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## FAMILY COURT AMENDMENT BILL 2021

### EXPLANATORY MEMORANDUM

#### Overview of the Bill

On 5 December 2018 the *Family Law Amendment (Family Violence Cross-examination of Parties) Act 2018* (Cth) passed both Houses of Federal Parliament, amending the *Family Law Act 1975* (Cth) to provide protections for victims of family violence during the cross-examination process in all family law proceedings.

The Council of Australian Governments National Summit on Reducing Violence against Women and their Children in October 2016 recommended that a ban should be placed on the personal cross-examination of victims by the perpetrator in family violence and family law proceedings. Personal cross examination occurs when a party is not represented by a lawyer so they must perform the cross-examination themselves. Personal cross-examination by a perpetrator of family violence can cause additional trauma to victims and also have an adverse impact on the quality of their evidence. Furthermore, due to the power imbalances in relationships involving family violence, it is also difficult and distressing for victims if they have to personally cross-examine the perpetrator.

It is the usual custom for Western Australia to amend the *Family Court Act 1997* (WA) to mirror any amendments made to the *Family Law Act 1975* (Cth). This ensures the same legislative position applies to parents of ex-nuptial children and people who were in a de facto relationship as to what applies to married people under the Commonwealth legislation.

This Bill, like the *Family Law Amendment (Family Violence Cross-examination of Parties) Act 2018* (Cth), will prohibit personal cross-examination in family law proceedings in certain circumstances. In cases where there is an allegation of family violence between the parties to a Family Court proceeding they will be prohibited from directly cross-examining each other in any of the following circumstances:

- Where either party has been convicted of, or is charged with an offence involving violence, or a threat of violence, to the other party;
- Where a family violence order (other than an interim order) applies to both parties;
- Where an injunction *made under the Family Court Act 1997* for the personal protection of either party is directed against the other party; or
- If the above circumstances do not apply, the court, in its discretion, makes an order that the parties cannot cross-examine each other. The court may make such an order on its own initiative or upon application from either party or an independent children's lawyer.

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The cross-examination must be conducted by a legal practitioner if a ban on direct cross-examination applies.

In cases where none of these circumstances apply but an allegation of family violence has been made, the court must ensure that appropriate protections are taken for the alleged victim of the family violence. For example, the court may consider it appropriate to direct that the cross-examination be conducted by way of video or audio link and/or allow the alleged victim to have a support person with them.

The provisions in this Bill will equally apply to both property and child related hearings.

In all cases where direct cross-examination is prohibited under this legislation, the cross-examination must be conducted by a legal practitioner acting on behalf of the examining party. A legal practitioner must perform the cross-examination for both parties, regardless of whether the party is the perpetrator or the victim.

Parties, where possible, should obtain their own legal representation. If a party is unrepresented, they will be advised to obtain representation and will also be referred to Legal Aid WA who are administering the Commonwealth Family Violence and Cross Examination of Parties Scheme (the Scheme). In support of this legislation the Commonwealth established the Scheme and have provided funding to Legal Aid Commissions across Australia. Legal Aid WA receives funding for this initiative from the Commonwealth on an annual basis.

Under section 102 NC of the *Family Law Act 1975* (Cth) the Commonwealth will be reviewing their cross-examination of parties legislation after the second anniversary of the commencement day (that legislation commenced 10 September 2019). The review is to ensure that the amendments are operating as intended i.e. reducing trauma to family violence victims and improving the quality of evidence given whilst maintaining procedural fairness for all parties. The Commonwealth Attorney-General's Department will conduct the review in consultation with family law courts, National Legal Aid and other stakeholders. The Family Court of WA and Legal Aid WA will participate in the review (albeit that the Scheme is yet to apply in WA for parents of ex-nuptial children and people who are in de facto relationships).

Given the Commonwealth will be reviewing the cross-examination of parties legislation in family courts across Australia it was not necessary to include review provisions into this Bill.

Apart from reducing trauma to victims of family violence there are also a number of other benefits that will stem from this legislation.

- The cross-examination process is an integral part of having evidence tested in a proceeding and allowing the court to make evidence based findings. Putting an end to victims being cross examined by perpetrators will improve their ability to give clear and cogent evidence. Furthermore, the cross-examination of perpetrators by legal practitioners will ensure their evidence is appropriately tested and therefore more reliable. This in turn will enable judicial officers to make more informed decisions and judgments.

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- Being personally cross-examined by a perpetrator can be so daunting that it can lead to some victims prematurely settling their matter on terms that are less favourable to them or are not in the best interest of the children. Their personal safety and care can be put at risk. For example children may have to spend more time living with a perpetrator of family violence. This Bill aims to reduce those situations from occurring.
  - The provisions in this Bill equally apply to perpetrators so their rights to procedural fairness and a fair hearing will not be unduly impinged. Having a professional legal practitioner to represent them during the cross examination process should also assist with the better presentation of their case.
  - Women are usually the victims of family violence. A woman who is subject to family violence is three times more likely to receive a minority share of relationship assets than women who are not subject to family violence. These new laws will help to lessen the discrimination against women by encouraging them to be fully involved in presenting their case to the Family Court. Their right to a fair hearing and access to justice will be enhanced.

The *Family Law Act 1975* (Cth) cross-examination provisions commenced 10 September 2019 so there will be a considerable time lag before the state legislation comes into effect. (Note : The Family Court Amendment Bill 2019 was introduced into the previous Parliament to enact the cross examination provisions but that Bill lapsed so it has been superseded by this Bill).

#### **Clause 1     Short title**

Clause 1 provides that the Bill, once enacted, will be known as the *Family Court Amendment Act 2021*.

#### **Clause 2     Commencement**

Clause 2 provides for the commencement of the Act.

Sections 1 and 2 come into operation on the day the Act receives the Royal Assent.

The rest of the Act comes into operation the day after the Royal Assent.

#### **Clause 3     Act amended**

This Act will amend the *Family Court Act 1997*.

#### **Clause 4     Part 8 Division 3 inserted**

This clause will insert **Division 3 Cross-examination of parties where allegations of family violence** into Part 8 of the *Family Court Act 1997* (WA). Part 8 of the Act deals with procedure and evidence.

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## 219AJ. Application of Division

In this section:

- **commencement day** means the day section 4 of the *Family Court Amendment Act 2019* comes into operation i.e. the day after Royal Assent.
- **specified day** means the day after 90 days has expired beginning on commencement day.

This Division will apply to cross-examinations occurring on or after the specified day in court proceedings that were instituted before, on or after the commencement day.

The 3 month time gap between commencement and application will allow the Family Court of WA the time to identify the existing matters to which the amendments will apply, for any necessary orders to be made, and for the parties to apply to the Family Violence and Cross-Examination of Parties Scheme administered by Legal Aid, if necessary. The time gap will minimise the risk of listed trials being delayed or adjourned if the cross-examination ban applies and one or both parties are self-represented.

## 219AK. Mandatory protections for parties in certain cases - FLA s.102NA

Proposed sub-section 219AK(1) provides that if:

- a) a party in a family court hearing intends to cross examine the other party;
- b) there is an allegation of family violence between the parties; and
- c) any of the following circumstances apply :
  - i. either party has been convicted of or is charged with an offence involving violence or a threat of violence to the other party;
  - ii. a family violence order (such as a Family Violence Restraining Order taken out in accordance with the *Restraining Orders Act 1997*) applies to both parties (Interim orders are excluded in this circumstance);
  - iii. a personal protection injunction made under the *Family Court Act 1997* has been taken out against the other party;
  - iv. the court makes an order that the requirement will apply to the cross-examination,

then the requirement for a legal practitioner to perform the cross examination outlined in sub-section 219AK(2) will apply.

Interim orders were excluded from the circumstances in subsection 219AK(1)(c)(ii) as the information provided or evidence given in those cases is untested and a final determination is yet to be made by the court. Nevertheless, if the victim is subjected

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to family violence in this case he/she can still apply to the judicial officer for an order to be made under subsection 219AK(3)(b).

Under sub-section 219AK(2):

- a) the examining party cannot personally cross-examine the witness party; and
- b) the cross-examination must be conducted by an Australian legal practitioner acting for the examining party.

New section 219AK(2) will apply to cross-examinations where the victim is either the witness party or the examining party. This will provide victims with protections in both cases.

As the same cross examination provisions apply to the perpetrator (or the alleged perpetrator) there is no discrimination against either party in how their evidence is presented. Legal practitioners will be required to perform cross-examinations on behalf of both parties.

The involvement of a legal practitioner in cross-examinations where there is an allegation of family violence is anticipated to improve the quality of evidence from victims who are often intimidated and traumatised by the current personal cross-examination process.

New subsection 219AK(3) gives the court the power to make an order under subsection 219AK(1)(c)(iv) at its discretion or upon application by either party or an independent children's lawyer.

The court is given the discretion to make an order under subsection 219AK(1)(c)(iv) as the court may be in possession of information that family violence is occurring between the parties. The information could be brought to the court's attention from sources such as WA Police, the Department of Communities or the children involved in the proceedings.

An independent children's lawyer is given the power to make an application to the court for an order to be made as that lawyer may also be aware that family violence is occurring between the parties.

This section will not affect other laws which protect witness parties (as in the case where section 215 of the *Family Court Act 1997* (WA) requires the court to forbid offensive questions from being asked).

### **219AL Court ordered protections in other cases – FLA s.102NB**

This proposed section provides that, where there is an allegation of family violence but the provisions of subsection 219AK(1)(c) do not apply, the court must, in those circumstances, take appropriate measures to ensure that alleged victims of family violence are adequately protected when they are to be personally cross-examined or when they are to perform the cross examination personally.

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The kinds of protection that the court can take is:

- allowing the witness to give their evidence from a remote venue via video link or audio link (as outlined in section 219AB of the *Family Court Act 1997* (WA));
- allowing a support person to sit with the victim during the giving of evidence or throughout the proceedings;
- 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.

This section is intended to capture all allegations of family violence not captured under section 219AK in any property or child-related hearing.

This section will not affect other laws which protect witness parties (as in the case where section 215 of the *Family Court Act 1997* (WA) requires the court to forbid offensive questions from being asked).

#### **Clause 5     Section 243 amended**

This clause will amend section 243 to address issues as identified by Parliamentary Counsel's Office error reporting processes.

Section 243 is to be amended to improve the clarity of the section and better set out the respective higher and summary penalties for each crime.

Section 243(8)(a)(a) is inserted to clarify that subsections 1 and 2 also do not apply to information communicated to State or Territory agencies which oversee the welfare of children and which is prescribed in the regulations for that purpose.