FAMILY COURT AMENDMENT BILL 2019

Second Reading

Resumed from 28 November 2019.

DR A.D. BUTI (Armadale) [11.36 am]: I rise to contribute to the second reading debate on the Family Court Amendment Bill 2019. It is opportune and timely that the debate on this bill follows on from the debate on the Family Violence Legislation Reform Bill 2019, because the measures in this bill fit within the government's whole approach of trying to assist victims of family violence, and I will go into that in a moment. The explanatory memorandum to the Family Court Amendment Bill 2019 states —

> 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.

Further on, the explanatory memorandum states —

> 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 that the parents of ex-nuptial children and people who were in a de facto relationship are treated in the same way as married couples.

Before I go into the contents of this bill, it is interesting that that had to be put into the explanatory memorandum. We are quite unique in the Family Court system in Australia because we have our own Family Court of Western Australia. All other states come under the commonwealth Family Court jurisdiction. The history of this goes back to when the Family Law Act 1975 was passed by the commonwealth Parliament under the Whitlam government. The emphasis was to ensure that we had a no-fault divorce scheme. Western Australia decided that it would not join the federal Family Court scheme. At the time, the Solicitor-General was Sir Ronald Wilson, who ended up becoming Western Australia's first High Court Justice. He was very strong on state rights. Of course, the Premier at the time was Sir Charles Court, who also was always prepared to stand up to the rest of Australia. Sir Ronald Wilson's view that we should go it alone was supported by the Attorney General at the time, Ian Medcalf, who was the member for Nedlands or whatever the seat was at that time. So we had our own Family Court.

It is interesting to look at the constitutional arrangements for family law in Australia. The Family Law Act, which was passed in 1975, has constitutional powers—marriage power under section 51(xxi), divorce and matrimonial causes power under section 51(xxii), and incidental power under section 51(xxxix) of the Australian Constitution. Those constitutional powers allowed the commonwealth Family Law Act 1975 to be passed by the commonwealth Parliament to have constitutional power over the rest of Australia. Of course, territorial power was another head of constitutional power in the Northern Territory and the Australian Capital Territory. But Western Australia went alone. At the time, that provided Western Australia with certain advantages over the other jurisdictions, because de facto relationships were not covered by commonwealth constitutional powers. The Western Australian Family Court could deal with de facto relationships because it was not governed by the commonwealth constitutional power. There were problems in other jurisdictions in that respect. By 1 March 2009, people in de facto relationships were able to access the federal family law system for post-separation parenting arrangements, via the referral of that power by the various states of Australia to the commonwealth under the constitutional referral power of section 51(xxxvii). For all intents and purposes, the Western Australian system mirrors the federal system. Due to the referral of de facto powers from various state Parliaments to the commonwealth, the commonwealth Family Court has the jurisdiction to deal with property law matters. It should also be stated that de facto relationships can also be governed under the general common law of equity and trust.

The Family Court Amendment Bill 2019 basically mirrors the federal Family Court jurisdiction and is important legislation. Members may not have paid much attention to the bill because they see it as purely a procedural matter, but it is incredibly important because it will ensure that people who have been subject to family violence do not have to endure further violence during the cross-examination phase of any matter before the Family Court. This bill is reflective of the Family Law Amendment (Family Violence Cross–examination of Parties) Act 2018 and prohibits personal cross-examination in family law proceedings in certain circumstances. The parties involved in an allegation of family violence in a Family Court proceeding will be prohibited from directly cross-examining each other in the following circumstances: when either party has been convicted of, or is charged with, an offence involving violence or a threat of violence to the other party; when a family violence order, other than an interim order, applies to both parties; when an injunction made under the Family Court Act 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. In those circumstances, cross-examination will have to be done by a legal practitioner. Members can obviously understand why the commonwealth instigated its legislation and why we are replicating that legislation in the bill before us. When

two parties are before a family court proceeding, the alleged perpetrator is allowed to cross-examine the alleged victim. Members can understand the trauma that places on the victim. The emotional trauma placed on the victim could be immense and it furthers the violence that the victim has had to endure. This has been a long time coming and has been spoken about for many years. It is a very important measure, because one of the ways that perpetrators have been able to retain control over a victim in family law situations is by instigating family law proceedings and cross-examining their victim partner. Limiting cross-examination to a legal practitioner in the circumstances that I mentioned is a worthwhile measure.

But, of course, this should not be the end of reforms to the way domestic violence and the proper treatment of children are handled in the Family Court system. In this regard, we can look no further than the 135th report of the Australian Law Reform Commission dated March 2019, "Family Law for the Future—An Inquiry into the Family Law System: Final Report". People who perpetrate domestic violence have a control or power issue, and we are trying to limit that power by preventing direct cross-examination of the victim. But another way that that power can be retained and continued is when the perpetrator continues to instigate proceedings in the Family Court. When custody of children has been granted to the victim, usually the mother, in a Family Court matter, one way that the non-custodial parent and perpetrator—I am not saying that the non-custodial parent is always the perpetrator, but in the situation in which they are the perpetrator—can continue to have power and inflict abuse is by instigating proceedings against the victim in an attempt to have the custody orders changed, which places more pressure on the victim. There could be a situation in which the perpetrator is self-represented and not incurring legal costs, while the victim is represented by a private lawyer or a lawyer from Legal Aid—if they own property, a caveat can be put on that property to delay the payment of legal fees in the Legal Aid system. The continuation of proceedings in the Family Court allows the perpetrator to continue to abuse and have power over the partner. The Australian Law Reform Commission report made a number of recommendations about this situation and the whole issue of the custody of children. Before I talk about that, I have major concerns about the way federal Parliament has set up its review of the family law system, because Senator Pauline Hanson of One Nation is on the inquiry committee and she has made clear statements about her views on Family Court battles between partners over the custody of their children. I have major concerns with the views Pauline Hanson has expressed because if we look at her history, we can see that her political philosophy has generally reflected her personal experiences.

When she became a member of Parliament many years ago, she made some incredibly derogatory statements about people of Asian origin and Aboriginal people. However, she ended up being imprisoned as a result of funding issues. I think Tony Abbott was involved in the legal movement to prosecute Pauline Hanson and she went to prison where she interacted with prisoners, many of whom were Aboriginal women, and she seemed to change her views about people who were in prison and about Aboriginal women because she had had personal experience. In the situation now confronting her, she is relying on the experience of her son. I do not know the particular circumstances but she has talked about how she believed her son had been unfairly treated in the Family Court scenario. Her views appear to be very negative towards what she perceives is a very biased attitude of the Family Court. She believes the court always favours the mother rather than the father.

Section 60B of the commonwealth Family Law Act is replicated in section 66 of the WA Family Court Act. It refers to the best interests of children being met by ensuring they have the benefit of both of their parents. Both parents should have maximum involvement in raising their children. That is considered to be in the best interests of the child. That may be so in some cases but it may not always be the case. Pauline Hanson has said that she believes the "victim" always gets the children. That should not be the situation. It should be what is in the best interests of the child, not what is in the best interests of the adults before the proceedings. The Australian Law Reform Commission has made that quite clear. The federal government and the federal Attorney-General need to consider the whole raft of recommendations and findings of the Australian Law Reform Commission report and, hopefully, we will follow suit if they make some positive changes in that respect.

The Family Court also looked at the issue of preventing people from instituting frivolous proceedings being used as a back way of trying to maintain control and abuse of people who are already victims. The Australian Law Reform Commission report recommended —

> The family courts should be able to deal with the misuse of systems and processes of the family law system separately from the need to establish that such conduct may also amount to family violence.

[Member's time extended.]

Dr A.D. BUTI: Furthermore, in its submission, the Family Court said that the court should be able to exercise the power when it "forms the view that the further institution of proceedings against that other person may have a detrimental effect on that person's wellbeing or detrimentally affect that person's parenting capacity". They are very important matters.

The commonwealth Attorney-General, Hon Christian Porter, responded to those recommendations and findings of the Australian Law Reform Commission. He said that we need to ensure families requiring the assistance of the

courts are able to have their matters dealt with as quickly, efficiently and cheaply as possible. I do not think that should be the main priority. The main priority should be the best physical and emotional wellbeing of the child. That should be paramount, as also should be reducing the continuing abuse of victims of family violence.

The bill before the house is a very significant bill. It follows on from the Family Violence Legislation Reform Bill, which we have just been debating and has been passed. This bill is also very important to that area and should be supported by all sides of the chamber.

MR K.M. O'DONNELL (Kalgoorlie) [11.54 am]: Greetings, Acting Speaker. I, too, rise in support of the Family Court Amendment Bill 2019. From the outset, I agree with the member for Armadale that the child's welfare is paramount. I thoroughly disagree that the victim in Family Court proceedings should automatically get full custody of the child or children.

This bill provides protection for victims of family violence during the cross-examination process in all family law proceedings. That is very good. A ban should be placed on the personal cross-examination of victims by the perpetrator in family violence and family law proceedings. That came out of the Council of Australian Governments' national summit back in 2016. Various things could cause additional trauma and have an adverse impact on victims. It can be distressing for victims if they have to personally cross-examine the perpetrator. Police do not normally get involved in Family Court matters but they are involved in the Family Court in guarding, protecting and making sure everything is okay. Police also see it through the Magistrates Court when restraining orders are sought against the husband, and during evidence in criminal prosecutions, due to violence against members of his family.

When a victim is about to give evidence, they walk within metres of the perpetrator. As the member for Armadale said, the perpetrator—predominantly "he"—has power and control over his victims. It can be very daunting and traumatic for victims to have to walk past the perpetrator. In some instances, victims do not want to do that. Whenever I was involved in a wife or a family member giving evidence against a husband, I advised them to turn their chair so they were looking at the magistrate or the judge. On many occasions, the lawyer or the offender wants the witness giving evidence to stare at them so they can eyeball them and have power and control over them so that their evidence is not reliable.

In the old days, upstairs in the Kalgoorlie courthouse, there were only L-shaped seats. Everyone sat on the bench and they were all in together. The offenders, witnesses and victims were all together. Sometimes they were advised that an office was available that the victim could sit in to keep away from the offender. However, if the lawyer wanted to interview one of their clients, they had precedence, and when coming out of the office, the victim had to walk past or sit near the offender or perpetrator. That was not good. When it was time for court to finish, I made sure that I met the wife or the child and accompanied them to the waiting room, or whenever they felt they required that. I have gone into court and been ready to go with our evidence; the witness has been called, but the witness has got cold feet and left. There is nothing worse. The offender or his lawyer would get up and ask for the case to be withdrawn because the victim had not turned up. However, the victim not turning up was understandable.

This bill will prohibit personal cross-examination in family law proceedings in certain circumstances where either party has been convicted of violent offences or threats of violence to the other party. That is acceptable and understandable. A family violence order other than an interim order can apply. I agree with that. For anyone who does not know, if somebody wants to take out a violence restraining order on a person, they have to make application to the courthouse and go before a magistrate and give evidence. The magistrate listens to only one side—the person who applies for the restraining order. That then becomes an interim order until the perpetrator or respondent requests the hearing so that he can give his side of the story. It is better having just the final order, the family violence order. The court in its discretion may make an order that parties cannot cross-examine each other. That is good. I like that if they do not meet the criteria, there is a fourth criteria; that is, the court in its discretion can make a decision. I am all for that.

The cross-examination must be conducted by a legal practitioner if a ban on direct cross-examination applies. That is a no-brainer. We do not want to see perpetrators saying, "Can I get a friend to stand up before the court?" No; it is not interested in that. The qualified legal practitioner must abide by guidelines and rules, and the cross-examination must be held in a professional manner.

Another element of the bill I like is that 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. That is a very good provision. Many times people have told me about police interviewing a victim in the street or a driveway, as the Attorney General said. That is fine; they tell us what has happened, but in some instances by the end of the conversation they do not want any action taken because they are scared. Having a video or audio link or having the person in another room or building, or even in another town, to give evidence is a good provision and we need to put the ball in the victim's court rather than in the perpetrator's court.

Where possible, parties should obtain their own legal representation. If a party is unrepresented they will be advised to obtain representation and will be referred to Legal Aid. That is fantastic; however, I note that the commonwealth family violence and cross-examination of parties scheme is administered by Legal Aid. Legal Aid Western Australia received funding for that initiative for 2018–19 and half of the funding allocated for 2019–20. Everybody in this place knows it is fantastic when funding is allocated, but it is not a bottomless pit and it is possibly not ongoing. I dare say that if the family violence and cross-examination of parties scheme is inundated—there is that possibility when business is booming and more and more people go through the Family Court—what will happen if Joe Blow and Sally have their hearings at the end of the financial year, or the calendar year, whichever the scheme provides, and they are told that the funding is exhausted? That is why I say that it is not a bottomless pit. Let us say that $3 million is allocated—I do not know how much it is—and that is all utilised by the lawyers, well and truly before time. If the commonwealth government says that it has put in, and that is it, will the state step in to ensure that funds will be available for everybody? That is one area that needs to be looked at to ensure there is a guarantee. If the wife is working, for example, and does not have much cash but is just paying off the home loan and paying the bills and is living from pay to pay and does not come under the provisions of Legal Aid—some people do not, whether it be the perpetrator or the victim—will the state government ensure that there is money in the coffers to fund anybody when the court says they need representation?

This is another bill with which I agree. From my experience, anything to help victims of crime and those involved in disputes before the Family Court is a good thing.

MR J.R. QUIGLEY (Butler — Attorney General) [12.05 pm] — in reply: I rise to respond briefly to members' comments. I thank all members of the chamber for their contribution. The Family Court Amendment Bill 2019 has received bipartisan support, and for very obvious reasons: it is another measure that protects victims of family violence by changing the Family Court Act. I note that the member for Hillarys lamented the fact that the Family Court Act of Australia had been amended and that we were just a little bit behind. Of course, we are the only state that has its own Family Court—the Family Court of Western Australia. We are the only state that has its own Family Court and that decision was taken many, many years ago. As I recall, in the 1970s, with the inauguration of the Family Court Act of Western Australia, the then Western Australian government decided not to cede its powers to the commonwealth in that space, but to inaugurate its own court and it did so with an agreement with the commonwealth that the commonwealth would fund the judicial officers and premises, which are located, of course, in the Federal Court building. Although there has been some little time lag from time to time in amending the Family Court Act of Western Australia, that little time lag has been a price well worth paying in the sense that we have a system that is envied by family law practitioners from other jurisdictions.

We now have a list of practitioners who are available to be called upon and to be assigned to represent a victim during a case that involves family violence. This funding has gone to the Legal Aid Commission and there are 14 in-house lawyers at Legal Aid and 27 private lawyers who are on the cross-examination scheme list to manage the workload created by this scheme. 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 and not just for the cross-examination of the other party. The funding under the scheme also provides for parties to attend late intervention dispute resolution conferences and parenting and financial matters at Legal Aid Western Australia. Parties are always represented at those conferences and the conferences have a very high settlement rate. Parties are asked to make a contribution to the cost of legal representation depending on their financial circumstances.

The recommendation about cross-examination emanates from the royal commission and the Law Reform Commission's report. On my sitting down it will have completed its passage, apart from the vote on the third reading stage. I once again thank all members for their contribution. This together with other reforms that we passed this morning through the Legislative Assembly, the Family Violence Legislation Reform Bill, are two pieces of legislation that complement each other. This bill in particular complements what we have already passed this morning for the protection of victims in a courtroom scene and in settlement conferences. I acknowledge the contribution of all members and thank them for that. I commend this bill to the chamber.

Question put and passed.

Bill read a second time.

Leave granted to proceed forthwith to third reading.

Third Reading

Bill read a third time, on motion by **Mr J.R. Quigley (Attorney General)**, and transmitted to the Council.