

Cross-examination - Key Literature

Australia

Bryant, Diana, 'The Family Courts and Family Violence' (Paper Presented at the Judicial Conference of Australia Colloquium, 9-11 October 2015).

This paper discusses various issues which confront the family courts where family violence is a feature. The Chief Justice identifies cross-examination by alleged perpetrators of alleged victims as one of 16 particularly complex issues. See at p 4 – 'Where the alleged perpetrator cannot afford a lawyer, or chooses not to get one, and is ineligible for legal aid, there is a need for the court to ensure that each party is afforded procedural fairness in presenting their case and, where facts are in issue in parenting matters (beyond the question of whether or not violence has occurred), to deal with the issue of cross examination of the alleged victim by the alleged perpetrator.'

Chisholm, Richard, 'Family Courts Violence Review: A Report' (Canberra: Attorney-General's Department, 2009).

Professor Chisholm was required to 'assess the appropriateness of the legislation, practices and procedures' that apply in cases where family violence is an issue and to recommend improvements.

He observes that: 'In relation to safety at court as well as other aspects of dealing with family violence issues, measures need to be in place to ensure that risk is disclosed, and understood, and that necessary actions are then taken'. For example, the Federal Magistrates' Court (at the time) submitted that electronic means of giving evidence should be universally available to 'balance the requirement of procedural fairness in allowing testing of the evidence when there may be a victim of violence being cross-examined by an abusive partner' (p 161).

See especially at pp 168-169, where the author cites one submission which noted that sometimes 'cross-examination of a victim by an unrepresented violent partner can be experienced as a continuation of the violence'.

Moreover, the Family Law Section of the Law Council of Australia submitted – '*Self-represented litigants can be at a significant disadvantage. For victims of violence to present a case and argue it, including cross-examining the perpetrator, can be very difficult. If perpetrators are unrepresented this means they may be personally cross-examining the victim. These outcomes are increasingly frequent as legal assistance is under-funded and unable to assist many litigants who cannot otherwise afford representation*'

(p 169).

Harrison, Margaret, *Finding a Better Way: A bold departure from the traditional common law approach to the conduct of legal proceedings* (April 2007).

This document contains a general overview of the Family Court's transition from the traditional common law adversarial trial to the less adversarial trial (LAT). It contains a history of procedural reforms to the Family Court. It discusses the differences between adversarial and inquisitorial systems, and contains detailed discussion of the operation of the LAT model.

See in particular at pp 6-7, where it is noted that traditional adversarial processes such as cross-examination present particular difficulties in family disputes which are often compounded when there are family violence allegations or more subtle imbalances of power in the relationship.

Family Law Council and Family Law Section of the Law Council of Australia, '*Best Practice Guidelines for Lawyers Doing Family Law Work*' (2017).

See section 2.8 (p 15) which states –

'Where a matter is proceeding to a hearing, a lawyer may need to alert a client to features of cases involving a self-represented litigant. These might include...the fact that the client may find themselves being cross-examined by their former partner, when the lawyer may need to counsel them about how to react to particular lines of questioning'.

Family Law Council, '*Litigants in Person: A Report to the Attorney-General*' (August 2000).

This commissioned report extensively considers the issue of litigants in person in the family law context. The report was written in the broader context of the number of self-represented litigants increasing. It contains discussion of the reasons for the increase in unrepresented litigants as well as general characteristics of unrepresented litigants.

See firstly at p 9, where the report notes various concerns that in family law matters involving allegations of family violence, women were suffering a continuing form of abuse through their unrepresented former partners cross-examining them and filing endless interim applications. Note, at p 17, the report notes – 'adequate presentation of a case includes testing the opponent's case by cross-examination and other measures'. At p 25 – 'In many instances a litigant may be intransigent or genuinely disgruntled and not necessarily vexatious. The judge has authority to control proceedings if the unrepresented litigant uses cross examination of the former spouse as an opportunity for harassment. However, judges have to balance concerns about harassment with the unrepresented litigant's right to put evidence to the court, and

they generally attempt to avoid any perceptions of bias’.

Fogarty, John, ‘Family Court of Australia: into a brave new world’ (2009) 20(3) *Australian Family Lawyer* 2-24.

In this article, the author critiques the rationale and operation of the ‘less adversarial trial’ (LAT). The ‘radical’ nature of the changes in particular are criticised. The author advocates instead for carefully explained, incremental reform ‘with, in particular, strong control over the early identification of the issues and the evidence’ (p 10).

Kaspiew, Rae et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009).

This evaluation of the impact of the 2006 changes to the Family law Act involved the collection of data from some 28,000 people involved or potentially involved in the family law system - including parents, grandparents, family relationship service staff, clients of family relationship services, lawyers, court professionals and judicial officers - and the analysis of administrative data and court files. Of relevance here see:

- > See Chapter 9: ‘Legal system professionals regularly made the point that women felt pressured to agree to outcomes in negotiations that they didn’t feel were in their children’s interests. While this was said to be happening frequently, particular concerns were expressed about the nature of the agreements reached in two different situations. The first concerned cases where there had been a history of family violence. The second situation causing concern involved matters where a lack of legal representation at all, or a perceived imbalance in the quality of the legal representation, failed to alleviate the apparent pressure caused by the imbalance in bargaining power, resulting in women agreeing to inappropriate arrangements’ (p 221).
- > Also see ‘15.1.2 Consent orders’ (from p337), noting that ‘The tensions in this area are succinctly summarised in this comment by a legal practitioner about the choice litigants face in deciding whether or not to settle: “Most of them settle by consent and you’ve got a real tension because those that settle by consent feel as if they’ve been bullied into it, get a settlement because they can’t afford it and they want to get it over and done with. Those that run the full trial feel as though they got shafted anyway because they didn’t get heard properly. So either way they feel as though they’ve lost”. In reflecting on their practices concerning consent orders, a common observation among registrars and judicial officers was the limited supervisory role courts have in the context of a system that encourages parties to reach agreement by themselves’.

Kaspiew, Rae, et al, 'Responding to Family Violence: A Survey of Family Law Practices and Experiences' (Report, Australian Institute of Family Studies, October 2015).

This report presents the findings of Responding to Family Violence: A Survey of Family Law Practices and Experiences (Survey of Practices). This report draws on surveys and interviews with professionals (n653) (judicial officers and registrars, lawyers and non-legal family law professionals) working across the family law system and telephone interviews with parents (n2,473) who used family law system services in the period of approximately 12 months preceding August 2014. See in particular from p 114 –16 on leading evidence and cross-examination.

Queensland, Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015).

Submissions to taskforce raised the lack of legal representation and assistance as a major concern for victims, particularly where a male respondent can afford legal representation. Submissions stated that this often results in the victim withdrawing or not pursuing a legal response and can lead to a failure in protection for an aggrieved. Submissions also noted the benefits from a duty lawyer system:

- > 'Mitigating the trauma of the court process for victims;
- > Parties are better informed of their rights and the legal process and know what they can and cannot ask of the court
- > Victims will receive assistance and advice with completing their application forms. This will ensure all relevant information is before the court. The court process will proceed more smoothly as a consequence of properly prepared documents and legally informed clients appearing before it
- > Queensland Police Prosecutors will also indirectly benefit as a consequence in the same way as the court will
- > More appropriate orders and conditions can be applied for which improves victims safety, and reduces the risk of recidivism, breach and applications for variations of the orders
- > Timely legal advice and information to respondents could lead to a less litigious approach to proceedings and appropriate referrals
- > Victims will be empowered to pursue their matters and not withdraw because of fear or intimidation by the perpetrator or because of lack of knowledge of the complex legal system. The result will be greater safety for older people, women and children experiencing domestic and family violence. (p 312)

International

Section 5 of this report presents quantitative and qualitative data on women and legal professionals' experience of legal proceedings. In relation to legal representation, this report found that there were instances where women had to represent themselves (and thus have to cross-examine men who had been violent to them) or face the prospect of being cross-examined by their ex-partners. Women were afraid of these two scenarios (p 38). Solicitors and barristers surveyed identified two issues relating to potential abuse and intimidation that self-representation raises. First, 'perpetrators representing themselves used cross-examination as another route to harass and undermine their ex-partners'. Second, fearful victim-survivors representing themselves may not disclose the full details of their abuse and may inhibit themselves from questioning perpetrators about their actions and motivations (p 39). The report identifies multiple ways in which the outcome of the case can be influenced where women and/or their abusive ex-partners represent themselves:

1. Victim-survivors are not enabled to give their best evidence about histories of abuse, which may be crucial to determining whether contact, and in what form, is deemed appropriate.
2. The difficulties of cross-examining their perpetrators may mean they do not ask sufficiently probing questions or challenge responses, which again informs what evidence is available to the court.
3. They are rarely equipped with the legal knowledge and experience to prepare documentation and negotiate family law processes e.g. requesting finding of fact hearings.
4. Pressure to reach speedy resolution may mean that women accede to arrangements which are not necessarily in their own or their children's best interests' (p 40).