FAMILY COURT AMENDMENT BILL 2021

Second Reading

Resumed from 12 August.

HON NICK GOIRAN (South Metropolitan) [5.07 pm]: I rise enthusiastically to speak on the Family Court Amendment Bill 2021. I indicate that I am the lead speaker on behalf of the Liberal–National alliance. I want to say at the outset that the alliance will most definitely be supporting the bill currently before the house. This bill seeks to amend the Family Court Act 1997, which primarily deals with children and property matters, particularly for de facto relationships. The bill before us mirrors amendments passed by the commonwealth—in particular, the Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018. My one regret is that it has taken three years to get to the point at which these important reforms will be passed for people in de facto relationships in Western Australia.

By way of explanation, all other states, except for our own, have referred family law powers to the commonwealth. Western Australia, of course, has its own Family Court. The commonwealth legislation covers all family law matters in other states and territories, and with respect to Western Australia, it covers proceedings under two matters. The commonwealth Family Law Act 1975 covers married couples wanting to divorce and make arrangements regarding their children, property and spousal maintenance; whereas the Family Court Act 1997—the act that will be amended by this bill—covers the situation for de facto couples.

Another key difference for de facto couples in Western Australia is that they cannot obtain superannuation splitting orders, whereas married couples can under the federal act. Members may well appreciate that on average, women retire with less superannuation than men—that is not always the case, but on average—and that at times superannuation can be the only significant asset in the matrimonial pool. Women in de facto relationships currently do not always receive their fair share of that asset pool because of the inability to access their former partner's superannuation. Super splitting will help women coming out of de facto relationships to recover financially, which is especially important for those escaping family violence.

That type of further reform should be expedited by the McGowan government, but it has not been. Just like the bill before us now, which deals with the cross-examination of victims of family and domestic violence, this reform has been stalled by the McGowan government. Instead, the government has prioritised bills such as the Metropolitan Region Scheme (Beeliar Wetlands) Bill 2018, which saw the house agree that the McGowan government would not build a road that it had no intention of building anyway, which it has complete control over for the next three years. That bill was given greater priority than this bill before the house. Meanwhile, provisions covering superannuation splitting are nowhere to be seen. Do not get me started on the elder abuse reforms that the Attorney General promised more than 1 500 days ago.

The bill before us is important and I urge all members to support it. Its primary aim is to deal with the reduction of trauma that is experienced by victims of family and domestic violence when they find themselves being cross-examined by a self-represented perpetrator. This bill will remove the adverse impact on the quality of evidence provided in family law proceedings where personal cross-examination takes place between the victim and the perpetrator of family and domestic violence. It should be self-evident to members that it is traumatic for a victim to be cross-examined by their abuser.

I refer now to a 2018 study by the Australian Institute of Family Studies titled *Direct cross-examination in family law matters*. This 2018 report states that it has been observed in some research and commentary that the process of direct cross-examination by a perpetrator or a victim may be as traumatic as the initial abuse. Further, the report states —

> More recently, the final report of the Parliamentary Inquiry by the House of Representatives Standing Committee on Social Policy and Law Reform … indicated that most participants in the inquiry "overwhelmingly supported" addressing the issue of direct cross-examination by perpetrators of family violence in family law matters … Some submissions to this Committee characterised direct cross-examination by a perpetrator as an abuse of process … and a means by which perpetrators may continue to traumatise their victims …
>
> The Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs: Final Report … —

Prepared by the Australian Institute of Family Studies —

> and colleagues similarly identified that the experience of direct cross-examination can be an abuse of process …

It goes on to say —

> … using the various aspects of these systems to perpetuate the dynamics of fear, coercion and control, in particular by extending the family's engagement with the family law system …

As I said, that is from the 2018 report. I also note that on page 7, it reads —

> … the reports of both the House of Representatives Standing Committee and the Australian and New South Wales Law Reform Commissions identified (as noted above) the prospect of direct cross-examination as a factor leading parties to elect not to contest proceedings and to agree to consent orders that may not accord with the safety and best interests of the children …
>
> Concerns about the potential for direct cross-examination in the context of family violence to give rise to poor quality and/or incomplete evidence have also been raised by both the Family Law Council … and by the Australian and New South Wales Law Reform Commissions … where it was identified that these dynamics are such that they "may significantly inhibit the ability of a victim, or another witness, to provide truthful and complete evidence in protection order proceedings" …

It can be argued that the Family Court Amendment Bill 2021 will further enhance the safety and best interests of Western Australian children.

The need for this reform before us has been recognised in a number of reports and inquiries over the years. Indeed, I note that the Productivity Commission's inquiry report, volume 1, *Access to justice arrangements,* which was published in 2014, indicates at recommendation 24.2 that the federal Family Law Act 1975 be amended to restrict personal cross-examination by those alleged to have used violence. I also note that the *Family Law Council report to the Attorney-General on families with complex needs and the intersection of the family law and child protection systems: Final report—June 2016* noted that personal cross-examination can result in victims being re-traumatised and a perpetuation of the abuse of victims of family violence. It also found that it can impact procedural fairness due to incomplete and poor quality evidence. I further note that the Council of Australian Governments' national summit on reducing violence against women and their children, which was held in Brisbane on 27 and 28 October 2016, noted at page 29 of its communiqué that five priorities for reform had been agreed to. The first of those was —

> Protecting victims through all court proceedings, including imposing a bar on direct cross-examination by perpetrators in any family law or family violence proceedings. This includes giving victims the ability to give evidence remotely or by alternate means, and funding for adequate legal assistance in all jurisdictions.

In addition, I refer members to the December 2017 report by the House of Representatives Standing Committee on Social Policy and Legal Affairs. It recommended the introduction and urgent passage of the federal bill, which I referred to earlier. In 2018, the Australian Institute of Family Studies worked with the family law courts to determine the prevalence of direct cross-examination. They found certain things, including that it was more common for men to personally cross-examine women and that safeguards were typically not in place during personal cross-examinations; and if there were safeguards, they generally involved judicial officers intervening to relay questions.

On 4 June this year, the Law Council of Australia reviewed the federal act and its ban on personal cross-examination. The council says that it supports the continuation of the scheme and generally believes the scheme is operating well but has a few procedural and practical challenges. In respect of that point, I will ask the parliamentary secretary whether the government has had the opportunity to consider the *Review of direct cross-examination ban* dated 4 June 2021 that was done by the Law Council of Australia and whether it concurs with the federal reviewers that the continuation of the scheme should be supported and whether it generally believes that the scheme is operating well but in particular whether it concurs with the federal reviewers that there are a few procedural and practical challenges. If the government agrees that there are a few procedural and practical challenges, will this bill address them; and, if not, why not?

That said, it is clear that there is overwhelming community support for this bill. Although this bill needs to address the balance between procedural fairness, so that evidence can be tested via cross-examination, it also needs to balance that with the protection of parties who have experienced domestic violence. I will take a moment to draw to the attention of members a report from the Senate's Legal and Constitutional Affairs Legislation Committee dated August 2018. Paragraph 2.53 on page 19 states —

> The committee notes that a critical tension emerged in evidence, which was the balance between procedural fairness and the protection of parties who have experienced family violence. The committee acknowledges the importance of striking a balance between both elements in order to ensure that parties to such proceedings are protected, but also have equal opportunity to present their cases and receive a just outcome. After carefully considering the evidence presented to the committee in relation to these matters, the committee finds that the correct balance has been achieved by the bill.

That said, some concerns associated with this bill have been raised, including adequately funding the scheme that will underpin this regime, particularly when we consider the increased rates of domestic violence during the

COVID-19 pandemic. There has also been reference to the increased public discourse regarding domestic violence, resulting in a greater recognition of behaviours that may not have previously been recognised as family violence. An example was provided about inadequate funding under the scheme involving a solicitor who would not prepare documents for a party due to a lack of funding. I have already flagged with the hardworking parliamentary secretary some questions so that we can get to the bottom of that.

The other concerns that have been raised by stakeholders in respect of this bill include the limitations on the scope of the scheme, as identified by the Law Council of Australia, and also the capacity of the Family Court to provide appropriate protections for alleged victims of family violence. I am going to conclude shortly, but let me say once again that the opposition provides its full-throated support for this bill. Let us keep in mind, members, that if this bill passes, it will come into operation the day after assent and will have an immediate and meaningful impact on those people accessing the Family Court of Western Australia. That is why I am asking members to support this bill. However, it is regrettable that it has taken so long for this to occur. This Family Court Amendment Bill 2021 before us is essentially identical to the bill brought in during the fortieth Parliament. That bill made its way through the other place and was third read on 12 March 2020. It was introduced into this place on 17 March 2020. It might interest members who were not here in the fortieth Parliament to know that not once during the entire calendar year of 2020 did the McGowan government bring this bill on for debate in the Legislative Council. It is bringing it on now on 1 September 2021. A victim of family and domestic violence in a de facto relationship in Western Australia could have had access to these provisions since March last year. However, because of the decisions made by the McGowan government, in particular the Leader of the House, who controls the legislative program, those victims of family and domestic violence have had to wait until now, 1 September, when we pass this bill—I would like to think, hopefully, today—for these reforms to be utilised. That is all because the government refused to bring this bill on for debate.

The government, particularly the Leader of the House, who is away on urgent parliamentary business, will say, "We had to deal with COVID-19." There is no question about that, but as we will demonstrate this afternoon, this bill can be passed in a short time because it has bipartisan support, because a competent parliamentary secretary will ensure that a briefing will be provided and because adequate answers will be provided to questions so that the opposition can be satisfied that the scheme to be implemented, which is already available for married couples in Western Australian when they go to the Family Court, will apply also to de facto couples.

This could have been done had there been an ounce of competence by the McGowan government in the fortieth Parliament, but there was a stubborn refusal to bring it on in the last Parliament. It is inexplicable and shameful. It is easy to make these political points but the consequence of it is that Western Australians have missed out. I congratulate the parliamentary secretary in particular for ensuring this bill has, in a sense, been expedited at least this week. It is regrettable that since the March election, this is the first day we are having this debate. Why is that the case? It is because, presumably, some members opposite did not want to knock on the door of the Premier or the Leader of the House and say, "Let's expedite this bill." Why? It is because they preferred to deal with the Metropolitan Region Scheme (Beeliar Wetlands) Bill 2021. It was extremely important to make sure that we passed a bill in this place to effectively ban the building of a road that the government will not do at any time during this forty-first Parliament. There is no prospect of the government doing that; it was more important that it made sure that bill was passed prior to this one here, which can take effect immediately. In fact, this afternoon and yesterday, we have been dealing with the Arts and Culture Trust Bill 2021, which has the support of the opposition. We agreed to it, yet it cannot come into operation for another six months because the government has to do some work on the regulations. That bill was considered more important than looking after the victims of family and domestic violence. This bill has been buried by the McGowan government since March 2020.

I commend the parliamentary secretary for arranging for this bill to be provided for our consideration today. It has the strongest support of the opposition, and I ask all members to support it.

HON PIERRE YANG (North Metropolitan) [5.29 pm]: I congratulate the parliamentary secretary for bringing the Family Court Amendment Bill 2021 to Parliament. I understand that we all want the bill passed, so I will make a very, very brief contribution. Hon Nick Goiran said that we have a competent parliamentary secretary. We have an outstanding parliamentary secretary in Hon Matthew Swinbourn and, equally, we have three outstanding parliamentary secretaries in Hon Darren West, Hon Samantha Rowe and Hon Kyle McGinn.

Members may know that I was in the legal profession for about 10 years and family law featured prominently during that time of my practice. I have represented clients who were victims of family and domestic violence or who were allegedly subjected to family and domestic violence. I appreciate the debilitating effect of family and domestic violence on the receiving partner, and I have seen that myself. I congratulate the government for moving this bill, and I look forward to the speedy passage of this bill.

HON MATTHEW SWINBOURN (East Metropolitan — Parliamentary Secretary) [5.30 pm] — in reply: I will give a very short response in reply on the Family Court Amendment Bill 2021. I know that we are going into

committee. I thank Hon Nick Goiran for his contribution. I am not going to take issue now with the matters he has raised about timing. The point I make is that we are here now and today, and we have the opportunity to progress. That is what I am focused on, and I am not really in a position to do anything about what has happened previously. I thank the member for telegraphing to us the areas of concern that he wished to address and, hopefully, we will be able to achieve that as expeditiously and thoroughly as we can.

I thank Hon Pierre Yang, particularly for his kind words, but also I appreciate the member keeping his contribution short. I know the member has significant experience as a practitioner in the family law area and I am sure that he absolutely appreciates what a difference this bill will make for de facto and exnuptial people. Hon Nick Goiran raised some issues, but I will deal with those in the committee stage. On that basis, I commend the bill to the house.

Question put and passed.

Bill read a second time.

Committee

The Deputy Chair of Committees (Hon Jackie Jarvis) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 1: Short title —

Hon Dr BRIAN WALKER: I was going to rise earlier very quickly to say that we support this bill and that we are very happy with what we heard.

I must say that the briefing was excellent. I want to point out that we are looking at bringing fairness into the system, specifically extending the same rights that married couples have to those who are not legally married—de facto or otherwise. It is only right and fair that this applies to all people.

I want to bring up the question of abuse. I am wondering how that will be addressed under the provisions of the Family Court Amendment Bill 2021, because it will apply across the board. The example I have is of a married couple who separated and upon whom mediation was forced. I know this situation personally; I watched the deterioration, over some months, of a healthy, vibrant woman who became thin—emaciated, in fact—in tears and unable to work because of the behaviour of her husband. The couple had two small children, and she was forced into mediation. She had been brutally treated by her husband, not with any force but through mental abuse, including blame and gaslighting. This occurred in a rural area. The husband took her car and her mobile phone, because "I paid for them"; he was very controlling. To manage the care of the children, I think she got about $23 a week. The husband, with the support of his family, then went to mediation. As a married couple, they went into mediation with lawyers on both sides. That was a huge expense for someone who was earning a pittance, and she was depending on her savings to pay her lawyer. This was abuse.

I was actually a witness. I was called to testify; I am not quite sure on whose behalf, but I was called by the husband. I personally found the process abusive—it was very difficult to keep control of my temper—and this was borne out by the experience of the woman concerned. She spent eight hours in the witness stand being thoroughly cross-examined—abusively cross-examined as only lawyers can do, I would think—to the nth degree, talking about every aspect of her life, including her intimate sexual life. I was actually asked by a lawyer, "Are you a friend?", the implication being, if I were a friend, my evidence would be negated, and the whole thing would have been very, very unpleasant.

We are talking here about abuse, and we can all agree that neither the children of a partnership nor a spouse, whichever sex that spouse is, should be exposed to abuse in any form. How will we ensure under this legislation that giving fairness to all will allow for lawyer-initiated abuse in mediation proceedings to be reduced, so that the people who go through that already very stressful situation will not be abused and further stressed?

Hon MATTHEW SWINBOURN: I do not think this bill is concerned with lawyers and their behaviour; lawyers are governed by the Legal Profession Act and by professional and ethical obligations. During the course of any Family Court proceedings in which lawyers are involved, a judge or mediator could take issue with the behaviour of a particular lawyer. It is very difficult for us, of course, to speak about the circumstances that the member has described because we do not have everyone's version of events, but as I say, this bill is not about abuse that might arise from a lawyer. If a lawyer's conduct is such that it amounts to abuse, they would be in breach of their professional and ethical obligations, and officers of the court would be able to make a complaint to the Legal Profession Complaints Committee in relation to those sorts of things. If people are faced with a situation like that about the particular behaviour of a lawyer, I would suggest that others can make such a complaint as well. There is a tension here in the fact that we continue to have cross-examination in the Family Court environment. It is a balance in our adversarial system; it is not perfect, and it is not perfect in other civil and criminal situations, but it is probably the most perfect of all systems available for deciding the outcome of a matter in situations in which there is a contest between parties. I do not profess to say that cross-examination does not have its own faults.

Hon NICK GOIRAN: In the last financial year, has the funding for the commonwealth family violence and cross-examination of parties scheme been adequate to meet the demands created by the cross-examination requirements for married couples in our state?

Hon MATTHEW SWINBOURN: I can answer that shortly, member. Yes, it has been.

Hon NICK GOIRAN: Is the government confident that the scheme's funding will be sufficient to fund these new cross-examination requirements for de facto couples?

Hon MATTHEW SWINBOURN: I think the answer to that is a qualified yes. The cross-examination ban provisions in the Family Law Act are reviewed by the commonwealth after two years—I am not sure whether the member is aware of that—as required by the legislation. I think that period formally lapsed this month, being September. The review is examining the cost of providing legal representation under the ban and that review will inform the ongoing funding requirements for all states and territories, including WA. Legal Aid WA has been working closely with the commonwealth Attorney-General's Department to ensure that the amended funding agreement will meet the high demand for the service. The commonwealth Attorney-General's Department anticipates that the number of bans will double in Western Australia once this legislation applies to de facto and exnuptial children. I think, as I said, it is a qualified yes in that regard.

Hon NICK GOIRAN: When one of these bans is put in place, to what extent will the role of the legal practitioner start and finish? Is it intended to cover just the cross-examination phase or will legal practitioners be employed to represent the person who is self-represented for a large proportion of the proceedings? In particular, is it intended to be for the entire proceedings?

Hon MATTHEW SWINBOURN: Once the ban is in place, those lawyers will stay in place until the matter is resolved. Once trial directions have been made and a scheme lawyer appointed, the lawyer will prepare the matter for trial and represent the party for the whole of the family court trial, not just the cross-examination of the other party. This may also include the preparation and presentation of the party at a lawyer–assisted family dispute resolution parenting and/or property conference mediation at Legal Aid. Funding under the scheme will also provide for parties to attend late intervention dispute resolution conferences in parenting and financial matters at Legal Aid WA and, when appropriate, that is manageable from a safety perspective. Parties are also legally represented at these conferences, which have a very high settlement rate. The reality is that once the ban is in place, as has happened with married couples, it is expected that the resolution of the matter will be expedited when no cross-examination takes place because of the introduction of legal representatives for unrepresented parties. The parties will find a way of resolving the differences in those circumstances and the parties will continue to be entitled to the funding.

Hon NICK GOIRAN: Further to that, how will it work for a self-represented litigant when the ban has been put in place, the litigant is not able to do the cross-examination and therefore the lawyer who has been appointed for them will undertake that, but the litigant does not wish the lawyer to take further part in the proceedings—for example, if the litigant wants to make the submissions themselves? Will that remain a possibility in that situation?

Hon MATTHEW SWINBOURN: The advice I have been given is that presently the courts have not been keen to allow someone to no longer be represented by a lawyer. The ban will stay in place until the court removes it. Therefore, I suspect that the court will have the power to continue to enforce those arrangements. Obviously, a relationship between a client and lawyer is complex at times. The member knows that better than probably anybody else in the chamber. I think that is where that is at.

Hon NICK GOIRAN: That is curious, because even though the court will be imposing a ban on cross-examination proceedings, which is what the scheme and the legislation is allowing for, it sounds like in practice what it will actually be imposing is, in specified circumstances, a ban on self-representation. Although there may well be good reasons, and the court might be enthusiastic, for that to happen, including for the reasons that the parliamentary secretary has mentioned, it is often the case, despite the reputation that some lawyers give the legal profession in general, that the involvement of lawyers facilitates settlement. Equally, we also know of circumstances in which some family lawyers are busy feasting on the carcass that is the matrimonial property pool, disgraceful as that is. But here we have a situation in which an ordinary Western Australian will be entitled, if they wish, to be self-represented. They might say that they do not want a lawyer or, in fact, they might not like the lawyer. There might be a falling out with the lawyer or there might be a complaint against the lawyer. How will the scheme deal with that kind of situation? I understand that the parliamentary secretary is saying that the court has not been that enthusiastic for the ban to be removed, but perhaps the best question to ask and have answered at this stage is: have there been circumstances in which the ban has been removed?

Hon MATTHEW SWINBOURN: Not that we are aware of, but I will make this point about the cross-examination ban: if a person is banned and they choose to continue to be self-represented, which I understand is a possibility, they will be barred from cross-examination. That is what they will be barred from doing. They will not be compelled to have legal representation throughout the whole course of it, but there will be a consequence of them turning their back on that arrangement.

Hon NICK GOIRAN: That definitely helps to understand how it will work in practice. Is it the expectation of the government that there will be a significant increase in the demand for Legal Aid Western Australia and other community law centre services following the passing of this bill?

Hon MATTHEW SWINBOURN: I think yes. I have already said that there is an anticipation that there will be a doubling of cases. The commonwealth Attorney-General's Department has anticipated that, once the bill is passed, the number of bans will double once it also applies to de facto couples. Funding under the scheme is currently being assessed as part of the statutory review of the Family Law Act 1975. The review is examining the cost of providing legal representation under the ban and will consequently take into account estimated demand in its assessment of ongoing scheme funding requirements. It has been put to me by advisers and people working in that area that there have been strong indications of continuing support from the commonwealth to meet the needs of this particular program. I hope that assures the member about that part of it.

Hon NICK GOIRAN: Did I understand correctly that the funding has ceased at the moment, pending the review?

Hon MATTHEW SWINBOURN: No, member, it has not.

Hon NICK GOIRAN: The situation is that the funding is in place at the moment. The commonwealth is used to, and has become accustomed to over the last few years, funding at a certain level. It has been funding this scheme for all the rest of Australia and, in the case of Western Australia, it has been used to funding it partially, and the expectation is, as the parliamentary secretary has indicated, that that will now double. Is the funding commitment from the commonwealth at the moment that it will simply pay on an as-needs basis, so if Western Australia suddenly comes to the scheme and says that it has double the number of cases, the commonwealth will simply fund that?

Hon MATTHEW SWINBOURN: Yes.

Hon NICK GOIRAN: So, from a Western Australian perspective, that becomes their problem. We at least have confidence that this scheme will have funding.

The Attorney General has stated that National Legal Aid has determined the estimated average cost of providing legal assistance under the measures introduced by this bill. Does the parliamentary secretary know what the amount is, and can he provide that to the chamber?

Hon MATTHEW SWINBOURN: The future needs prediction in each jurisdiction is based on an average of $10 000 per grant. However, the actual average cost of finalised grants differs from one jurisdiction to another. I have a little table that sets out the additional funding received to date by year. In 2018–19, WA got $44 700; in 2019–20, we got $593 003; in 2020–21, we got $971 952; and in 2021–22 to date, to 1 September, we got $541 990.

Hon NICK GOIRAN: Just so that I understand, the Attorney General said in the other place during the debate on 12 August this year —

> The commonwealth initially allocated $7 million to fund the scheme across Australia for three years. The Australian government has worked extensively with National Legal Aid to cost the measures in this bill. The average estimated cost of providing legal assistance under the measures of the Family Court Amendment Bill were determined by National Legal Aid. The cost includes the preparation and appearance at final hearing as well as legally assisted dispute resolution where appropriate.

The figures that have been provided by the parliamentary secretary do not sound like the average cost; they sound more like the total or gross cost.

Hon Matthew Swinbourn: By way of interjection, they are the gross cost.

Hon NICK GOIRAN: Does the government have at its disposal the average estimated cost that was referred to in the other place by the Attorney on 12 August?

Hon MATTHEW SWINBOURN: It was the $10 000.

Hon NICK GOIRAN: Further to that, in the other place the Attorney General referred to an amended funding agreement. Who are the parties to that agreement, and is the agreement capable of being tabled?

Hon MATTHEW SWINBOURN: The parties are the commonwealth Attorney General and Legal Aid WA. Because the member telegraphed to us the questions that he wanted answered, we sought advice from the commonwealth as to whether it was agreeable to the tabling of that agreement, and I can say—for a change, perhaps—that I am able to table those funding agreements, and the variations.

[See paper 504.]

Hon NICK GOIRAN: While that is being circulated, has Legal Aid WA ever advised the Attorney General or the staff of the department of any concerns or issues about the funding arrangements? I imagine that it has not, for the reasons that we have just discussed.

Hon Matthew Swinbourn: By way of interjection, member, no.

Hon NICK GOIRAN: Okay. Good. What steps has the government taken to ensure that there is not a repeat of the situation in the 2020 Family Court of Western Australia case of Fraser v Lafayette? In that particular situation, as I understand it, no funds were available under the scheme to enable a party in that case to receive representation.

Hon MATTHEW SWINBOURN: I am familiar with the case. That case is only a point in time, and I can confirm that the party, which was the wife, has received funding under the scheme. Therefore, we do not anticipate that the issue that was identified by, I think, Justice O'Brien, is a present and continuing issue.

Hon NICK GOIRAN: Is there an explanation as to why there was that problem in that particular instance? Was it just an anomaly in the overall schema, or is it something that needs to be addressed?

Hon MATTHEW SWINBOURN: It is contained in the reasons for the decision. It says that in that case, the husband had applied for and obtained financial assistance under the scheme and had been allocated a solicitor. There was obviously a ban in place, and he took those steps. This is from the judgement. The wife then contacted Legal Aid WA by telephone only, seeking assistance, and she acknowledged that there was a possibility of miscommunication or misunderstanding leading to her not receiving assistance via the scheme. What I would say is that there had been contact, and there had not been a crystallisation of the arrangement. But, again, I am speculating because there is some confidentiality about the individual circumstances of the parties concerned.

Hon NICK GOIRAN: My last question on clause 1 again deals with the issue of the ban. If a party subject to the ban has actually the means to contribute to their own legal fees, does that in any way impact their eligibility for the scheme?

Hon MATTHEW SWINBOURN: No, it does not.

Hon NICK GOIRAN: It is bit perverse that the taxpayers at a commonwealth level—all of us—have to pay for perpetrators of family and domestic violence who choose to be self-represented but who have the means to pay for legal representation. They choose to represent themselves, as is their right, and not have a practitioner represent them. They are then banned from cross-examination. We, the taxpayer, then have to pay for their representation. It seems a little perverse but, if that is how the scheme has been operating for the last couple of years, that is how it will continue to operate until there is a subsequent review.

Hon MATTHEW SWINBOURN: I share some of the sentiments the member expressed. However, it is open for Legal Aid Western Australia to ask for a contribution; it is not something that precludes someone from getting assistance. Legal Aid may seek a contribution. It is also our understanding that this issue is being considered more broadly by the review into the commonwealth act.

Hon NICK GOIRAN: With the review of the commonwealth act, I am reminded that in my contribution to the second reading debate I sought for the government to indicate its position on the review report that was provided. I think I have handed my copy of the review to my friends at Hansard for their use, but I am pretty sure that the report on the commonwealth review was due in June this year—certainly in the last few months. Is the parliamentary secretary in a position to advise what the state government's position is on the findings of the review? I am particularly keen to know whether the state government agrees that there are a few procedural and practical challenges and whether those few procedural and practical challenges are being addressed by this bill. If not, what is the government's plan to deal with them?

Hon MATTHEW SWINBOURN: I think the member might be referring to the Law Council of Australia's review of the direct cross-examination ban. There is some confusion there because that was the Law Council's submission, initially. The review is being conducted by Mr Robert Cornall, AO, and Ms Kerrie-Anne Luscombe. There is a bit of an issue about things crossing over. The commonwealth review was due yesterday. The advice I have is that the commonwealth Attorney-General's office has advised that a report into the review of the direct cross-examination ban has been developed, completed and delivered to the commonwealth Attorney-General's office. This report is now being considered by the commonwealth Attorney-General so we do not have access to it at this stage, because I suspect it is cabinet-in-confidence until the commonwealth has had the opportunity to consider it. I am not sure whether I can take the member further on those points.

Hon NICK GOIRAN: That is fair enough. I think there is a supplementary notice paper on this bill. My copy of it is not available but, from memory, I think an amendment was moved by Hon Dr Brian Walker regarding a statutory review clause after five years. What is the government's attitude to that amendment, particularly given that we, at the moment, are passing a bill without the benefit of the commonwealth review, which, as the parliamentary secretary indicated, is with the commonwealth for its consideration?

Hon MATTHEW SWINBOURN: We do not support the amendment. I think we have to understand that the changes to our Family Court Act happen in the broader context of what the commonwealth does with its act. Obviously, it has the current review underway, and, of course, we will be anticipating and keeping an eye on the outcomes of that. We are highly motivated to make sure that the system keeps working as planned. Part of the system in Western Australia is happening in relation to married couples. We are keeping a close eye on the Family Court itself and Legal Aid to monitor how the system is working in WA, and we will provide advice to that effect to the

commonwealth as needed. For consistency reasons, we did not want to diverge from what was happening in other jurisdictions within Australia through an independent review of our own.

Clause put and passed.

Clauses 2 and 3 put and passed.

Clause 4: Part 8 Division 3 inserted —

Hon Dr BRIAN WALKER: I move —

Page 4, after line 26 — To insert —

219AM. Review of Division

(1) The Minister must review the operation and effectiveness of this Division, and prepare a report based on the review, as soon as practicable after the 5th anniversary of the specified day (as defined in section 219AJ(1)).

(2) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after it is prepared, but not later than 12 months after the 5th anniversary.

Amendment put and negatived.

Hon NICK GOIRAN: It is regretful that the government was not agreeable to supporting a review. I see no good reason why that should not be done. Nevertheless, it is the prerogative of the government to decide whether these things pass or not.

I want to consider some judicially considered phrases. I want to take the parliamentary secretary specifically to proposed sections 219AK and 219AL, which are the second and third sections proposed to be inserted via this clause. In both of those sections there is a reference to the phrase "in proceedings under this Act". I have a couple of questions here. Firstly, is the government aware that, in the case of Monaco and Daniels & Anor, which is another Western Australian case from last year, it was found that these words in the federal act limited the scope of the scheme and that the ban does not apply to proceedings that have been transferred from another jurisdiction?

Hon MATTHEW SWINBOURN: Yes, it is aware of the case.

Hon NICK GOIRAN: Is it indeed the government's intention that a victim of domestic violence in a matter that was transferred to the Family Court not be protected?

Hon MATTHEW SWINBOURN: No, and I can give the member some more context to that. Although the court originally determined in the case of Monaco and Daniels & Anor that the scheme did not extend to all components of the hearing due to it being transferred from the Supreme Court, the court ultimately found at paragraph 14 —

> At the hearing on 3 March 2020, after submissions had been made, the matter was stood down for enquiries to be made as to the availability of counsel, and to afford the parties the opportunity to consider how they would submit the trial should proceed in the event that I dismissed Ms Daniels's oral application, leaving a situation where the cross-examination ban applied to parts of the proceedings but not to others. When the hearing resumed, I was informed that in fact, subsequent to the last hearing, the Department of the Attorney General has made funding available to Ms Daniels for the purpose of the transferred proceedings, bearing in mind that those proceedings are entirely about her allegations of family violence and the alleged impact of that violence on her.

The finding continued at paragraph 15 —

> That being the case, Ms Daniels will now be represented for the entirety of the trial of the various proceedings.

Despite the matter being transferred, upon the discovery of the allegations of family violence, funding was provided, so Ms Daniels was represented for the entire case.

Hon NICK GOIRAN: That is very good. The other judicially considered phrase is "there is an allegation of family violence". That is found in proposed sections 219AK(1)(b) and 219AL(1)(b). The Law Council of Australia has expressed some concerns that these words are not clear and could be interpreted narrowly to include a current and live allegation of family violence, as opposed to including historical occurrences of family violence. Is it the intention of the government that that phrase be interpreted in that way? I should correct the record. I think I said earlier that it was "judicially considered". This is just a concern that has been raised by the Law Council of Australia.

Hon MATTHEW SWINBOURN: The direct answer to the member's question is: no, it is not the government's intention. The Family Court of Western Australia takes all allegations of family violence incredibly seriously, including historical allegations. I think that probably goes without saying. If an application is made for a discretionary ban and there are any allegations of family violence, the court can take note of them in any decision regarding the ban. The department has been advised that this has been the case with Family Law Act matters that the Family Court

of WA has been dealing with in the last two years in regard to the ban. Further, "family violence" is defined in section 4AB(1) of the Family Law Act and its equivalent, which is section 9A in the WA Family Court Act, and provides for a broad definition of what constitutes family violence that the court can consider.

Hon NICK GOIRAN: Will the ban also apply if the allegation of family violence is not necessarily against one of the parties but that it has been perpetrated against one of the children?

Hon MATTHEW SWINBOURN: New section 219AK will apply if there is an allegation of family violence between the examining party and the witness party. As I said before, "family violence" has a broad definition in both the Family Court Act and the Family Law Act, so what can be defined as "family violence" often can extend to family members. However, should the ban not be considered to apply automatically, the court will have discretion under proposed section 219AK(1)(c)(iv) to make an order that the ban shall apply, so it will have that discretionary power in making that determination. The Family Court will be able to consider all allegations of family violence, including any allegations of violence to members of the person's family, including children. Does that make sense to the member?

Hon NICK GOIRAN: I think the parliamentary secretary is saying that there is proposed section 219AK(1)(c)(iv) on line 21 of page 3. If I understand the answer correctly, we are saying that proposed section 219AK(1)(c)(iv) is to be interpreted as a general provision for the court to make the order in the circumstances it determines are appropriate.

Hon MATTHEW SWINBOURN: Yes, I think so. I think that is the discretion. I refer the member to proposed section 219AK(3), which says —

> The court may make an order under subsection (1)(c)(iv) —
>
> (a) on its own initiative …

So the court has that power.

Hon NICK GOIRAN: I have a couple more questions on clause 4. The first relates to the issue of resourcing. Proposed section 219AL(2) states —

> The court must ensure that during the cross-examination there are appropriate protections for the party who is the alleged victim of the family violence.

Do any resource implications flow from that; and, if so, what discussions have occurred with the Family Court of Western Australia to ensure that those resources are ready from the day after assent?

Hon MATTHEW SWINBOURN: I might take the member back a step to the day of assent. An earlier clause refers to the commencement day and the specified day. Although clause 2 states that the act comes into operation on the day of royal assent and the rest of the act comes into operation the day after, a 90-day period follows that, which is the specified day, as set out in proposed section 219AJ(1), which means the day after the period of 90 days beginning on commencement day. The reason that is in the bill is that the court and, I think, Legal Aid WA has asked for that time period to transition the current cases—as the member can imagine, there are probably very many of them—and have the system come into place 90 days following that period.

Hon NICK GOIRAN: I am a little surprised by that. The Family Court of Western Australia is already using this scheme for disputes between couples that are or were married. All we are doing now is extending that, albeit belatedly, to couples who are or were in a de facto relationship. It is not immediately apparent to me, subject to any further information the parliamentary secretary can provide to the chamber, why the court has requested this, effectively, 90-day delay.

Hon Matthew Swinbourn: It is so that it can identify the necessary cases, because it does not know who it applies to. As matters arise and come before the court, they will obviously be identified and the court will act accordingly.

Hon NICK GOIRAN: The Family Court of Western Australia will have a database with all the cases in the system. I assume it would know which of those cases are operating under the commonwealth legislation and which are operating under the Western Australian legislation. I would have thought that information was readily ascertainable.

Hon Matthew Swinbourn: We cannot speak to the databases of the Family Court, unfortunately.

Hon NICK GOIRAN: I turn to my last question, which again relates to proposed section 219AL(2). Apart from the measures that have been identified in the explanatory memorandum, what other appropriate protections could be put in place by the court to protect victims under that particular provision?

Hon MATTHEW SWINBOURN: I have quite a long answer, so I ask members to bear with me. If the Family Court determines not to ban personal cross-examinations, protections are available that can be put in place. These are not additional resources but measures that are currently used by the Family Court to ensure appropriate protections for victims of family violence. The available protections include: allowing the witness to give their evidence from a remote venue via video link or audio link under section 219AB of the Family Court Act 1997, which could include video link or audio link from another room at the court; requiring the examining party to ask their questions from

a remote venue via video link or audio link, which could also include video link or audio link from another room at the court; allowing a support person to sit with the victim during the giving of evidence or throughout the proceedings; and making an order that questions from the examining party be directed to the presiding judicial officer, who can then relay that to the witness party. The court has an obligation to forbid offensive questions from being asked of witnesses under section 250 of the Family Court Act. The court can refer disputes involving allegations of family violence with the consent of the parties to the lawyer-assisted family dispute resolution conferences. This is a form of mediation involving lawyers, which addresses the potential parallels between unrepresented parties. Conferences are organised with appropriate safeguards and are less traumatic for victims of violence than court proceedings. The Family Court also has general protections and measures in place to ensure the safety and wellbeing of all at-risk parties. There are separate waiting areas inside the court and separate entry and exit points to and from the building. Primary security checkpoints and weapon detection systems are at all entrances and security escorts within the court building can be arranged as required.

The court is bound to general principles for conducting child-related proceedings. The principles are contained in division 12A of the Family Law Act 1995 and division 11A of the Family Court Act 1997 respectively. These provisions can extend to other proceedings with the consent of the party, specifically, sections 69ZN and 69ZQ of the Family Law Act and sections 202B and 202E of the Family Court Act 1997 outline a way in which courts can manage proceedings to ensure the safety of victims of family violence. The Family Court reports that these measures have been sufficient to manage proceedings involving an allegation of family violence with no additional resources requested by the court.

Clause put and passed.

Clause 5 put and passed.

Title put and passed.

Report

Bill reported, without amendment, and the report adopted.

Third Reading

Bill read a third time, on motion by **Hon Matthew Swinbourn (Parliamentary Secretary)**, and passed.