Relationships Australia

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Mr Robert Cornall AO and Ms Kerrie-Anne Luscombe
Reviewers
Review of direct cross-examination ban – *Family Law Act 1975* (Cth)
By email: cross-examination@ag.gov.au

Dear Mr Cornall and Ms Luscombe

Review of direct cross-examination ban – Consultation

Thank you for seeking the views of Relationships Australia concerning the operation of the direct cross-examination ban, as provided for by sections 102NA and 102NB of the *Family Law Act 1975* (Cth) ('the Act'). Relationships Australia welcomes the opportunity to make a submission to the review, and appreciated the opportunity to speak with you earlier this month. This submission is made on behalf of the eight State/Territory Relationships Australia organisations. It develops the themes we discussed on 6 May 2021, and provides further information on the questions you raised then and since.

Our recommendations

Relationships Australia considers the continuation of the ban to be necessary, but not sufficient, to achieve the Government's policy objectives concerning responses to family violence and, in particular, minimise the use of legal proceedings to perpetuate such violence. Accordingly, we offer the following recommendations.

1. **Amend** the Act to:
    a. enable continuation of the ban, with a further statutory review scheduled for late 2024 (allowing five full years of operation)
    b. require the collection and timely publication of quantitative data about the costs and other financial implications of continued operation over the full five years, and
    c. require the collection and timely publication of qualitative data about the impact of the ban on witness parties, examining parties, and children.
2. **Fund** Legal Aid Commissions with a dedicated appropriation for the duration of the ban (with a component to meet the costs of data collection as contemplated by Recommendation 1).
3. **Consult** with the Law Council of Australia, and more broadly among the legal profession, about how best to support the kind of discrete task representation required by the ban.
4. **Exclude** cost recovery, user pays and like mechanisms from consideration as means of partially or wholly funding legal representation pursuant to the ban.
5. **Implement** recommendation 10 of ALRC Report 135, *Family Law for the Future – An Inquiry into the Family Law System*, with which the Government has indicated its in principle agreement, to complement the ban, and further ameliorate the harms consequent to adversarial processes in family separation.

Work of Relationships Australia

The Relationships Australia federation is a leading provider of secular, not-for-profit services, helping individuals, families and communities to achieve and maintain safe, positive and respectful relationships. Relationships Australia believes that violence, coercion, control and inequality are unacceptable. We offer counselling, family dispute resolution, mental health services, and a range of family and community support and education programs. Relationships Australia State and Territory organisations, along with our consortium partners, operate around one third of the 66 Commonwealth-funded Family Relationship Centres. Relationships Australia Queensland operates the national Family Relationships Advice Line and the Telephone Dispute Resolution Service. Our member organisations have served Australians for over 70 years and are funded by a range of federal, state and local government grants to work across almost 100 sites in metropolitan, regional and rural Australia.

We are strongly committed to supporting measures that serve the outcomes described at paragraph 1(a) of the Terms of Reference for the Review. We are also committed to supporting measures that enable identification, prevention and appropriate responses to abuse of process and systems abuse. We are aware, for example, of recent instances in which court-based mediation has been conducted on the basis that 'we'll stay here until an agreement is reached', and have concerns that such practices of agreement by attrition are not safe or trauma-informed and that they in fact enable abuse and inflict secondary victimisation (see, eg, Laing, 2017). The recent study by Francia *et al*, 2019, found that 'coercion by legal professionals was common', as well as identifying, among parents, 'deep concerns around the expertise of professionals' (at p 227; see also p 230).

While beyond the scope of this Review, we have observed elsewhere that the family law system is innately unsuited to meet the needs and legitimate expectations of contemporary Australian families; what is required to fully and genuinely meet the needs of families affected by family and domestic violence is transformative, system-wide change.

In the absence of such transformation, Government has a clear responsibility to ensure that parties and witnesses coming before the family law courts are not subjected, through court processes, to further trauma or the perpetuation of abuse more broadly. The ban on direct cross-examination is a necessary, though not sufficient, step towards fulfilling that responsibility.

Prevalence of family violence in our services – why the ban is, and will remain, necessary (Term of Reference 3(a) – current and future drivers of demand; Recommendation 1(a))

We have welcomed the initiatives taken by Governments and also by the family law courts, in responding to family violence and the exigencies of the COVID-19 pandemic. We further acknowledge and warmly welcome the additional funding of family law services announced in the 2021-2022 Federal Budget.

Family violence remains a serious and highly prevalent problem among Relationships Australia clients. It is not a discrete phenomenon - it is generally accompanied by a constellation of interacting co-morbidities including substance abuse, mental health problems and personality disorders (see, for example, Family Law Council, 2015; Kaspiew *et al*, 2015a; Kaspiew *et al*, 2015b). It is acknowledged to be 'core business' for the family law courts.

A recent national study of family dispute resolution ('FDR outcomes') conducted by Relationships Australia involved approximately 1700 participants, of whom:

- nearly a quarter (23%) presented with high levels of psychological distress, and
- 68% reported experiencing at least one form of abuse, with verbal abuse being the most common (64%).

A large proportion (72%) of parenting participants in the Study also reported significant child exposure to verbal conflict between parents, including yelling, insulting and swearing. The Act recognises that such exposure is a form of family violence in its own right, of which children are direct victims (subsections 4AB(3) and 4AB(4)).

An audit of data collected by Relationships Australia South Australia found that clients reported concerns about violence, harm to children and mental health. The audit analysed over 3,200 files from 2013-2018. Its findings are summarised in the following table.

DOOR 1 wording*	Clients saying 'Yes'	Sample size	Risk indicator
In the past 2 years, have you seen a doctor, psychologist or psychiatrist for a mental health problem or drug/alcohol problem?	33.9%	3232	Mental health problem
Have things in your life ever felt so bad that you have thought about hurting yourself, or even killing yourself?	18.8%	3189	Mental health
If yes, do you feel that way lately?	9.5%	599 (Yes only)	Suicide risk
In the past year, have you drunk alcohol and/or used drugs more than you meant to?	10.3%	3245	Alcohol or drug abuse
In the past year, have you felt you wanted or needed to cut down on your drinking and/or drug use?	9.4%	3177	Alcohol or drug abuse
Does your young child(ren) have any serious health or developmental problems?	10.5%	1452	Developmental risk (child <5 years)
In the past 6 months, has any professional (teacher, doctor, etc.) been concerned	14.0%	1411	Developmental risk(child <5 years)

about how your young child(ren) was doing?			
Does your child(ren) have any serious health or developmental problems?	20.6%	2107	Developmental risk(child >=5 years)
In the past 6 months, has any professional (teacher, doctor etc.) been concerned about how your child was doing?	33.7%	2028	Developmental risk (child >=5 years)
Have any child protection reports ever been made about your child(ren)?	13.1%	3095	Child abuse
As a result of the other parent's behaviour, have the police ever been called, a criminal charge been laid, or intervention/restraining order been made against him/her?	28.4%	3228	Family violence (victimisation)
Is there now an intervention/restraining order against other parent?	5.1%	3131	Family violence (victimisation)
As a result of your behaviour, have the police ever been called, a criminal charge been laid, or intervention/restraining order been made against you?	14.3%	3244	Family violence (perpetration)
Is there now an intervention/restraining order in place against you?	4.5%	3130	Family violence (perpetration)

*DOOR 1 was developed by J E McIntosh

COVID-19 and demand for family violence services – a basis on which to predict demand for legal financial assistance? (Term of Reference 3(a)(iii); Recommendation 1(a))

Relationships Australia notes that the ban commenced on 10 March 2019, operating for barely 12 months before COVID-19 measures came into effect. Further, despite the family law courts' best efforts to conduct business as usual throughout the pandemic, the emergence of COVID-19 may have interrupted contemplated or on foot proceedings. It is therefore premature to quantify definitively the impact of COVID-19 on critical factors such as the prevalence of family separation, family violence, and of related co-morbidities including mental illness and misuse of alcohol and other drugs. We are, however, in a position to say that people are experiencing those issues more often, and with greater intensity, than prior to the pandemic. In any event, it seems likely that any data from the past year is more likely to understate than overstate the need for court room support for family violence victim/survivors.

Relationships Australia offers the following insights from our member organisations about service provision since emergence of the pandemic.

Service provider snapshots from the pandemic

Relationships Australia South Australia noted unabated demand for funded Specialist Family Violence Services ('SFVS'). Some existing clients required more intensive work.

Relationships Australia New South Wales recorded a high volume of first time clients, who reported scant prior indications of family violence. However, referrals to SFVS initially decreased, and there remains a concern that, as restrictions continue to ease, there will be a surge in demand both in numbers and in the intensity of services required.

Relationships Australia Tasmania reported that the volume of family risk assessments and child safety assessments increased by 15%, compared to pre COVID-19 volumes, and that clients were revealing the existence of family violence even where that was not the primary presenting issue identified by clients on approaching our services. Relationships Australia Tasmania also expressed concern about the anti-therapeutic effects of disruption to Men's Behaviour Change Program ('MBCP') services.

Relationships Australia Queensland reported an increase in police referrals and a dramatic increase in SFVS demand, with a high volume of new presentations, many of whom are first time clients. Relationships Australia Queensland is contracted by the Attorney-General's Department to deliver the Family Relationships Advice Line, and reported that some clients were finding it difficult to seek help even online while they and their perpetrators were living together and working from home under COVID-19 restrictions. It cannot be assumed, even in normal times, that everyone who needs help is safe and confident about seeking help, but during 2020, Relationships Australia Queensland reported higher risk clients as withdrawing from contact during lockdown periods.

Relationships Australia Western Australia reported higher than usual numbers of missed calls and website hits from late at night, suggesting that people felt unsafe in seeking help when others were around, and likely to have been able to see or hear what they were doing. Again, this may point to a surge in demand once people feel safer in seeking help. Relationships Australia Western Australia noted no particular increase in domestic violence in the generalist programmes, but its SFVS were inundated with calls, as were its programmes serving Aboriginal women.

Relationships Australia New South Wales shifted MBCP away from group work to casework, and noted that clients would still need to complete face to face services as COVID-19 restrictions allowed.

Data collection (Terms of Reference 1, 2(b)(ii), 2(c), 3(a), 3(d); Recommendations 1(b), 1(c))

The relatively short period of operation of the ban, and its disruption by COVID-19, means that the Review has relatively little data on which to base recommendations. Should Recommendation 1 from this submission be implemented, Relationships Australia further recommends mandatory collection of quantitative and qualitative data, to measure cost,

outcomes and impact of the ban, and inform future policy. Data collection should be adequately and discretely funded.

Financial implications (Terms of Reference 2(c), 3(d), 3(e); Recommendations 2, 4)

Relationships Australia considers that it is ethically questionable to seek to recover costs incurred in implementing a measure to ameliorate trauma to victim/survivors of family violence. This is especially so since the ban is required because court processes are available (and even enticing) for perpetrators to employ as a weapon to intimidate, coerce or harass, and courts have not been effective in deterring or curbing this behaviour (see, for example, ANROWS, 2018; Fitch & Easteal, 2017). Despite some very encouraging innovations in the family law courts in recent years, concerns remain that family violence is minimised and marginalised in the courts (see, for example, Francia *et al*, 2019; Easteal *et al*, 2018), and that a not insignificant number of judges and other professionals do not have adequate expertise to consistently prevent the perpetration of family violence during and adjacent to court proceedings (Francia *et al*, 2019, at p 229, and references cited therein).

An appropriate, ethical and proportionate response requires nothing short of institutional transformation. Relationships Australia acknowledges that proposal of such a response falls well beyond the scope of this Review. However, the ban and its financial sustainability is not severable from the context in which the demand for it arose. It is therefore pertinent to draw to your attention that Relationships Australia has, in numerous other family law reform consultations over the past three years, advocated for the removal of institutional incentives to use the courts to perpetuate violence. We have made detailed recommendations about how this should be done; see our submissions to:

- the Parliamentary Joint Select Committee inquiry into improving Australia's family law system (2020)
- the inquiry of the House of Representatives Social Policy and Legal Affairs Committee into Family, Domestic and Sexual Violence (2020)
- the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Federal Circuit and Family Court of Australia Bill 2019 (2020)
- the Australian Law Reform Commission, responding to Issues Paper 48 and Discussion Paper 86 (2018)
- the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Federal Circuit and Family Court of Australia Bills 2018 (2018), and
- the inquiry of the House of Representatives Social Policy and Legal Affairs Committee into a better family law system to support and protect those affected by family violence (2017).

Links to these submissions are included in the references list at the end of this submission.

Relationships Australia considers that cost recovery would contribute to worse situations for separated families and, in particular, for victim/survivors of abuse (including children). It is well established that, post-separation, financial difficulties persist for several years (with more dire, and longer-lasting, consequences for women); see, for example, de Vaus *et al*, 2007;

de Vaus *et al*, 2015; Fehlberg & Millward, 2014; Gray *et al*, 2010. Consequently, charging for services delivered pursuant to the ban, or seeking to recover costs after the event, would be likely to:

- inflict secondary victimisation on victim/survivors of family violence (see, for example, Laing, 2017)
- further exacerbate poverty and hardship experienced by both parties (and their children)
- re-animate and/or heighten conflict and violence between parents and impose further strain on effective co-parenting
- have other significant adverse effects on children who have already endured exposure to family violence, compounded by the trauma of having had parents engaged in prolonged and hard-fought adversarial proceedings, and
- in any event - yield returns insufficient to offset the costs of that action and may not be possible for some years after provision of the service.

Mechanisms which prove effective, acceptable and reasonable in other settings, including civil litigation and other government services for which citizens are charged a fee, are unsuited to the family law setting. It is misleading to assume equivalence. There are important differences in character between family law litigation and other litigation, arising in particular from the involvement of children. The central inquiry is always the prospective best interests of the child, even if litigation is nominally about property. If there are children of a relationship, a property dispute is never just about property – it will always affect children's development, wellbeing and relationships. Family law matters are future focused, and centre on the wellbeing of someone who is not a party to the litigation.

Another relevant factor relates to sequencing of disputes in the family law system, which purports to draw a bright line distinction between parenting and property matters, despite the practical reality that this is not how separating parents, or their children, experience their difficulties. As a consequence of that distinction, parenting disputes are generally required to be addressed separately and before property matters. In our experience, however, litigation of property disputes often leads to the undoing of previously well-functioning parenting agreements (even in the absence of family violence; see, for example, Fehlberg & Millward, 2014). There is very little (if any) financial legal assistance available to separating parents to deal with property disputes, heightening the likelihood that one or both parent will be self-represented, and call upon the scheme for representation in cross-examination.

Further, the provisions of the Family Law Act do not deal satisfactorily with family violence as a matter to be taken into account by judges in making property orders. This deficit has been acknowledged in recent inquiries and is currently the subject of a concurrent consultation being undertaken by the Attorney-General's Department. Its relevance in this context is that failure adequately to take account of the impact of family violence can exacerbate the post-separation financial disadvantages endured by victim/survivors. These disadvantages could be compounded if perpetrators are obliged to re-pay costs of representation for cross-examination, and their resources to pay child support, for example, are depleted accordingly.

Last, a final judicial determination or a consent agreement may not include a definitive finding of whether there has been wrong-doing, in the form of violence or otherwise, to provide a moral or ethical basis on which to justify a financial impost to recover legal assistance costs from one or both parties.

Alternative protections (Term of Reference 1(d)); mitigating demand (Term of Reference 3; Recommendation 5)

Relationships Australia welcomes the Government's in principle agreement to Recommendation 10 of ALRC Report 135:

> Combined rules for the Family Court of Australia and the Federal Circuit Court of Australia should provide for proceedings to be conducted under Pt VII Div 12A of the *Family Law Act 1975 (Cth*) by judges of both courts. Both courts should be adequately resourced to carry out the statutory mandate in s 69ZN(1) of the *Family Law Act 1975* (Cth).

In the absence of, or complementary to, system transformation, we suggest full and sustained implementation of Recommendation 10. Relationships Australia concurred with other submitters to the ALRC inquiry that Part VII Division 12A was a valuable resource to ameliorate those aspects of the family law system that are particularly problematic in terms of providing trauma-informed, family violence literate services.

It is not within our expertise to determine whether that would involve more expense (in providing adequate resources to the courts) than ongoing implementation of the ban. However, it would offer a way around some of the procedural issues raised by the ban (eg in terms of affording natural justice, and the difficulties of providing discrete task representation in this context).

Other related measures, that we have advocated elsewhere, would include:

- amending the definition of 'family violence' in the Act to include abuse of process (supporting use of alternative protections in the family law courts), and
- implementation of proposals 8-2, 8-3, 8-4 and 8-5 in ALRC Discussion Paper 86 (dealing with the definition of 'family violence', abuse of process and unmeritorious proceedings).

Existing court powers to manage unmeritorious or abusive use of the court system are not sufficient, as has been suggested by the Law Council of Australia (submission 43 to the ALRC inquiry, paragraphs 277-284). Current provisions are confined in their operation to conduct in relation to court or tribunal proceedings. Powers to identify and respond to abuse of systems and processes need to recognise the multiplicity of systems and processes that can be used, in concert or in succession, to perpetuate abuse, control, intimidation and coercion. The fragmentation of the family law system allows significant scope - even incentives - to someone who wishes to engage in this form of behaviour, offering multiple avenues by which to maintain contact and sustain violence and abuse. Responses to misuse of systems and processes cannot be confined to consideration of what happens in legal proceedings before the court and in the court room, but must also encompass conduct outside the court, that is connected to the dispute. This includes creating a climate of fear not only around the prospect of direct

cross-examination, but around all aspects of the family law system, contributing to what are, effectively, coerced 'consent orders' and 'agreements'.

For example, in its submission to the inquiry of the Senate Legal and Constitutional Affairs Committee into the Family Law Amendment (Parenting Management Hearings) Bill 2017, the Law Council of Australia noted that

> It is widely acknowledged that the AAT child support jurisdiction has come to be used by perpetrators of family violence as a means of committing further family violence by exploiting the opportunity to take legal proceedings against the victim.' (Submission 20, p 18, paragraph 51).

Contravention proceedings are also used by perpetrators to pressure victim/survivors to acquiesce to 'consent' orders.

This, in our view, underscores the need to legislate to recognise that systems misuse, by parties to family dispute, can be achieved by a number of routes inside and outside the court room, within and adjacent to formal proceedings. Relationships Australia reiterates that the ban is necessary and must, therefore, be continued. But it is nowhere near sufficient to afford safety to victim/survivors of family violence whose perpetrators enjoy a wide choice of weapons to perpetuate their abuse not only at the Bar Table and in the court room, but in the carparks, corridors and waiting rooms of courts and other agencies of government, as well as out in the community. Family violence costs the Commonwealth $13.5 billion per year; the cost of this ban must be considered against that background.

CONCLUSION

Policies and programmes cannot narrowly focus on family violence alone, or on one limited element of the family law system, or on a single procedural component such as cross-examination. The ban under review is well-intentioned and needs to stay in place, but it is no panacea for, or deterrent against, systems abuse, which is why Relationships Australia will continue to advocate for systems transformation, rather than a profusion of discrete measures that are tightly confined in terms of scope and timeframe.

We again thank you for the opportunity to engage with this Review, and would be happy to discuss further the contents of this submission if this would be of assistance. I can be contacted directly on (02) 6162 9301. Alternatively, you can contact Dr Susan Cochrane, National Policy Manager, Relationships Australia National, on (02) 6162 9309 or by email: scochrane@relationships.org.au.

Yours sincerely

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National Executive Officer

REFERENCES

ANROWS (2018). *National Risk Assessment Principles for Domestic and Family Violence*. Retrieved from https://www.anrows.org.au/research-program/national-risk-assessment-principles

de Vaus, D., Gray, M., Qu, L., & Stanton, D. (2015). *The economic consequences of divorce in six OECD countries* (Research Report No. 31). Melbourne: Australian Institute of Family Studies

de Vaus, D., Gray, M., Qu, L., & Stanton, D. (2007). *The consequences of divorce for financial living standards in later life* (Research Paper No. 38). Melbourne: Australian Institute of Family Studies

Easteal, P., Young, L., & Carline, A. (2018). Domestic violence, property and family law in Australia. *International Journal of Law, Policy and The Family*, 32, 204–229. doi:10.1093/lawfam/eby005

Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems – Interim Report* (2015)

Fehlberg, B. & Millward, C. (2014). Family Violence and Financial Outcomes after Parental Separation. In Hayes, A., & Higgins, D. (Eds.). (2014). *Families, policy and the law: Selected essays on contemporary issues for Australia*. Melbourne: Australian Institute of Family Studies.

Fitch, E., & Easteal, P. (2017). Vexatious litigation in family law and coercive control: Ways to improve legal remedies and better protect the victims. *Family Law Review*, 103, 103–115. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id¼3015354

Francia, L., Millear, P. & Sharman, R. (2019). Addressing family violence post separation - mothers and fathers' experiences from Australia. *Journal of Child Custody*. 16:3, 211-235, DOI: 10.1080/15379418.2019.1583151

Gray, M., de Vaus, D., Qu, L., & Stanton, D. (2010). *Divorce and the wellbeing of older Australians* (Research Paper No. 46). Melbourne: Australian Institute of Family Studies

Kaspiew, R., Carson, R., Dunstan, J., Qu, L., Horsfall, B., De Maio, J., Moore, S., Moloney, L., Coulson, M., & Tayton. S. (2015a). *Evaluation of the 2012 Family Violence Amendments: Synthesis Report*. https://aifs.gov.au/publications/evaluation-2012-family-violence-amendments

Kaspiew, R., Carson, R., Dunstan, J., De Maio, J., Moore, S., Moloney, L. (2015b). Experiences of Separated Parents Study (Evaluation of the 2012 Family Violence Amendments). Melbourne: Australian Institute of Family Studies.

Laing, L. (2017). Secondary victimization: Domestic violence survivors navigating the family law system. *Violence Against Women*, 23(11), 1314–1335. doi:10.1177/1077801216659942

Relationships Australia National Office. (2017). Submission to the House of Representatives Social Policy and Legal Affairs Committee into a better family law system to support and protect those affected by family violence. https://www.relationships.org.au/about%20us/submissions-and-policy-statements/a-better-family-law-system-to-support-and-protect-those-affected-by-family-violence-relationships-australia2019s-response-to-the-parliamentary-inquiry

Relationships Australia National Office. (2018). Submission to Australian Law Reform Commission in response to Issues Paper 48. https://www.relationships.org.au/about%20us/submissions-and-policy-statements/australian-law-reform-commission-review-of-the-family-law-system-issues-paper-released-14-march-2018-submission-from-relationships-australia

Relationships Australia National Office. (2018). Submission to Australian Law Reform Commission in response to Discussion paper 86. https://www.relationships.org.au/about%20us/submissions-and-policy-statements/australian-law-reform-commission-review-of-the-family-law-system

Relationships Australia National Office. (2018). Submission to the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Federal Circuit and Family Court of Australia Bills 2018. https://www.relationships.org.au/about%20us/submissions-and-policy-statements/submission-inquiry-into-bills-relating-to-the-federal-circuit-court-and-the-family-court-of-australia

Relationships Australia National Office. (2020). Submission to Parliamentary Joint Select Committee on Australia's Family Law System. https://www.relationships.org.au/about%20us/submissions-and-policy-statements/joint-select-committee-on-australia2019s-family-law-system-2013-relationships-australia-national-office-submission

Relationships Australia National Office. (2020). Submission to the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Federal Circuit and Family Court of Australia Bill 2019. https://www.relationships.org.au/about%20us/submissions-and-policy-statements/federal-circuit-and-family-court-of-australia-bill-2019-submission

Relationships Australia National Office. (2020). Submission to the inquiry of the House of Representatives Standing Committee on Social Policy and Legal Affairs into Family, Domestic and Sexual Violence. https://www.relationships.org.au/about%20us/submissions-and-policy-statements/submission-24-july-2020-to-the-house-of-representatives-standing-committee-on-social-policy-and-legal-affairs-inquiry-into-family-domestic-and-sexual-violence

Smyth, B., & Weston, R. (2000). *Financial living standards after divorce: A recent snapshot* (Research Paper No. 23). Melbourne: Australian Institute of Family Studies