

Opening Statement



1 August 2018

Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018

Opening Statement: Senate Legal and Constitutional Affairs Legislation Committee

Morry Bailes, President, Law Council of Australia

1. Good afternoon. My name is Morry Bailes and I am the President of the Law Council of Australia. I am joined this afternoon by Mr Paul Doolan, the Deputy Chair of the Law Council's specialist Family Law Section.
2. As the Committee will be aware, the Law Council is the peak national body representing the legal profession in Australia and we thank the Committee for the opportunity to provide evidence to its inquiry this afternoon.
3. The Law Council welcomes this inquiry into the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill, and acknowledges that for survivors of family violence, the prospect of being cross-examined by a violent ex-partner can cause significant emotional distress and trauma and discourage them from starting or continuing litigation and from exercising their legal rights.
4. As noted in the Explanatory Memorandum to the Bill, it is important that any restrictions on cross-examination balances the need to protect family violence victims from being re-traumatised during their court proceedings, with the need for procedural fairness for parties.
5. The Law Council has been actively engaged in the development of the measures proposed by this Bill, having made detailed submissions to the Attorney-General's Department when an Exposure Draft was released in July 2017, together with our primary and supplementary submissions to this Committee.
6. As our submissions have pointed out, while there have been some improvement to the Bill since its original form, the Law Council maintains serious reservations about a number of aspects of the proposed measures.
7. These concerns relate primarily to the following aspects of the Bill:
 - the lack of clarity regarding the proposed model for participation of a lawyer to perform a cross-examination;
 - the absence of any confirmation that extra funding will be provided to legal aid commissions to enable them to perform this vital role under the proposed scheme;
 - the uncertainty with guidelines that will be applied by legal aid commissions to people who cannot afford a private lawyer to act for them and who seek the assistance of a legally aided lawyer as a result of the proposed scheme;

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- the absence of any reported extra funding to the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia to enable them to implement the Bill; and
 - uncertainty about what is to occur if a party cannot afford a private lawyer and is not eligible for legal aid. In this context, the Law Council is particularly concerned that situations may arise where a perpetrator of family violence is legally represented, but the victim is unable to secure legal representation.
8. The Law Council regards cross-examination as playing a critical role in testing and challenging the evidence of the other party and their witnesses. It is through this process that the truth or otherwise of an allegation is established, by the testing of the credibility and the veracity of the witness.
 9. Without further clarity on the model proposed under the Bill, there is a concern that the model may call for legal practitioners to effectively be ‘parachuted’ into a hearing only for the cross-examination of a witness, raising serious ethical and liability issues for those practitioners. Effective cross-examination requires the cross-examiner to have an understanding of all of the evidence and the central issues in the case, and for that person to be present to observe the evidence of the other party, their witnesses and the evidence of his or her own witnesses.
 10. Regardless of the level of appearance expected of legal practitioners under the proposed model, it is clear that there will be an impact on legal aid commissions, and the Law Council is concerned by some media reports which suggest that no extra funding will be made available. If legal aid commissions are to provide representation but no new funding is made available, then the Bill will have a significant financial impact on the capacities of legal aid bodies to fund other aspects of family law disputes.
 11. The Law Council is also concerned that no extra funding for the family courts accompanies the Bill. The Law Council anticipates that without extra resources being provided, the family courts will be unable to implement this initiative without adding to the backlog and delay of their existing caseload.
 12. As noted in our written submissions, the Law Council considers that the existing legislative structure provides sufficient power to the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia to properly protect the rights and interests of both victims and perpetrators.
 13. For those small number of cases where no other alternative to direct cross-examination is suitable, the Family Law Act could be amended to allow a judge to request a legal aid commission to provide representation for the alleged perpetrator and the victim if they are unrepresented. As already noted, the Law Council suggests proper administration of justice requires that such a lawyer be engaged for the whole trial, not just the cross-examination. If legal aid commissions effectively become a measure of last resort in this context, they should be provided with additional Commonwealth funding to perform this role.
 14. The Law Council has included additional feedback on the Bill in its written submissions, and my colleague, Mr Doolan and I are certainly happy to answer any questions the Committee may have. Thank you.

The Law Council’s [submission](#) and [supplementary submission](#) are available online.

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