

# 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](mailto:familylawunit@ag.gov.au))

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## Your details

**Name/organisation:**

Australian Women Against Violence Alliance

**Contact details:**

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## Your submission

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AWAVA endorses the submission by Women's Legal Services Australia to this consultation and makes the following additional comments. This submission is informed by input from our Advisory Group, particularly DV Victoria, as well as research including other submissions and reports.

### The impact of direct cross-examination in cases of family violence in family courts

Cross-examination by an abuser can have a devastating impact on vulnerable witnesses, particularly victims/survivors of violence. Legislation protecting vulnerable witnesses from direct cross-examination by the alleged perpetrator in sexual offence trials has been passed in every state and territory jurisdiction within Australia<sup>1</sup>. In five of the eight state and territory jurisdictions, specific protections are also included in legislation to prevent a vulnerable witness from being directly cross-examined by an unrepresented alleged perpetrator of violence. However, family law proceedings lack such a protection against the direct cross-examination by alleged perpetrators and do not adequately protect victims/survivors from being required to directly cross-examine an alleged perpetrator. This means that if an abuser elects to (or has no alternative to) self-represent at trial and has the option to directly cross-examine, victims/survivors may find themselves in a position of being directly cross-examined by their abuser. This has the effect of continuing the violence through a court sanctioned process and is recognised as court sanctioned abuse.<sup>2</sup>

The experience of direct cross-examination often results in victim/survivors being re-traumatised. It can also lead to them choosing to settle their matters prior to trial on unfavourable and inequitable terms, which may not be in the best interests of the children, to avoid being cross-examined by – or having to cross-examine – their abuser. This can potentially place them and their children at risk<sup>3</sup>. It can also increase the risk of poverty if the settled terms are financially inequitable. Likewise, the experience can lead to victims/survivors providing compromised evidence to courts, which can affect safe and effective orders, and can allow the perpetrator to use court proceedings to control and dominate the victims.<sup>4</sup>

In 2015-16, WLSA conducted a survey to which 338 women responded, providing evidence about the extent and impact of being directly cross-examined by alleged abusers in family law courts.<sup>5</sup> Of the respondents, 147 reported having experienced such cross-examination.<sup>6</sup> Sixty-four per cent of women reported sexual violence.<sup>7</sup> Thirty-nine per cent of matters were settled before judgment and in 45 per cent of those cases, respondents said the fear of personal cross-examination by their abuser was a significant factor in the decision to settle.<sup>8</sup> Many respondents described the effects of cross-examination, including the following comments:

"I felt he had the privilege to continue his intimidation and threats, yet in a confined legal space. It defeats the purpose of having a safety room at court – my support person and I sit there to avoid seeing

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<sup>1</sup> Criminal Procedure Act 1986 (NSW) s 294A; Criminal Procedure Act 2009 (Vic) ss 356-357; Evidence Act 1977 (Qld) s 21N; Evidence Act 1906 (WA) s106G; Evidence Act 1929 (SA) s 13B; Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 38D; Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 5; Evidence (Children and Special Witnesses) Act 2001 (Tas) s 8A.

<sup>2</sup> Legal Aid NSW submission to the Productivity Commission's Access to Justice Arrangements Inquiry, 10 October 2013, p 53. See: <http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub068-access-justice.pdf>

<sup>3</sup> WLSA submission to the Productivity Commission's Access to Justice Inquiry, 4 November 2013, p13. See: [WLSA submission](#)

<sup>4</sup> Loughman, Janet. 'In focus: Protecting vulnerable witnesses in family law', *Law Society of NSW Journal*, No. 19, Feb 2016: 26-27, <http://search.informit.com.au/documentSummary;dn=800122548748436;res=IELAPA>

<sup>5</sup> WLSA submission to this Public Consultation on Cross-examination Amendment.

<sup>6</sup> WLSA submission to this Public Consultation on Cross-examination Amendment.

<sup>7</sup> Loughman, Janet. 'In focus: Protecting vulnerable witnesses in family law', *Law Society of NSW Journal*, No. 19, Feb 2016: 26-27, <http://search.informit.com.au/documentSummary;dn=800122548748436;res=IELAPA>

<sup>8</sup> Loughman, Janet. 'In focus: Protecting vulnerable witnesses in family law', *Law Society of NSW Journal*, No. 19, Feb 2016: 26-27, <http://search.informit.com.au/documentSummary;dn=800122548748436;res=IELAPA>

him, yet we are 'thrown to the wolves' when we enter the court room. It made me feel all the feelings over again. It made me sick to the core."

"Couldn't speak very well, frozen."

"Terrifying. I could not look at him. The judge later said in his submission that I hated the man cause I couldn't look at him. The man terrorised me for years and to this day is still making me paranoid that he will carry out his death threat."

Considering the impact on victims/survivors of direct cross-examination, as well as the fact that the quality of evidence to the court is undermined when such dynamics are present, AWAVA welcomes the Government's commitment to ban direct cross-examination in family court cases involving family violence, and the Attorney-General's Department's consultation on the model to put the ban into effect. We endorse WLSA's submission in response to specific consultation questions relating to aspects of the legislation and its implementation, and provide the following further comments.

### **Development of the model for preventing direct cross-examination**

AWAVA notes that many features of the model are yet to be defined, and together with WLSA ask for future opportunities to have input as the model is further developed.

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

Please refer to WLSA's submission.

Yes. An automatic ban would strengthen the system's ability to prevent direct cross-examination in cases of domestic and family violence, in contrast to a system reliant purely on judicial discretion. Such a ban is warranted in view of the impact of direct cross-examination on victim/survivor safety, well-being and access to justice.

There are remaining questions about how the ban would be implemented and the concern that 'band-aid' solutions may be introduced in a context where funding is lacking for parties to have legal representation. Our preferred model is one that avoids direct cross-examination and also minimises other disadvantages that women experiencing family violence face in the family court system via funding legal representation.

There are further questions about how the ban would be handled administratively. For example, if the victim/survivor is self-represented, how does she submit the evidence that the case meets the specific circumstances for the ban, or even raise that she is a survivor of family violence? Or who else gathers this evidence (such as evidence of charges/convictions) after she has identified that she is a survivor of family violence?

We support WLSA's call for early assessment for FV in family law cases, and agree this could be part of an expanded family consultant role. Such a system must be careful to protect confidentiality and address the possible lack of independence from the perpetrator. We believe that a finding of risk for family violence as an outcome of the assessment could be added as a specific circumstance for mandatory ban.

In Victoria, the risk assessment could be integrated with the common risk assessment and risk management framework. It should be ensured that the assessor is familiar with referral points for further and ongoing support.

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

Yes. Each of these circumstances (a charge or conviction, a DVO [but not an interim order], or an injunction under the Family Law Act) should be sufficient to trigger a ban, unless an application is made to the contrary by the victim. However, we believe additional circumstances should be sufficient to bring a ban into effect (see below).

Please refer also to WLSA's submission.

#### **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.**

Please refer to WLSA's submission.

In addition to the circumstances listed above, the ban should come into effect in any case where domestic and/or family violence has been alleged by either of the parties. Obtaining a charge or conviction, an injunction or a DVO sets too high a bar for victims/survivors, given the well-known challenges (financial, psychological, safety) involved. If courts are to proactively prevent the re-traumatisation of victims/survivors and enhance the quality of evidence provided to the courts, the a more expansive definition is required for the circumstances in which the ban will apply.

As currently proposed, the requirements would exclude women who have never reported to the police or obtained final orders for the whole range of reasons this happens, including that the violence and risk to her safety prevents her from doing so. The proposed limitations could also exclude women who disclose the violence for the first time during the family court process. Given the relatively low rates of charges and convictions for family violence, including breaches of orders, the proposed circumstances set too high a threshold and also exclude non-criminal experiences of family violence (which is particularly unfair where there is no consistent legal definition of family violence between states).

Consideration should be given to including advice from the specialist family violence sector that family violence is occurring, as another circumstance which should trigger a an automatic ban. The specialist family violence sector is a credible and reliable source of evidence for family violence. An example of this evolving in Victoria is in the Housing area, where a victim/survivor no longer needs to provide reams of evidence of family violence when applying for public of social housing – rather, a family violence worker ticking a box on the application form is seen to be sufficient evidence of family violence. This would assist those women who have experienced family violence but never reported to Police or obtained final orders, or where a perpetrator has never been charged or convicted, to qualify for the automatic ban.

Another mandatory criteria to consider is where an outcome of a risk assessment conducted by a family consultant or family court counsellor finds that family violence has occurred or there is risk of family violence – please refer also to feedback in previous sections.

**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?**

Please refer to the WLSA submission.

If a ban is in effect, then it should apply to both parties. However, we believe the discretionary power to allow cross-examination should be dependent on the victim/survivor's consent only, and not the consent of the alleged perpetrator. Being cross-examined by a self-represented perpetrator, or having to cross-examine him herself are both retraumatising situations for the survivor and disadvantage her in the legal proceedings – they do not enable her to access judicial fairness.

A question still to consider is whether in cases where both parties are self-represented, a victim/survivor will have the option to cross-examine a perpetrator directly herself, but not be subject to cross-examination by him.

**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?**

Please refer to WLSA's submission.

The discretionary power should be exercised only on the application of the victim/survivor, and not on the application of the alleged perpetrator. It should only be exercised with the full, informed and freely-given consent of the alleged victim/survivor (together with the other proposed conditions about enabling a fair trial and not endangering welfare). The wishes of women who are assessed by the court as fully informed and freely given should be implemented. For some women, this might be an opportunity to feel empowered.

A remaining question is whether a separate process of assessment and support needs to be provided to a victim/survivor to ensure that her decision to be cross-examined or conduct direct cross-examination is fully informed and her consent is freely given. If so, the question arises of who would conduct such assessment process.

We would also like there to be some guidance on any right to appeal a decision made at the discretion of the court. ie. Under 102NB, if the judge chooses not to deny direct cross-examination of the victim by the perpetrator, what options are there to appeal this? Or if the judge does choose to deny cross-examination, will the perpetrator have an option to appeal that decision, potentially seeking to overturn it or put himself forward as the victim?

**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.**

Please refer to WLSA's submission.

We reiterate that the best solution would be to have full funding for legal representation, which would avoid the complications involved in defining the court-appointed person role, as well as as well as mitigate the other disadvantages faced by survivors of family violence in the family courts.

However, if the proposed model is pursued, the court-appointed person should not be elders, religious leaders or any people with relationship to either a victim/survivor or an alleged perpetrator. In particular, the alleged perpetrator should not be able to nominate a person to ask questions on their behalf.

We endorse WLSA's criteria in their submission that the CAP would need to be:

- Independent and with a duty to the court, not the parties
- Legally trained and professional
- Trained in trauma-informed practice and the impact and nature of domestic and family violence
- Culturally competent and disability aware

We further request that any cost arising from the court appointing a person to ask questions be met by the court and this be written into the legislation.

It should also be clearly stated that there should be a different CAP for each self-represented person, where they are both self-represented.

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

Please refer to WLSA's submission.

The court-appointed person (CAP) should be independent, legally trained, with duties to the court and not to the parties, trauma trained and family violence trained.

As with court officials generally, there is a need for the court-appointed person to be trained in the area of cultural competency both to work with Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds, be trained and able to work with interpreters, be disability-aware, understand the needs and issues of people who are LGBTIQ, and more generally be able to mitigate their own prejudices.

We add that the role should be accredited and/or regulated in some way. That is, if people are going to join some kind of pool of CAPs, there needs to be accredited training that qualifies people to join that pool. The performance of CAPs need to be monitored for effectiveness and learning for improvement. There needs to be options to make complaints about the CAP by the self-represented party.

The model options proposed in the WLSA submission are possible solutions for who could fulfil this role, noting that as WLSA and the Family Law Council have indicated, there is a strong potential for confusion and conflicting roles if the Independent Children's Lawyer were to take on the CAP function.

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

Yes, the requirements along the lines noted above should 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.**

As noted by WLSA, the detail to be included in legislation will depend on the model adopted, and we would like to have further input as the model is developed further.

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

If the court-appointed person is to be independent then the self-represented person should not be permitted to nominate the person appointed.

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

Yes, as indicated throughout this submission. A major concern is that the model is being developed within a set of government-imposed resource constraints. Despite the best intentions of drafters, this approach is bound to fall short of a reasonable standard for protecting victims/survivors. No matter what model is pursued, if it is to be sound and workable it will have costs attached. Particularly in the context of an extremely resource-constrained family courts system, expecting a new model to work effectively without any extra resourcing is unrealistic and bound to fail.

Further concerns are that the proposed model will not necessarily address the issue of perpetrators using cross-examination as an opportunity to retraumatise and extend the abuse in the same way that full legal representation would. It could be labour-intensive and complex to administer, and it is unclear who would be appropriate to fill the CAP role. The model may save the government money but there is no assurance that it will improve the family court process or outcomes for survivors of family violence.

**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?**

See above. The focus should be on the victim/survivor’s safety and well-being, and her sense of agency and empowerment. Therefore her consent should be prioritised. The perpetrator could use his discretion to consent or not in relation to cross-examining her or being cross-examined by her as an extension of the coercive control that underpins the family violence.

See also the issues raised in above in point 5 regarding safeguards for ensuring a victim’s/survivor’s consent is fully informed and freely given.

**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?**

See point 5 regarding safeguards related to consent being fully informed and freely given. If the court proceeds with direct cross-examination with the victim/survivor’s consent and later identifies this is facilitating harm to her, they should be able to adjourn and re-adjudicate the decision on granting leave for direct cross-examination in consultation with the woman – who should also have access to ongoing,

trauma informed support in general but to also assist her to decide whether to continue with direct cross-examination.

**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?**

See above. Both harm and access to justice should be taken into consideration.

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

The court should consider safety considerations for children, the length of time waiting for finalisation of the case, and the perpetrator's motivations for requesting discretion.

**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?**

The amendments should apply to all proceedings. There is no reason why not, provided victims/survivors have a reasonable opportunity to determine the operation of the ban – i.e. to have control over whether cross-examination will occur – and the court-appointed person model is sound, i.e. meets safeguards as noted.

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

We note again that the best outcome would be for cases in the family court that involve family violence to be fully funded for legal representation.

**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?**

It is important to note that what might be considered procedural fairness for one party (ie.the perpetrator) may in fact deny the other party (ie. the victim) procedural fairness.

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

See the other responses given 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?**

We support WLSA's proposals under this section in their submission.

**21. Any general comments.**

Although this proposed scheme addresses the issue of direct cross-examination, there are many other areas of reform required to support the operation of the ban. These have been identified in WLSA's Five Step Plan for Safety First in Family Law and AWAVA once again commends this Plan to the Government. In particular, as noted above, the system's ability to respond appropriately to victims/survivors of violence needs to be resourced in terms of financial capacity as well as training.

Consideration should be given the use of secure witness locations in courts. These could be similar to the remote viewing rooms that have been adopted for vulnerable witnesses.

We understand that AGD has commissioned the Australian Institute of Family Studies to conduct a prevalence study, and that preliminary thinking is that only a few hundred (perhaps 200) cases involve self-represented litigants. However, our view is that this does not capture women who are dropping out because of the fear being cross-examined. Data collection needs to address this issue, which also highlights the need to pursue other reforms to support victims/survivors in conjunction with the cross-examination ban.

## ***Family courts' responses to sexual violence in the implementation of the ban***

A further point is that as the Family Courts improve their capacity to respond to domestic and family violence, greater attention needs to be given to sexual violence, which is under-reported even within cases of family violence. Attention to this form of violence puts into stark relief the need for cross-examination (as well as all other court and legal processes) to be conducted according to good practice trauma-informed standards, recognising that putting the onus of proof onto victims/survivors will perpetuate a system that fails to provide access to justice.

We note WLSA's finding above that 64% of women surveyed after going through the family law system had been subjected to sexual violence. This finding accords with Sexual Assault Support Service (Tasmania)'s estimate that 40-45% of women who experience physical abuse from an intimate partner are also forced into sexual activities by them.<sup>9</sup> Further, women living with the effects of childhood sexual abuse are both more likely to be subjected to domestic violence and more likely to have sexual violence inflicted upon them by an intimate partner in later life.<sup>10</sup> An estimated 5% to 12% of women in Australia have sexual violence inflicted upon them by a partner within their lifetime.<sup>11</sup>

Where sexual violence is perpetrated within a domestic/family violence relationship, it increases the likelihood that more severe physical violence, including lethal violence, is also inflicted.<sup>12</sup> Victims/survivors of intimate partner sexual violence experience more negative impacts, such as decreased self-esteem and coping skills, compared with victim/survivors who have lived in family violence situations in which they did not have sexual violence inflicted upon them.<sup>13</sup> It follows that the implications for these victims/survivors of direct cross-examination may be particularly severe, and that they require well-informed and specialised responses.

Sexual violence as a form of domestic and family violence is clearly a significant issue and needs to be identified and explicitly addressed within legal and other responses to domestic and family violence, including the implementation of the ban on cross-examination. However, sexual violence within intimate partner relationships is still largely a hidden problem, with low levels of reporting, even where a victim/survivor discloses other forms of abuse.<sup>14</sup>

For these reasons, AWAVA makes the additional recommendation that where models for risk assessment, training and accreditation are developed to implement the ban (along the lines of WLSA's submission), these models include dedicated material and standards relating to sexual violence within domestic and family violence. Where there is a requirement that a person be trauma-informed and trained in family violence, these capabilities should include the capacity to ask about and respond appropriately to disclosures of sexual violence.

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<sup>9</sup> Sexual Assault Support Service (SASS Tas), Brief - Intimate Partner Sexual Assault and Family Violence, 2015.

<sup>10</sup> Peta Cox, Sexual assault and domestic violence in the context of co-occurrence and re-victimisation: State of knowledge paper, Australia's National Research Organisation for Women's Safety, 2015, <http://anrows.org.au/publications/landscapes/co-occurrence-and-re-victimisation>

<sup>11</sup> Sexual Assault Support Service (SASS Tas), Brief - Intimate Partner Sexual Assault and Family Violence, 2015.

<sup>12</sup> Braaf, Rochelle (2012), 'Preventing domestic violence death: Is sexual assault a risk factor?', Australian Domestic and Family Violence Clearinghouse, [Research Brief](#); Sexual Assault Support Service (SASS Tas), Brief - Intimate Partner Sexual Assault and Family Violence, 2015.

<sup>13</sup> Ibid.

<sup>14</sup> AWAVA (2017), Sexual violence: Law reform and access to justice - issues paper, [Issues Paper](#)