

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)

Publication of submissions

Submissions will be published on the Attorney-General's Department website. Please advise if you wish all or part of your submission to remain confidential.

Please prepare your submissions in this template and submit in Microsoft Word format (.doc or.docx) to familylawunit@ag.gov.au. Use of the submission template assists in meeting the Australian Government's commitment to enhancing the accessibility of published material.

The department will consider hardcopy submissions received by mail, but these submissions will not be published on the website.

Please also note that it is an offence under section 121 of the *Family Law Act 1975* (Cth) to disseminate to the public or to a section of the public by any means any account of any proceedings under the Act that identifies:

- a party to the proceedings;
- a person who is related to or associated with a party to the proceedings or is otherwise concerned in the matter to which the proceedings relate; or
- a witness in the proceedings.

Your details

Name/organisation (if you are providing a submission on behalf of an organisation, please provide the name of a contact person)

Australian Human Rights Commission

Contact details (one or all of the following: postal address, email address or phone number)

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Confidentiality

Submissions received will be made public on the Attorney-General's Department website unless otherwise specified. Submitters should indicate whether any part of the content should not be disclosed to the public. Where confidentiality is requested, submitters are encouraged to provide a public version that can be made available.

I would prefer this submission to remain confidential (please tick if yes)

Your submission

Please see attached letter.

1. Should direct cross-examination only be automatically banned in specific circumstances?
2. Should direct cross-examination be banned in each of the specific circumstances set out in the new proposed subsection 102NA(1)?
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.
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?
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?
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.
7. What qualifications, if any, should the court-appointed person have?
8. Should any requirements regarding who the court can appoint and their qualifications be included in the Family Law Act?
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.
10. Should a self-represented person be allowed to nominate the person who is appointed by the court to ask questions on their behalf?

11. Do you have any concerns about the court-appointed person model?
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?
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?
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?
15. Are there any other issues the court should be required to consider before granting leave for direct cross-examination to occur?
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?
17. Should any changes be made to the proposed amendments to ensure that all parties receive a fair hearing?
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?
19. Should any changes be made to the proposed amendments to ensure that the courts are able to make informed decisions?
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?
21. Any general comments.



25 August 2017

Public consultation: Family violence cross-examination amendments
Family Violence Taskforce
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: familylawunit@ag.gov.au

Dear Family Violence Taskforce

Exposure draft – Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017

Thank you for the opportunity to provide a written submission to the Public Consultation Paper: *Proposed amendments to the Family Law Act 1975 (Cth) to address direct cross-examination of parties in family law proceedings involving family violence*, and the Exposure draft – Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2017 (the Exposure Draft Bill).

The Commission does not provide direct comments on each of the consultation questions in the Public Consultation Paper or the provisions of the Exposure Draft Bill. Rather, the Commission provides relevant information in support of the stated aims of the proposed reforms, and also notes potential issues of human rights compliance that should be considered as part of any Statement of Compatibility of the Bill.

The Commission is broadly supportive of the intended effect of the proposed amendments to the *Family Law Act 1975 (Cth)*: to prevent direct cross-examination by unrepresented parties in family law proceedings, in matters involving family violence. These reforms aim to ensure that victims of family and domestic violence are not re-traumatised in giving their evidence to the court.

The Commission recognises the significant social and economic impact of family and domestic violence on the Australian community, and the disproportionate impact that this has on women and children.¹ The Commission notes that direct cross-examination of parties involving family violence risks reinforcing the power dynamic that typifies family and domestic violence, and consequently risks affecting the probity of evidence put before the Court, where power and control is asserted over the victim during proceedings.

¹ See: <https://anrows.org.au/publications/fast-facts-0/violence-against-women-key-statistics%20> (viewed 9 August 2017).

The proposed reforms promote greater access to justice by empowering victims of family and domestic violence to participate in the family law process, which is a critical pathway to achieving gender equality.² This is consistent with the United Nations *Convention on the Elimination of All Forms of Discrimination against Women*, which requires state parties to take appropriate measures to eliminate discrimination against women, including gender-based violence.

The Commission also acknowledges that children are witnesses, bystanders and direct victims of violence in the home. As a party to the *Convention on the Rights of the Child*, Australia must take all appropriate measures to protect children from all forms of physical or mental violence, injury or abuse. It must also take all appropriate measures to promote the physical and psychological recovery of a child victim of abuse, in an environment that fosters the health, self-respect and dignity of the child.

The policy intent of the proposed reforms is also consistent with recommendations made by the United Nations Committee on the Rights of the Child, which has called on governments to provide comprehensive and integrated protective measures to address violence against children, including measures for prevention, identification, reporting, referral, investigation, treatment, follow-up, and judicial involvement.³

In 2015 the National Children's Commissioner included a chapter in the [Children's Rights Report 2015](#), which contained the findings of a major investigation on the impact of family and domestic violence on children (Chapter 4). A copy of the report is provided with this submission. The Taskforce is referred in particular to the findings and recommendations set out at pp 144–150.

The Commission has also made a number of submissions that include recommendations relating to violence against women and children in Australia, which may be relevant to the present consultation. The following submissions are attached, for information:

- [Submission to the Special Rapporteur on violence against women](#)
- [Submission to the Senate Finance and Public Administration References Committee, inquiry into domestic violence and gender inequality](#)
- [Submission to the Joint Committee on Law Enforcement inquiry into human trafficking](#)
- [Submission to the Fair Work Commission four yearly review of AM2015/1 Family and domestic violence clause](#)

The Commission acknowledges that, if the Exposure Draft Bill proceeds to a Bill before the Parliament, a Statement of Compatibility will be required, which must contain an assessment of the Bill's compatibility with the rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified.

² Committee on the Elimination of Discrimination against Women, *General Recommendation No. 33 – women's access to justice*, CEDAW/C/GC/33 (2015). At: <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx> (viewed 15 August 2017).

³ Committee on the Rights of the Child, *General Comment No 13: The right of the child to freedom from all forms of violence*, 56th sess, UN Doc CRC/C/GC/13 (18 April 2011) [45–57].

The Commission suggests that some of the preliminary human rights issues that should be considered as part of this process are:

- the protection of vulnerable witnesses and their capacity to give effective evidence balanced against the right of another party to test evidence adduced by all relevant witnesses;
- the need to take into account the views of the women and children, and the importance of the role of independent children's lawyers;
- procedural fairness and potential limitations on the unrepresented party's ability to effectively examine the witness; and
- the particular requirements and role of the court-appointed person (for example, consideration could be given to requirements similar to those found in Part 8, Local Court Practice Note No. 2 of 2012 (NSW) for Domestic and Personal Violence Proceedings).⁴

The Commission would be pleased to meet with you to discuss any issues regarding the Bill's compatibility with human rights. Please do not hesitate to contact my office on (02) 9284 9614 should you have any questions.

Sincerely

**Emeritus Professor Rosalind Croucher AM
President**

[contact details redacted]