

Protecting vulnerable witnesses in family law

The failure of the Federal Government to protect vulnerable witnesses in family law proceedings leaves women feeling like they have been thrown to the wolves, writes **JANET LOUGHMAN**, Principal Solicitor at Women’s Legal Services NSW.

In each Australian state and territory, there are legal protections in many civil and criminal proceedings to prevent self-represented litigants cross-examining former partners where there is a history of violence, including sexual violence

These protections recognise the traumatic impact of cross-examination of vulnerable witnesses by perpetrators of violence.

There are no equivalent provisions in the family law jurisdiction. The *Family Law Act* contains no protection against direct cross-examination by perpetrators or any specific protections for vulnerability in general – for example, for witnesses with disability.

Cross-examination by an alleged abuser can have a devastating impact and can also lead to some people choosing to settle their family law matters on less-than-satisfactory terms to avoid being cross-examined by – or

having to cross-examine – a violent ex-partner. The experience can result in re-traumatisation, can compromise the quality of evidence given to the court, which can affect the court’s ability to make safe and effective orders, and can allow the perpetrator to use court proceedings to control and dominate the victim.

In 2015, 330 women responded to a Women’s Legal Services Australia (WLSA) survey of survivors of domestic and family violence to gather evidence about the extent and impact of being directly cross-examined in family law courts. High levels of violence were reported and 64 per cent of women reported sexual violence.

Thirty-nine per cent of matters settled before judgment and 45 per cent of those respondents said the fear of personal cross-examination by their abuser had been a significant factor in their decision to settle.

Some 144 respondents made comments about the effect the cross-examination had had on them. Some comments included:

“I felt he had the privilege to continue his intimidation and threats, yet in a confined legal space.

It defeats the purpose of having a safety room at court – my support person and I sit there to avoid seeing him, yet we are ‘thrown to the wolves’ when we enter the court room. It made me feel all the feelings over again. It made me sick to the core.”

“Couldn’t speak very well, frozen.”

“Terrifying. I could not look at him. The judge later said in his submission that I hated the man cause I couldn’t look at him. The man terrorised me for years and to this day is still making me paranoid that he will carry out his death threat.”

Protections for vulnerable witnesses in intervention order proceedings

In jurisdictions such as Victoria, Tasmania, Western Australia and South Australia, an unrepresented accused person in a protection order matter cannot directly cross-examine the protected person who is the subject of proceedings. In South Australia, Western Australia, the Northern Territory and Victoria, a person is appointed by the court to carry out the cross-examination.

In Victoria, this person is appointed by Legal Aid, while in the other jurisdictions the defendant must pose his or her questions to the court or a person appointed by the court, who must repeat those questions accurately to the complainant.

Protections for vulnerable witnesses in sexual offence trials

In all Australian jurisdictions, an unrepresented accused person in a sexual offence proceeding cannot directly cross-examine the complainant. In Tasmania and South Australia, the accused must obtain legal representation or forfeit the right to cross-examination.

In all other Australian jurisdictions, a person is appointed to carry out the cross-examination. In Victoria and Queensland, this person is appointed by Legal Aid.

In NSW, the court must appoint the person. It is explicitly stated that the person cannot give the accused independent legal advice and, if the appointed cross-examiner is a lawyer, there is statutory protection against liability for anything done, or omitted to be done, in good faith.

Protections for vulnerable witnesses in Commonwealth criminal trials

In 2013, protections were introduced for adult complainants involved in proceedings relating to slavery and slavery-like conditions, as well as trafficking in persons or debt bondage. These protections include the requirement of leave for an unrepresented defendant to cross-examine an adult complainant or special witness.

Leave must not be granted unless the court is satisfied the vulnerable person's ability to give evidence while being cross-examined by the defendant will not be adversely affected. This includes any trauma that could be caused. Protection from direct cross-examination by the defendant extends beyond sexual offences to "any Commonwealth offence" for special witnesses.

A "special witness" includes a person unable to "satisfactorily give evidence" because of "intimidation, distress or emotional trauma" due to one of a number of factors "including relationship to a party to the proceeding", "nature of the evidence" or "some other relevant factor".

What can the courts do now in family law?

Judges in family law proceedings can use the *Family Law Act* provisions in Part VII Division 12A, including the principles outlined in Section 69ZN, to ensure that the proceedings are conducted in a way that will safeguard the parties against family violence.

These can be applied usefully to allow parties to use a safe room at court; to give evidence by audio-visual link; and for an ICL to cross-examine first, before a self-represented litigant.

The judicial officer can intervene to the extent that he or she feels fairness allows, and an appeal will not result, to restrict inappropriate questions (if identified, as this can be difficult in intimate partner violence).

Although these measures assist, they do not adequately remedy the injustice that flows and that other proceedings such as sexual assault trials have accommodated.

Survey respondents commented, however, that they did not believe the court adequately intervened to protect them and many felt the system had let them down and was complicit in the abuse.

Is Legal Aid the answer?

Legal Aid is important to women who have experienced family violence, as effective legal representation and access to legal aid will protect victims to some extent. However, legislation is required

because there will always be parties who choose to be unrepresented as an act of intimidation and control.

What needs to change?

If, as a community, we are saying that domestic violence is a national disgrace, then we need to make sure legal protection continues through the family law processes.

On 14 October 2015, Independent MP Cathy McGowan introduced a private member's motion calling on the Government to amend family law legislation to ensure that in situations of family violence, an unrepresented litigant alleged or known to have perpetrated violence is unable to directly cross-examine the victim.

The motion noted that intimate partner violence is the top risk factor for death, disability and illness in women aged 15-44 years – the added fear and trauma of cross-examination by an alleged or known perpetrator of violence is a continuation of the violence.

WLSA has written an open letter to Federal Attorney-General George Brandis calling on the Government to protect victims of domestic violence in Family Court and Federal Circuit Court proceedings by introducing legislative protection from direct cross-examination. Visit the Women's Legal Services Australia website wlsa.org.au/ for further information on what changes need to be made to the family law system to ensure safety in family law. **LSJ**

This article represents the collective work of members of Women's Legal Services Australia, in particular Angela Lynch and Passana Mutha-Merrennege, as well as the many women survivors of family violence who have spoken out to raise awareness of the injustice at the core of this issue. Gendered language has been used to reflect the statistics regarding the dynamics of domestic violence.