# Submission to the Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017—Public Consultation on Cross-examination Amendment

(Consultation closes **COB 25 AUGUST 2017**). Please send electronic submissions to familylawunit@ag.gov.au*)*

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- a witness in the proceedings.

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# Your submission

Insert your text here and send the completed submission to the Attorney-General's Department at familylawunit@ag.gov.au.

1. **Should direct cross-examination only be automatically banned in specific circumstances?**

The right of a litigant to test the evidence of another party is a central right of our process of adversarial justice. As a result, the circumstances in which direct cross-examination should automatically be banned should be limited as far as is consistent with the protection of the vulnerable witness. There may, of course, be other circumstances in which a judge is not prepared to allow direct cross-examination to continue, but this is properly a matter of judicial discretion.

It should also be remembered that from a legal perspective the absence or limitation of cross-examination can potentially have procedural consequences. First, should the matter proceed on appeal, the appellant may find that their grounds of appeal are limited if they have not cross-examined on a point which they wish to challenge at appellate level. Second, while the rule in *Browne v Dunn* does not strictly apply in family law proceedings, the principle underlying the rule remains important: propositions of fact which are inconsistent with the evidence of an opposing witness ought to be put to that witness if they are to be relied upon.

It is important not to throw out these legal principles, even with such an extraordinarily good intention in mind; the risk is that the courts are unable to do justice. It is in the interests of the Judge, who bears the task of making a just decision, to have evidence properly tested before him or her.

2. **Should direct cross-examination be banned in each of the specific circumstances set out in the new proposed subsection 102NA(1)?**

Not necessarily. There are two circumstances in which it seems to us that cross-examination should not be automatically banned despite the existence of a family violence order applying to both parties:

The first is where the family violence order is limited to the basic condition (that the respondent be of good behaviour and do no domestic violence towards the aggrieved person). There is nothing in that condition which would prevent the parties from engaging in normal conversation (or indeed normal and properly-conducted arguments and conflicts) outside the Court; it is difficult as a matter of principle to see why such interaction should not be permitted inside the courtroom.

The second is where the family violence order has been accepted by consent without admissions by the respondent. This, in our experience, is a common decision made by a respondent who may still be convinced that they have not committed an act of domestic violence, but who wishes to avoid the expense, difficulty and risk of contesting the protection application. Given that such a person has not been found to have committed an act of domestic violence, it is difficult as a matter of principle to see why their right to cross-examination should be restricted.

It should be remembered that cross-examination very rarely occurs during the first return date of a family law matter. The Registrar or Judge has an opportunity during those interlocutory hearings to take the measure of the self-represented party well before the party appears in a proceeding where cross-examination would be expected.

An alternative approach would be for the Act to require the Judge to consider whether direct cross-examination should be permitted, in relation to any proceeding involving a litigant who is self-represented and who has agreed to an order by consent without admissions, or who is subject to a protection order bearing only the basic condition. The judge might be required to specifically state (ex tempore) that they have made such consideration,and then to state whether they will allow direct cross-examination to proceed.

3. **Should direct cross-examination be banned in any additional circumstances not referred to in the new proposed subsection 102NA(1)? For example, in the courts' Notice of Risk/ Notice of Child Abuse, Family Violence or Risk of Family Violence.**

Naturally, the Judge in each case should retain control of the proceedings, and should continue to have the prerogative to confine or conclude cross-examination if such cross-examination is undertaken improperly.

We are concerned that if the notice of risk/notice of child abuse process became a means by which the opposing cross-examination could be exlcluded, that may change the nature of the instrument. At present, those notices put the court on notice of particular issues which must subsequently be resolved by evidence and argument. They do no more. They certainly do not provide a factual basis on which the court can properly act to the disadvantage of a party.

We do however consider that if a party makes an application to the court, and that application is accompanied by a s.60I certificate in which the family dispute resolution practitioner has indicated that the dispute is unsuitable for mediation due to family violence issues, this too should result in a requirement that the judge specifically consider whether to allow cross-examination to proceed.

4. **Should any ban on direct cross-examination apply to both parties to the proceedings asking questions of each other, or only to the alleged perpetrator of the family violence asking questions of the alleged victim?**

In our view any ban should apply in both directions. It is difficult to see that a party who seeks protection from direct engagement with their former partner in one context (that in which the aggrieved is the witness) should somehow be more comfortable with that same interaction in another context (in which the aggrieved is the cross-examiner). If the purpose of the rule is to protect the aggrieved party from potentially problematic interaction with the other party, then that party should be protected in both roles.

It is easy, for instance, to imagine a circumstance in which the aggrieved cross-examiner asks a proper question, but is then subjected to an improper diatribe by way of answer. Naturally the judge in that situation would be well able to control the court, however the damage would have been done.

5. **Should the discretionary power only be exercised on application by the alleged victim, or by the courts' own motion, or should the alleged perpetrator also be able to make an application to prevent direct cross-examination?**

The over-riding interest must be to enable justice to be done in the courtroom, while managing and minimising the risk to the aggrieved person. As a result, it makes sense to us that any party should be able to make an application, including the aggrieved, the respondent, the Judge, and any intervener parties such as an ICL. We also consider that where a family report is ordered by a judge, it should be within the authority of the family reporter to recommend whether direct cross-examination should be allowed or not. Such a recommendation would not, of course, bind the judge; however it may well assist a judge to appreciate the dynamics between the parties.

6. **Which people would be most appropriate to be appointed by the court to ask questions on behalf of a self-represented person? For example, a court employee not involved in the proceedings, other professionals, lay people.**

In our view a court-appointed person is inherently problematic for a number of reasons.

First, cross-examination is a dynamic process. It is not always (indeed not usually) possible to anticipate what answers a witness might give in the course of cross-examination. Those answers may render some planned questions futile, or even unwise; the answers may also give rise to subsequent questions to be asked. It is difficult to see how a surrogate questioner, particularly a surrogate questioner who is acting as a mere mouthpiece, can manage this process without a severe disadvantage to the cross-examining party.

We wish to propose an alternative.

In our view, prior to the commencement of cross-examination, the cross-examining party should be required to hand up to the bench, and to any legal representative appearing for another party, a copy of the potential planned questions. This would enable the judge to strike out any improper or irrelevant questions before they are asked, and before any damage is done; this would also enable other parties to object to any questions before they were asked.

Once such a list was settled, the cross-examining party ought to be allowed to proceed with cross-examination, limited to those questions. The cross-examiner would be entitled to abandon any questions

then chose not to ask. At the conclusion of that "round" of cross-examination, the court might briefly adjourn in order to enable the cross-examiner to formulate a round of supplementary questions, which would be subjected to the same process.

This proposal would retain (in an admittedly constrained way) the dynamic nature of cross-examination; would enable the self-representing party to cross-examine in accordance with the normal rules of fair process, but would protect the witness by ensuring that improper questions are simply never asked.

If, to the contrary of our proposal, a court-appointed person is used, we do not consider that the qualifications, formal role, orany other characteristics of the court-appointed person are at all relevant. They are simply engaged in a mechanical reading exercise. We would even be happy for any of the (now very common) text-to-voice software packages to do the reading.

7. **What qualifications, if any, should the court-appointed person have?**

Please see 6 above

8. **Should any requirements regarding who the court can appoint and their qualifications be included in the Family Law Act?**

Please see 6 above

9. **Should any further information about the scope of the role of the court-appointed person be included in the Family Law Act? For example:**
    - **how the court-appointed person obtains questions from a self-represented party**
    - **the level of engagement the court-appointed person should have with a self-represented party on whose behalf they are asking the questions**
    - **whether the court-appointed person should be present in court for the whole of the proceedings or just during cross-examination**
    - **what discretion the court-appointed person can exercise (if any) in relation to asking the questions they have been provided by a self-represented party**
    - **whether the court-appointed person can ask any questions of their own (not provided by the self-represented party) during cross-examination**
    - **whether they are under a duty to cooperate with other parties to the proceedings such as an Independent Children's Lawyer appointed in a case, and**
    - **the intersection between the court-appointed person's role and that of the judicial officer.**

Our views as expressed above are based on the premise that the court-appointed person will have absolutely no forensic role in the cross-examination process. This would also relieve them of any responsibility to be in court during the balance of proceedings; or to co-operate with the other parties (other than by undertaking the usual courtesies at the bar table, such as sitting during objections). Given the absence of a forensic role, they should also have no role in excluding questions listed by the cross-examining party. Those questions should be excluded either by objection from another party, or from the judge.

We are firm in our view on this point, because the moment the court-apppointed person begins to take a forensic role, they begin to practice law. This would require them to be a legal practitioner, and as legal practitioners they would be subject to a range of further rules when appearing before the court. They would be in limbo between the representation of the party, and acting as a mere mouthpiece. This would blur the lines of the profession itself; this seems unnecessary when there are other alternatives available.

10. **Should a self-represented person be allowed to nominate the person who is appointed by the court to ask questions on their behalf?**

Please see 6 above

11. **Do you have any concerns about the court-appointed person model?**

Please see 6 and 9 above.

12. **Should the court only grant leave for direct cross-examination to occur if both parties to the proceedings consent? i.e. where an alleged victim consents to being directly cross-examined or consents to conducting direct cross-examination, should the alleged perpetrator's consent also be required?**

In our view, the question of "consent" is somewhat distinct from the issue as it has been presented in the discussion paper. If the process is one of application by one party, then consent seems rather beside the point. If neither party applies for cross-examination to be prohibited, then each of their consent is implied; if one party applies for cross-examination to be prohibited, then the approach of the other party will be evident from their response to that application.

If the judge decides that a prohibition on cross-examination is necessary, then it is likely the Judge would seek submissions from the parties on that point, most likely when giving directions for trial. Again, the views of parties would be evident from those submissions, without requiring consent as such.

Ultimately, our view would be that this decision should be made by the Judge in the matter, based on submissions from all parties.

13. **Should the court only grant leave for direct cross-examination to occur if it has considered whether the cross-examination will have a harmful impact on the party that is the alleged victim of the family violence?**

In our view the consideration of the court should proceed beyond merely considering whether the cross-examination will have a "harmful" impact on the alleged victim. "Harmful" seems a very generous test, unless the term is defined very carefully.

We say this because cross-examination is seldom a pleasant experience, even when both parties are represented and even where there is no allegation of domestic violence. Some level of discomfort, and even some level of genuine distress, are sadly a part and parcel of our system of adversarial justice. It is proper for the law to protect vulnerable witnesses, but the extent of that protection is genuinely contestable.

In our view, the proper consideration for the Court to make is to balance the advantages and disadvantages of cross-examination in each case; and to allow cross-examination wherever the Court is not satisfied that the risk of harm to the alleged victim outweighs the risk to justice of preventing a litigant from having the opportunity to cross-examine in the normal way.

In our view, however, our primary proposal (for the cross-examiner to hand up proposed questions) will generally be sufficient to allow for direct cross-examination while minimising potential harm to the alleged victim.

14. **Should the court only grant leave for direct cross-examination to occur if it has considered whether the cross-examination will adversely affect the ability of the party being cross-examined to testify under the cross-examination, and the ability of the party conducting the cross-examination to conduct that cross-examination?**

We have covered this in our answer to question 13; however a test of "adversely affect the ability" is an even broader test than the "harmful" test indicated above.

Many things may adversely affect the capacity of a witness to give their best evidence. Most of these things are perfectly proper. Court is in itself an intimidating environment for most witnesses; the knowledge that they are under oath, and that they are to be examined by an opponent; the fact that they are required to discuss their private affairs in public; all of these things are perfectly normal stresses for a witness. The purpose of the court should be to protect the witness from harm arising by immediate virtue of their role in a relationship characterised by domestic violence; the purpose of the court should not be to protect witnesses from perfectly normal pressures of giving evidence in a court.

15. **Are there any other issues the court should be required to consider before granting leave for direct cross-examination to occur?**

We have expressed our suggestion adequately in response to question 13 above.

16. **Should the amendments apply to proceedings started before the law comes into effect, or should they only apply to proceedings started after the law comes into effect?**

We consider that the amendments should not commence immediately (particularly if the proposed option of a court-appointed questioner is adopted). It will take time for staff to be arranged, and for eductive materials to be prepared to assist self-represented litigants. We suggest that the amendments be timed to commence perhaps 3 months after Royal Assent; and that the amendments apply to all matters on foot at the time of commencement, regardless of when those actions were commenced.

We do however consider that the Court should look somewhat generously upon self-represented litigants seeking adjournment of matters which are already underway at the time these provisions commence; such litigants may choose to obtain legal representation; other litigants may need to reconsider their position as a result of these amendments.

17. **Should any changes be made to the proposed amendments to ensure that all parties receive a fair hearing?**

We would respectfully reiterate our proposed model indicated in answer to question 6 above, which we feel would better strike the required balance between the protection of a vulnerable party and the need for all litigants to appear on an equal footing before the courts, in proceedings where they are able to question their opponents, test the evidence against them, and put contrary propositions to the other party.

Overall, we would summarise our position by recommending that vulnerable witnesses, including victims of domestic violence, should be protected from <u>improper</u> questioning, but not from proper questioning.

It should be remembered, in addition, that the Court already has a suite of tools which can be used to protect vulnerable witnesses, such as the use of remote witness rooms, or devices as simple as screens within the courtroom.

18. **Should any changes be made to the proposed amendments to ensure that the courts can be satisfied that any cross-examination of the parties that occurs through a court-appointed person will enable the judicial officer to accord procedural fairness to the parties?**

Again, we respectfully advance an alternative suggestion (set out in response to question 6 above).

19. **Should any changes be made to the proposed amendments to ensure that the courts are able to make informed decisions?**

Again, we respectfully advance an alternative suggestion (set out in response to question 6 above).

20. **Should any changes be made to the proposed amendments to ensure that they do not have any unintended consequences for victims of family violence?**

All legal proceedings are intensely human affairs; family law proceedings perhaps more so than most. It is inevitable that even the most well-thought-through legislation on a sensitive topic such as this will have unintended consequences. The only way to deal with these is to invest discretion in the Judges, who deal personally with the litigants. The operation of the docket system in the Federal Circuit Court is important from this regard as it enables judges to develop a strong sense of the litigants in a matter prior to the matter coming to trial.

In our view, the best way to manage potential unintended consequences is to ensure that the system is based on continued decision-making by judges, rather than mandatory measures imposed by statute.

21. **Any general comments.**

Our most important comment is saved until last; we have followed the pro forma, but we would rather have made this comment at the outset.

While we appreciate the effort being made to manage the potential hazards of self-represented litigants in contested hearings, the underlying issue is why there are so many self-represented parties in contested hearings at all. If that issue were resolved, and self-represented litigants in contested hearings were fewer in number, then the court would more rarely have to manage their potential impacts.

We suggest there are two elephants in the room in this regard.

The first is access to justice. This is, of course, a well-worn topic, and we are hardly innovative in raising it. However it remains the key to this whole matter. The courts themselves are substantially assisted where parties are represented by competent solicitors or counsel. There are a range of measure the government might take in order to decrease the number of parties who are self-represented in contested proceedings. We wish to especially suggest two.

a. The fees for solicitors and counsel in family law proceedings could be capped, in the same manner as the fees for debt recovery in a number of state jurisdictions. The fee caps should be above the current unrealistically-low Court Scale, but should still be sufficient to enable more parties to obtain representation. Our view is that parties often simply run out of money during the interlocutory proceedings; or that parties do not engage solicitors or counsel because they can neither afford nor predict the fees they might be asked to pay (even setting aside the prospect of a costs order in the event that they lose). A cap on fees would, of course, be unattractive to firms and counsel who are presently making lucrative profits from family law matters; however overall revenue may not decrease, as under a capped scheme a greater number of people would be able to afford representation.

b. The rules for direct briefing of counsel should be relaxed in the case of proceedings under the Family Law Act where oral evidence is to be adduced. At present, while direct briefing is allowed, it appears to occur rarely; the result is that parties become self-reresented because they cannot afford both a solicitor and a barrister; we suggest that often utilising a solicitor-advocate is not an option either, because the solicitor is unlikely to go on the record in a matter unless they have full carriage of the matter.

   As a result, we suggest the establishment of a scheme whereby a self-represented party in a Federal Circuit Court family list matter be able to directly brief counsel, and where the court recognise that Counsel are briefed on that basis and that counsel may not be receiving instructions of the same quality as might be expected from a solicitor. Some level of additional recognition and protection, especially for junior counsel, might encourage more counsel to accept direct briefs from family law litigants, thus making the representation more affordable for the litigant; and saving the court the difficulty of managing proceedings conducted by self-represented litigants.

The second issue is the place of Alternative Dispute Resolution within the family law system. Ideally, ADR should reduce the number of litigants in an absolute sense, by resolving matters without the need for contested proceedings. However the requirement for a s.60I certificate is now often becoming a mere procedural obstacle for parties intent on contesting proceedings. Many FDRPs will not conduct mediation in circumstances where family violence is alleged; the result of this must, as a matter of logic, result in more litigants before the court in contested proceedings.

A revision of the involvement of ADR processes in family law proceedings is beyond the remit of this paper. In general terms, we would recommend the consideration of evaluative mediation rather than facilitative mediation; with parties to run a greater risk of indemnity costs orders against them if they proceed to court to contest the evaluation of an evaluative mediator. However, regardless of the outcome reached, we suggest that protocols be developed to encourage more ADR processes in a safe environment, even in situations where there has been family violence within the couple. Intercepting more couples at the ADR stage should reduce the number of contested proceedings by self-represented litigants; this easing of the pressures on the courts may enable the Judges to take more time with those parties who do end up before the courts.