrict the improper use of cross-examination, have been implemented by legislatures over the last few decades. This includes a provision that the court must disallow an 'improper question' put to a witness (e.g. if it is misleading, intimidating, humiliating, or put in a manner or tone that is belittling or insulting).⁷ The manner in which a judicial officer controls proceedings before himself or herself is within their own independent discretion and what constitutes an improper question still comes down to the perception of the judicial officer.⁸

In family law proceedings there is a further safeguard included in section 101 of the *Family Law Act 1975*

¹ This Issues Paper is based on, and drawn from, the thesis of Ashleigh Tilbrook, 'Crossing the Line? Should a prohibition be implemented in the *Family Law Act 1975* (Cth) to protect victims of family violence from being personally cross-examined by their perpetrator?', University of Canberra, Law Honours, 2012.

² J Crawford & B Opeskin, *Australian Courts of Law* (Oxford University Press, 4th ed, 2004) 60.

³ R Steward, 'The self-represented litigant: A challenge to justice' (2011) 20 *Journal of Judicial Administration* 146, 159.

⁴ A Cossins 'Cross-examination in child sexual assault trials: Evidentiary safeguard or an opportunity to confuse?' (2009) 33 *Melbourne University Law Review* 68, 70.

⁵ Judicial Commission of New South Wales, 'Equality before the Law Bench Book: Section 10 - Self-represented parties' (2006) 10104

⁶ M King, 'Therapeutic jurisprudence, child complainants and the concept of a fair trial' (2008) 28 *Criminal Law Journal* 303, 303.

⁷ *Evidence Act 2011* (ACT) s 41.

⁸ R Boyd & A Hopkins, 'Cross-examination of child sexual assault complainants: Concerns about the application of s 41 of the Evidence Act' (2010) 32 *Criminal Law Journal* 149, 150.

(Cth) that provides that 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 essential in the interests of justice that the question be answered. The Family and Federal Circuit Courts have developed family violence best practice principles to assist decision makers. These guidelines highlight the courts' commitment to protecting children and any person who has a parenting order from harm resulting from family violence and abuse.⁹

Despite these best practice principles, when a judicial officer intervenes in cross-examination to prevent improper questioning, the court does not have the power to protect the cross-examined party from the effects of direct personal confrontation.¹⁰ Furthermore, the reliance on judicial officers to intervene to curb the harassing and traumatic effects of personal cross-examination can be problematic and inconsistent in practice.

The distress caused to victims and the negative impact this could have on their lives and the efficacy of a trial was recognised more comprehensively by the criminal justice system during the 2000s. In 2004, two high-profile cases intensified debate about whether perpetrators of sexual assault should be precluded from personally cross-examining their victim. Two gang rape trials¹¹ involved defendants refusing legal representation so that they could cross-examine the complainants personally. Bilal Skaf, and co-accused, and the 'K brothers' cases', involved numerous attacks on women throughout Sydney, with their trials attracting significant publicity.¹² The potential risk of further abuse of the victim, at the hands of the perpetrator in the courtroom, triggered demands for a prohibition on personal cross-examination to be implemented in New South Wales (NSW).¹³

During a trial in the UK, a sexual assault victim suffered greatly as a result of being personally cross-

examined.¹⁴ The accused cross-examined the complainant for six days, wearing the same clothes he had worn at the time of the alleged attack. At one stage during the proceedings the victim fled from the courtroom physically sick. The victim described the ordeal as 'raped once by Edwards and again by the British justice system'.¹⁵

During the same decade, major reforms occurred in the Australian family law system. In 2006, the Federal Government made some wide-ranging reforms to the Family Law Act¹⁶, which led the Family Court some way from using a strict adversarial model. In family law parenting matters, the paramount consideration for the judicial officer determining a matter is the best interests of the child and accordingly 'trials cannot be strictly adversarial'.¹⁷ These reforms saw a shift requiring separating couples to use mediation prior to engaging with the court system except where family violence is disclosed. A number of provisions recognise that the dynamics of domestic and family violence can adversely impact on victims in mediation. It has been argued, however, that these provisions do not go far enough and that some victims of family violence continue to experience negative outcomes as a result of attending Family Court.¹⁸

A prohibition on personal cross-examination may be necessary to protect victims in family law proceedings and could be justified on the basis that our legal system should not allow victimisation to occur in the courtroom. Removing a perpetrator of violence's right to personally cross examine their victim but maintain a right to cross examine the witness through another person would, arguably, ensure the adversarial system of justice is not undermined and would not infringe the right to a fair hearing.¹⁹ In fact, a mandatory prohibition would ensure a 'fair trial' for both the perpetrator of family violence and the victim.

In family law proceedings where there is evidence of family violence, a self-represented litigant has the opportunity to use the court proceedings to embarrass

⁹ Family Violence Committee, *Family Violence Best Practice Principles*, ed 3.1 (April 2013) 2.

¹⁰ New South Wales Law Reform Commission, *Questioning of complainants by unrepresented accused in sexual offence trials*, Report 101 (June 2003) 3.

¹¹ *R v MSK and Mak* (2004) 61 NSWLR 204, cited in Cossins, above n 5, 72; see, also, *R v Skaf* [2001] NSWCCA 74.

¹² D Caruso, 'Proposed reforms for the cross-examination of child witnesses and the reception and treatment of their evidence' (2012) 21 *Journal of Judicial Administration* 191, 196.

¹³ Ibid 198.

¹⁴ *R v Ralston Edwards* [1997] EWCA Crim 1679 (3 July 1997).

¹⁵ 'Rape trial ordeal prompts reform call', *The Guardian Weekly* (London), 1 September 1996, 9.

¹⁶ *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)

¹⁷ P Fitzgerald & M Fernando, 'Has the Less Adversarial Trial process abolished the Rules of Evidence?' (2009) 20(3) *Australian Family Lawyer* 25, 26.

¹⁸ R Braaf & C Sneddon, 'Family Law Act Reform: the potential for screening and risk assessment for family violence', *ADFVC Issues Paper*, 12, 10.

¹⁹ Ashleigh Tilbrook, above n 1.

and harass their former partner.²⁰ It has been said ‘the increased danger arises... often because the proceedings themselves represent a threat to the control that one spouse wants to exert over the other, manifested in its most extreme form by violence.’²¹ The traumatic experience is likely to be amplified where the parties have, or have had, ‘an intimate or family relationship’²², as this can create an ‘additional burden of having been betrayed by someone once trusted’.²³ Due to the nature of family law matters, it is almost impossible for the parties to examine or cross-examine their former partners or family members in an ‘objective, effective or meaningful way’.²⁴

An example of this occurring was exemplified in a case on appeal in the Full Court of the Family Court. One of the grounds of appeal was that ‘as a result of the trial’²⁵ judge’s refusal to permit the mother to be cross-examined remotely and not in the presence and by the father in person (her alleged abuser) the entirety of the trial miscarried’.²⁶ In the trial, the mother was highly distressed while being cross-examined and sought, after being subjected to cross-examination by the father for some time, to give evidence by video link, which was refused by the judge due to the late timing of the application. The trial judge suggested a number of ways in which the mother might be assisted during cross-examination, such as a support person sitting with her in the witness box.²⁷ However, the cross-examination continued to be highly distressing for the mother and the court was often adjourned to allow her to regain composure. This example is one of many which raise questions about why the family law system

in Australia is yet to seriously consider the introduction of provisions that preclude a self-represented litigant cross-examining a party who has made allegations of family violence.

In recognition of the needs of victims in criminal matters, relevant legislation has been amended in sexual and violent offence proceedings. All jurisdictions now impose restrictions on a defendant in sexual offence proceedings from personally cross-examining the complainant. Some restrictions also apply to violent offence proceedings.²⁸ The existing prohibitions vary in relation to their coverage, the categories of witnesses covered²⁹ and the alternative methods imposed to allow the witness’ evidence to be tested.

In NSW and the ACT criminal courts, questions are to be asked on the defendant’s behalf by a suitable person appointed by the court. The appointed person ‘must not independently give the accused person legal or other advice’.³⁰ In Victoria, the provision sets up a mechanism for the appointment of a representative from Victoria Legal Aid for the purpose of cross-examining a protected witness and that representative ‘must act in the best interests of the defendant even if the defendant does not give any instructions to that legal practitioner’.³¹ This approach has been subject to criticism on the basis that ‘counsel is the dummy of the ventriloquist accused’.³² The NSW Law Reform Commission and the Victorian Law Reform Commission both made recommendations that the court appointed person should be a legal practitioner so that they can provide legal advice for the purposes of cross-examination if necessary.³³

²⁰ New South Wales Bar Association, ‘Guidelines for barristers on dealing with self-represented litigants’ (October 2001) 11.

²¹ B Fehlberg & J Behrens, *Australian Family Law: The Contemporary Context* (2008, Oxford University Press), 58, citing Family Court of Australia, *Annual Report 2005-2006* (2006), 58.

²² Australian Law Reform Commission, *Family Violence - A National Legal Response*, Report No 114 (October 2010), 1337.

²³ New South Wales Law Reform Commission, above n 10, 14, quoting Standing Committee on Social Issues, Parliament of New South Wales, Legislative Council, *Sexual violence, the hidden crime: inquiry into the incidence of sexual offences in NSW: Part 1* (Report 6, 1993) [1.1.7].

²⁴ A Nicholson & M Harrison, ‘Family Law and the Family Court of Australia: Experiences of the First 25 Years’ (2000) 24(3) *Melbourne University Law Review* 756, 781.

²⁵ Trial is an accepted term in both Family Court and criminal court proceedings.

²⁶ *Cameron & Walker* [2010] FamCAFC 168 (7 September 2010) [80].

²⁷ *Ibid* [90].

²⁸ *Crimes Act 1914* (Cth) s 15YG; *Criminal Procedure Act 1986* (NSW) s 294A; *Criminal Procedure Act 2009* (Vic) s 356; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D; *Evidence Act 1977* (QLD) s 21N; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5; *Evidence Act 1906* (WA) s 25A; *Evidence Act 1929* (SA) s 13B; *Evidence (Children and Special Witnesses) Act 2001* (TAS) s 8A.

²⁹ Australian Law Reform Commission, *Family Violence - A National Legal Response*, above n 22, 1341-2.

³⁰ *Criminal Procedure Act 1986* (NSW) s 294A(4); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D(6).

³¹ *Criminal Procedure Act 2009* (Vic) s 357(4).

³² Caruso, above n 12, 206, citing Australian Law Reform Commission, *Family Violence - A National Legal Response*, above n 26, 1341.

³³ Australian Law Reform Commission, *Family Violence - A National Legal Response*, above n 22, 1340.

Similar provisions in family law proceedings may be difficult to implement due to the complex nature of family law proceedings where the person asking the questions would need a nuanced understanding of the entire case in order to ask questions that reflect the complex nature of family law matters. If family violence is alleged or proven to exist in a relationship, that issue permeates the entire case, particularly when there is a question of a party's capacity to parent. These circumstances may require a legal practitioner to be available to speak on the alleged perpetrators behalf for the full length of a trial.

Preventing perpetrators from cross examining their victims and providing them with a legal practitioner funded by Legal Aid to represent them during cross-examinations (or the entirety of their matter) may create a situation in which the perpetrator receives state funded legal representation and their victim does not; skewing the balance of power toward the perpetrator once again. It is also worth noting that if the victim is unrepresented in a family law matter they would be required to cross-examine their perpetrator. This could seriously compromise their ability to ask the necessary questions and affect their capacity to present their case effectively.

However, in considering a mandatory prohibition in criminal cases in NSW, the NSW Law Reform Commission deemed that it would ensure 'consistency, certainty and simplicity'.³⁴ A helpful clarity when it comes to the needs of victim. A mandatory prohibition on personal cross-examination in family law matters would put an onus on the system to ensure that an alternative person conducts this cross-examination but would not undermine the adversarial nature of the system.

It must be noted that a major impediment to a prohibition is that it would be resource intensive.³⁵ Family Court matters involving family violence are very common. Indeed, a sample of approximately 300 Family Court and Federal Magistrates Court files indicated half of the cases contained allegations of family violence and/or child abuse.³⁶

An additional consideration is that the Family Law Act operates nationally. As a result there is significant

variation in the types of facilities available in different Courts across the country. Some regional courts have limited facilities and would not be equipped with the technology to facilitate some alternative options such as the giving of evidence from a remote room

Meanwhile, the issue of self-representation in the family law jurisdiction has been described as a 'growing phenomenon':³⁷ in 2013-14 the incidence of self-represented appellants in the Family Court was 38%³⁸ and over a third of trials involved a self-represented litigant.³⁹ Inevitably there would be significant cost implications if a prohibition was imposed on such a large proportion of the workload of the jurisdiction.

There has been a noticeable failure by legislatures to recognise that victims⁴⁰ of family violence are susceptible to re-victimisation at the hands of the perpetrator in family law proceedings. This is striking when considering that the *Family Law Act* seeks to recognise and provide safety in other ways for victims of family violence.

The removal of this unnecessary trauma by implementing a prohibition would put victims in a better position to use the Family Law Courts effectively *and* get better outcomes for themselves and their children.

Notwithstanding the potential barriers to imposing a blanket prohibition, it is clear that preventing cross-examination in person by a perpetrator would be of a significant benefit to the wellbeing and accurate testimony of the victim of family violence and may contribute to a Family Law Court process that is fairer for both of the parties.⁴¹ Whilst the solution to this issue is not a simple one it is essential that the Commonwealth Government and stakeholders engage in consultation and actively explore a prohibition or other alternative solutions to effectively address this issue.

³⁷ R Foster, 'Australian Experience with self-represented litigants (SRLs) – A Family Court Perspective' (Paper presented at the 21st AIJA Conference on New Challenges, Fresh Solutions, Fremantle, 19-21 September 2003), 1.

³⁸ Family Court of Australia, *Annual Report 2013-2014* (2014).

³⁹ B Fehlberg & J Behrens, above n21, 58, citing Family Court of Australia, *Annual Report 2005-2006* (2006).

⁴⁰ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 3 July 2008, 2668 (Simon Corbell, Attorney-General).

⁴¹ New South Wales Law Reform Commission, above n 10, 47.

³⁴ New South Wales Law Reform Commission, above n 10, 55.

³⁵ Ibid, 57.

³⁶ L Moloney, B Smyth, R Weston, N Richardson, L Qu & M Gray, 'Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A pre-reform exploratory study' (Research Paper No 15, Australian Institute of Family Studies, 2007).